REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO. 29 OF 2018

BONIFACE NGURE NDUNGU.....APPELLANT

VERSUS

GATHU HOLDINGS LIMITED.....1ST RESPONDENT

SEBS ESTATES LIMITED.....2ND RESPONDENT

(Being an appeal arising from the judgement and orders of Hon J Kituku PM

delivered on the 27/4/2017 in CMCC No. 169 of 2015-Kiambu)

JUDGMENT

1. Vide an amended Plaint dated 30th July 2015 the Plaintiff sued the Defendants seeking the following orders:-

a. A mandatory injunction requiring the 1st Defendant forthwith to re-open the residential flat No. 34 – Thindigua Estate situated off Kiambu – Nairobi road and to permit a joint inspection in the presence of the Defendants and a Police Officer and to permit the Plaintiff to remove his property therefrom subject to any right of the 1st Defendant to levy distress for any due rent and related liabilities and/or directions by this Honourable Court.

b. The refund by the 1st Defendant of the rental deposit of Kshs. 22,000.00 with interest at 14% p.a from 1.6.2015.

c. The sum of Kshs. 37,631.00 as against the 1st Defendant pleaded in paragraph 14 hereinabove with interest at 14% p.a from 1.6.2015.

d. The sum of Kshs. 25,000.00 as against the 1st Defendant in lieu of notice to terminate the subject tenancy with interest at 14% p.a from 1.6.2015.

e. The sum of Kshs. 1,500.00 as against the 1st Defendant pleaded in paragraph 15 hereinabove with interest at 14% p.a from 1.6.2015.

f. The sum of Kshs. 970,000.00 as against the 1st and 2nd Defendants pleaded in paragraph 16(B) (i) hereinabove with interest at 18% p.a from 4.6.2015 until full payment.

g. Special damages of Kshs. 110,000.00 and Kshs. 80,000.00 as against the 1st and 2nd Defendants pleaded in paragraph 16(c) with interest at 14% p.a from 4.6.2015 until full payment.

h. General damages as against the 1st Defendant for constructive eviction and subjecting the Plaintiff to inhuman treatment and annoyance.

i. Costs of this suit with interest thereon at Court rates.

2. It was the Plaintiff's case that he was a tenant in Flat No. 34 Thindigua Estate belonging to the 1st Defendant and managed by the 2nd Defendant since June 2008. That initially the monthly rent was Kshs. 22,000/-, but later revised to Kshs. 25,000/-. In addition, that the

tenancy attracted Kshs. 2,000/- and Kshs. 2,500/- being refundable deposits for water and electricity respectively.

3. The Plaintiff avers that the rent was paid through a Pay Bill No. 937100 as directed by the 2nd Defendant in September 2012. That the Plaintiff remitted rent for the months of March, April and May 2015 through the said Pay Bill No. which payments were confirmed by the 2nd Defendant as agent of the landlord.

4. He pleaded that on 25/5/15 the 2nd Defendant acting as agent of the 1st Defendant locked up his house by welding the door grills on account of rent arrears for the month of March 2015 in the sum of Kshs. 21,355/- together with a penalty for late payment in the sum of Kshs. 6,896/-. The Plaintiff states that he duly paid the penalty on 3/6/15.

5. With respect to rent arrears, the Plaintiff was emphatic that he was fully compliant with rent payments. That he paid the rents as follows:-

Amount	**Month Rent**	**Pay Bill**	**Posted by 2nd Defendant on**
22,000	Month paid on 7/3/15	937100	27/5/2015
25,000	April Rent 7/4/15	937100	11/5/2015
25,000	May Rent 6/5/15	937100	11/5/2015
25,000	June Rent 3/6/2015	937100	8/6/2015
25,000	Penalty 3/6/2015	937100	-

6. The Plaintiff faults the Defendant for not levying distress if indeed he was in arrears or issue notice demanding payment.

7. Under paragraph 14 thereof the Plaintiff pleaded the particulars of loss and damage against the Defendants. That in the process the Plaintiff lost cash in the sum of Kshs. 970,000/- together with a laptop and a camera. Interalia, that the 2nd Defendant damaged his padlock and gained illegal entry to his house on 25/6/2015.

8. The Plaintiff's claim is opposed by the Defendants.

9. The Defendants were categorical that the Plaintiff defaulted in rent payments for the months of March 2015 onwards and that re-entry into the house was in accordance with the tenancy agreement between the Plaintiff and the 1st Defendant. That there was no payment made from the Plaintiffs known number.

10. Interalia, the Defendants denied breaking the padlock and also denied that their agents gained entry into the leased premises or as alleged at all. That before the joint inspection of the house there was no entry by the Defendants or their agents.

11. The Defendants further deny that they are responsible for any of the items alleged to be missing/stolen from the Plaintiffs house being cash or camera and laptop and puts the Plaintiff to strict proof.

12. At the hearing the Plaintiff's case was led by two witnesses: the Plaintiff and his brother Joseph Ndungu.

13. The Plaintiff adopted his witness statements dated 25/6/2015 and 30/7/2015. In brief, the Plaintiff stated that he remitted the rent for March, April and May 2015 through Pay Bill No. 937100 as per Page 27 of his bundle. That according to the tenancy statement given to him by the 2nd Defendant the said amounts are reflected having been credited on 11/5/2015, 11/5/2015 and 27/5/2015 though he paid on 7/3/2015; 7/4/2015 and 6/5/2015 for the months of March, April and May 2015 respectively.

14. That he was informed by 2nd Defendant that the reason why rent on his account was credited late in the 2nd Defendants internal system was on account of an unexplained system problem.

15. That his house was unlawfully broken into by the agents of the Defendants and to cover up welded the main door between 25/5/2015 to 10/6/2015 while he was away on a business trip. That he learnt the reason was rent default, which rent he insists he had duly paid.

16. That despite payment of Kshs. 6,897/- and Kshs. 25,000/- being rent penalty and rent for June 2015 (though not due) the Defendants refused to give him access to the house and it took Court's orders issued in his favour by the Court to access the house.

17. That he stayed at a hotel in the Central Business District, Nairobi during the closure of his house.

18. The witness stated that he had left some valuables in the house namely Kshs. 970,000/- in cash, laptop and a camera which items were stolen by the Defendants employees and or agents.

19. That on 25/5/2015 he withdrew Kshs. 3,750,000/- from his account at Equity Bank with the intention of purchasing dollars. That as fate would have it the forex bureau was only able to sell him dollars worth Kshs. 2,771,840/- leaving a balance of Kshs. 970,000/- that he kept in a drawer in his house.

20. The witness stated that he was not issued with notice to terminate the lease neither was he refunded the deposit of Kshs. 22,000/- that he had paid.

21. In cross, the Plaintiff stated that rent payments had been made through his Accountant's number for the past two years including the month of March – May 2015. He confirmed that the screen shots were not from Safaricom but a download of messages from his Accountants phone.

22. That the premises were opened in the presence of the Police under a Court order because he noticed the padlock had been interfered with.

23. PW2 – Joseph Ndung'u stated that he is the younger brother of the Plaintiff and that he was not present when the house grill was welded.

24. The Defendants called 2 witnesses in support of their case.

25. DW1 – Geoffrey Owano Amayo testified and adopted his statement dated 17/8/2015.

26. He stated that he is the property manager of the 1st Defendant premises at Thindigua in Kiambu. That on instructions of the 2nd Defendant he locked up the house on 12/4/2015 because of rent arrears. On the same day he found the padlock had been broken and the Plaintiff and his brother were in. That on 25/5/2015 he in the company of Moses Ochieng and Michael Mutachi welded the Plaintiffs steel door because of 2 months' rent arrears. That the door was reopened on 18/7/2015 in the presence of the police.

27. That he demanded rent from the Plaintiff and when default continued locked up the house on instructions of his employer, the 2nd Respondent.

28. That payment receipts into the paybill may not reflect for a day or two due to large payments coming in. That rent was due on the 5th of every month. That at the time of welding the door he was not aware if rent had been paid. All he was informed was that two months' rent was outstanding. He denied that the padlock of the Plaintiff was broken when the door was reopened in the presence of the police on 18/7/2015.

29. DW2 Moses Odhiambo Ochieng stated that he accompanied DW1 to the property to weld the steel door. That the Plaintiffs padlock was intact and was welded to the door. He learned that the tenant was in arrears.

30. That he was also present on 18/7/2015 when the house was opened in the presence of the police. That on entering the house the Plaintiff pulled a drawer open and informed them that Kshs. 970,000/- was missing.

31. Upon hearing the evidence the Court delivered its Judgment on 27/4/2017 as follows:-

"1) THAT Judgment be and is hereby entered in favour of the Plaintiff against the Defendants as prayed in the Amended Plaint filed on 5th August 2015 as follows:

a. Prayer (a) is spent.

b. Prayer (b) is hereby dismissed.

c. The 1st Defendant do pay the Plaintiff Kshs. 30,645.00 in terms of prayer (c).

d. The 1st Defendant do pay the Plaintiff Kshs. 25,000.00 with interest at 12% per annum from 1.6.2015 in terms of prayer (d).

e. Prayers (e), (f) and (g) are hereby dismissed.

f. The Defendants do pay the Plaintiff Kshs. 20,000.00 as general damages.

g. The Defendants do pay the Plaintiff the costs of this suit with interest thereon at Court rates."

32. Aggrieved by the said Judgment the Plaintiff/Appellant filed Memorandum of Appeal on the 19/5/2017 on the following grounds:-

a. The Learned Magistrate erred in law and fact to denying the Appellant/Plaintiff interest on the rental deposit of Kshs. 22,000/- sought in prayer (b) of the Amended Plaint in spite of having found that the subject tenancy had been unlawfully terminated by the Respondents.

b. The Learned Magistrate erred in law and act by disallowing the prayer (c) of the Amended Plaint for the reimbursement of Kshs. 6,986/- against the weight of the evidence.

c. The Learned Magistrate erred in law and fact in disallowing prayer (e) of the Amended Plaint against the weight of the evidence.

d. The Learned Magistrate erred in law and fact in disallowing prayers (f) and (g) of the Amended Plaint in spite of the cogent evidence on a balance of probability of the illegal and criminal entry into the suit flat by the Respondents' agents.

e. The Learned Magistrate erred in law by abdicating its jurisdiction by holding that it had no Civil jurisdiction to hear and determine prayers (f) and (g) of the Amended Plaint.

f. The Learned Magistrate erred in law in awarding manifestly inadequate general damages in the sum of Kshs. 20,000/.

33. The Appellant sought the following orders on Appeal:-

a. The Learned Magistrate's Judgment / Decree dated 27/4/2017 be partially set aside and substituted with an order of this Honourable Court allowing prayer (b), prayer (c) respecting the sum of Kshs. 6,986/- and prayers (e), (f) and (g) of the Amended Plaint.

b. The Learned Magistrate's Judgment/Decree dated 27/4/2017 be partially set aside and substituted with an order granting general damages sought in prayer (h) of the Amended Plaint in the sum of Kshs. 200,000/- or such other sum as this Honourable Court may find fair and just.

c. Costs of this appeal be borne by the Respondents.

34. On the 30/1/2020 the Court whilst admitting the Appeal directed the parties to file written submissions. Both parties filed their written submissions which I have read and considered.

35. As to whether the Kshs. 1,500/- the 1st Defendant was payable, the Appellant submitted that this is the cost of the padlock. The Appellant submitted that the agents of the Defendants damaged the Appellant's padlock in their ill calculated bid to repossess the suit flat.

36. On grounds 4 and 5 of the Appeal the Appellant submitted and faulted the trial Court for rejecting the Computer generated document showing the cost of the laptop and camera when the same had not been challenged by the Defendants in evidence. That the said rejection was contrary to Section 106B of the Evidence Act which provides for admissibility of electronic records.

37. With respect to proof of ownership of the laptop and the camera, the Court was faulted for insisting on production of documentary proof in terms of receipt. Relying on Section 116 of the Evidence Act, the Appellant was emphatic that receipts are not necessary to proof ownership of the items. That the burden shifts to the Respondents to show that he is not the owner of the items. That the Appellant is entitled and has proven that the cash and the items were stolen by the Defendants' agents and is entitled to special damages as pleaded.

38. With respect to ground 6, the Appellant faulted the Court for awarding Kshs. 20,000/- as general damages and urged the Court to enhance it to Kshs. 200,000/- on account of provisions of Section 57(4), 75 and 77 of the Land Act.

39. In their brief written submissions, the Respondents submitted that the trial Court held that the Appellant was in rent arrears.

40. On the issue of rent deposit the Respondents submitted that in the absence of production of a lease agreement by the Appellant it would not be possible to state the purpose of the deposit.

41. The Respondents faulted the phone screen shots on the basis that they were not certified by the service provider and opine that they cannot be held as confirmation of rent payment. That the documents are inadmissible.

42. That the Appellant has not tendered any evidence to warrant the interference of the award of general damages by the trial Court.

43. On whether or not there was an illegal entry and loss of the laptop and the cameral of the Appellant, the Respondent submitted that this should have been addressed through police investigations and not Civil proceedings. That no formal complaint was lodged to the police on the matter.

44. The Respondent urged the Court to dismiss the appeal.

45. I have read and considered the pleadings, the evidence on record, the Record of Appeal, the written submissions and all the material

placed before me and the issues that commend themselves for determination are:-

a. **Whether there was a Lease Agreement between the parties.**

b. Whether the Appellant paid rent, water and electricity deposit to the 1st Respondent.

c. Whether the Appellant was in default of rent payment.

d. Whether notice of rent default was issued.

e. Whether the Respondents acted lawfully in denying the Appellant access to his house.

f. Whether the Appellant proved that the Defendants and or its agents are responsible for the loss of the cash, laptop and camera. If yes whether the Appellant is entitled to compensation.

g. Whether the eviction of the Appellant was lawful.

h. Whether the Appellant should be compensated with Kshs. 1,500/- for the padlock.

i. Whether the award of damages in the sum of Kshs. 20,000/- should be enhanced.

j. Costs of the suit and appeal.

Analysis & Determination.

46. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated as thus:

> **"....this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."**

47.This Court will bear in mind that it neither heard or observed the demeanor of the witness and will nevertheless bear in mind the caution in the above case.

48. Before I address the issues in this suit, I wish to discuss the legal burden of proof. Sections 107 and 108 of the Evidence Act Cap 80 provide for burden of proof and who is to prove it that;

> **107. Burden of proof**
>
> **(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **108. Incidence of burden**
>
> **The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

49. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the "onus" is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant "on a balance of probabilities". This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

50. In the Court of Appeal case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR** examined the standard of proof in the foregoing;

> **"The burden of proof is placed upon the Appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite**

standard will not have been attained."

51. In the same vein, the Court of Appeal in the case of Anne **Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR** stated that the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in sections 109 and 112 of the Evidence Act, thus:

> **"109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**
>
> **112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

52. Similarly in the Court of Appeal case of **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR** the Court explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of **The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14**:

> **"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.**
>
> **The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."**

53. Therefore, in a Civil case, if the probabilities are weighed and found equal, the Defendant will be successful as the Plaintiff carries the burden of proof. If the scale however tips in the slightest in the favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious.

54. Evidently this case shall turn on whether or not the Appellant has discharged his legal and evidential burden of proof.

55. It is not in dispute that the Appellant was a tenant in Flat No 34, Gathu Thindigua Flats belonging to the 1st Respondent and managed by the 2nd Respondent. It is commonly accepted that there was no written lease agreement between the parties.

56. Black's Law Dictionary (Page 1694 -10th Edition) defines a periodic lease as follows;

> **"A tenancy that automatically continues for successive periods – usu. month to month or year to year – unless terminated at the end of a period by notice. A typical example is a month-to-month apartment lease. This type of tenancy originated through Court rulings that, when the lessor received a periodic rent, the lease could not be terminated without reasonable notice. Also termed tenancy from period to period; periodic estate; estate from period to period; (more specif.) month-to-month tenancy (or estate); year-to-year tenancy (or estate); week-to-week tenancy (or estate)".**

57. Periodic leases are provided for under section 57 of the Land Act as follows;

> **"Periodic leases**
>
> **1. If in any lease-**
>
> **a. The term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;**
>
> **b. The term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;**
>
> **c. The lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then-**
>
> **i. unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one; and**
>
> **ii. all the terms and conditions of the lease that are consistent with the provisions of sub-paragraph (i) shall continue in force until the lease is terminated in accordance with this section.**
>
> **2. If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.**

3. The periodic tenancy contemplated in subsection (1)(a) shall be the period by reference to which the rent is payable.

4. A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable."

58. Under Section 58 a periodic lease is defined as:-

(1) A short term lease is a lease –

(a) …

(b) that is a periodic lease; and

(c) to which Section 57(2) applies."

59. According to the evidence led by the parties the rent was payable monthly in advance. It is not contested that the Appellant rented the said premises from the June 2008 at the rent of Kshs 22,000/- which rent was revised in 2015 to Kshs 25,000/- payable in advance exclusive of water and electricity bills. In addition, that the Appellant averred that he paid a sum of Kshs 22,000/-, 2000/- and 2500/- being the rent deposit, water and electricity bills respectively. That in September 2012 the 2nd Respondent in writing directed all the tenants to pay rent through a MPESA Paybill No 937100. See the undisputed letter dated the 25/9/2013 addressed to the tenants.

60. It is the finding of the Court that the lease under discussion was a periodic lease. It is trite that any notice given under such a lease would be proportionate to the period within which the rent is payable or such other notice as may be reasonable in the circumstances.

61. Under section 65 of the Land Act, there are implied conditions on the part of the lessor in every lease. It provides as follows;

"(1) In every lease, there shall be implied covenants by the lessor with the lessee, binding the lessor-

a. that so long as the lessee pays the rent and observes and performs the covenants and conditions contained or implied in the lease to be observed and performed on the lessee's part, the lessee shall peaceably and quietly possess and enjoy the land leased during the term of the lease without any interruption from or by the lessor or any person rightfully claiming through the lessor;

b. …

c. …

(2) There shall be implied in every lease covenants by the lessee empowering the lessor to-

(a) either personally or by agents, enter, the leased land or buildings at any reasonable time and upon giving a seven days' notice to the lessee for the purpose of inspecting the condition and repair of the premises, or for carrying out repairs and making good any defects that it is the lessor's obligation so to do; but in the exercise of that power, the lessor shall not unreasonably interfere with the occupation and use of the land and buildings by the lessee;

(b) terminate the lease by serving a notice of intention to terminate the lease on the lessee where-

(i) any rent is unpaid for one month after the due date for payment, whether or not a demand, in writing, for payment has been made by the lessor or an agent of the lessor;

(ii) the lessee has failed for a period of one month, to observe or perform any condition, covenant or other term, the observation or performance of which has been assumed by the lessee expressly or impliedly in the lease."

62. Section 66 of the Land Act contains conditions implied in every lease between the lease and lessor. It provides as follows;

"(1) There shall be implied in every lease, covenants by the lessee with the lessor binding the lessee—

a. to pay the rent reserved by the lease at the times and in the manner specified in the lease."

63. My reading of the above provisions, "every lease" includes a periodic lease like in this case. The 1st Defendant was obligated, subject to the Appellant paying the rent due, to give peaceful and quiet possession of the leased premises to the Appellant. In turn the Appellant, was interalia, obligated to pay rent as it fell due and perform the obligations implied in the said periodic lease.

64. As to whether the Appellant defaulted in the payment of rent for the months of March, April and May 2015, evidence was led by the Appellant that he paid the rent through pay bill No 937100 on the 7/3/2015, 7/4/2015 and 6/5/2015 for the months of March, April and May respectively. He produced a schedule of MPESA payments on page 27 of his bundle of documents which the Respondents faulted as being

computer generated and not backed by a Safaricom document. In the absence of the Appellants or his Accountants MPESA statement showing debits to his account or such other account that was used to remit the rent, the screen shots are unacceptable proof of payment.

65. That said the Appellant led unchallenged evidence and produced a tenancy statement on page 20 – 24 of the Plaintiffs bundle. The statement refers to the period 1/5/2001 – 8/6/2015 and the name of the tenant is disclosed as Boniface Ngure – Unit No 34 – Gathu Thindigua. This statement shows that the rent account for Unit 34 for the months of March, April and May was credited on the 11/5/2015, 11/5/2015 and 27/5/2015. The DW1 explained this away in a casual manner that the Safaricom system sometimes takes 2 -3 days before it reflects payment on the 2nd Respondents system. Interalia the Appellant states that when he sought an explanation from the 2nd Respondents employee namely Jeff, he was told that there was a system breakdown. The evidence of the Respondents to the effect that the Appellant was in default was not supported by any scintilla of evidence. The 2nd Respondent being the managing agent of the 1st Respondents property was duty bound to account for the rent received to its tenant.

66. This Court being guided by section 112 of the Evidence Act, that states that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. The onus was on the Defendants and especially the 2nd Defendant to proof that the Appellant was in rent arrears. The Court thinks otherwise.

67. The Court is persuaded that the Appellant was not in arrears save for the delay by the Respondent in posting the sums already paid into their MPESA account.

68. The Respondents led evidence that the Appellant was notified through telephone calls that the rent was due but did not comply. There was no evidence to show that reasonable notice was issued to the Appellant to warrant the action of locking up his house on the pretext of rent defaults. The Respondents therefore acted contrary to section 65 of the Land Act.

69. Section 77 of the Land Act provides the steps to be taken before a lessee is evicted from the leased premises;

> **"(1) A lessee who is evicted from the whole or a part of the leased or buildings, contrary to the express or implied terms and conditions of a lease, shall be immediately relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted.**
>
> **(2) For purposes of this section, a lessee shall be considered as having been evicted from the whole or part of the leased land or buildings, if, on the commencement of the lease, the lessee is unable to obtain possession of the land or buildings or part thereof, as a result of any action or non-action of the lessor or any of the lessor's agents or employees, contrary to the express or implied terms of the lease: Provided that a lessee who is aggrieved as a result of unlawful eviction under this section may commence an action against the lessor for remedies."**

70. I am in agreement with the Appellant that the act of locking his house and denying him access amounted to constructive eviction contrary to section 77 of the Land Act. Having held that the Appellant was not in default, there could not have been any lawful reason in locking and welding the doors to the Appellant's house. The constructive eviction of the Appellant was unlawful. The Court answers this issue in the negative.

71. As to whether the rent water and electricity deposit should be refunded to the Appellant, the Appellant led evidence that he paid the said deposits and specifically argued that he is entitled to rent deposit of Kshs 22,000/-. This figure was not contested by the Respondents save to argue that in the absence of a lease there is no evidence as to how the deposit was going to be deployed in. The Appellant failed to table any evidence to support any payment of the deposit. This claim is rejected. The burden of proof rested with the Appellant to proof that indeed he paid the sums to the Respondents.

72. As to whether the Appellants padlock was damaged by the Respondents, the Court's finding was that there was no evidence to support this averment. The DW1 and DW2 stated that the padlock was welded on the door and that it was intact when the joint inspection was carried out in the presence of the police. Even the joint inspection report was silent on whether the padlock was damaged.

73. As to whether the Appellant is entitled to a compensation for the loss of the cash, laptop and the camera, the Court has keenly perused the documents relied by the Appellant in the trial Court. The Appellant averred that he withdrew Kshs 3,750,000/- on the 25/5/2015 from his disclosed Equity Account. A close perusal of the statement annexed on page 28 of the Appellant's bundle supports the withdrawal. It is the Appellant's averment that he purchased dollars' worth Kshs 2,771,840/- leaving a balance of Kshs 970,000/- which he kept in a drawer in the house and left on a business trip to China. A simple calculation of the sums shows the balance is Kshs 978,160. The figure being claimed by the Appellant is less. Even if it is assumed that the balance was Kshs 970,000/- there was no evidence led to show that the sums were left in the house and or that the house was broken into. How can an internationally exposed businessman leave such a colossal amount of money in the house? The Court is not persuaded that the evidence of the Appellant is neither cogent nor credible.

74. With respect with the laptop and the camera, the Court notes that these are high value items and that the proposition by the Appellant that proof of ownership is not required is with respect incorrect. These are items that cannot be equated to a pen or such other low value items that in many cases a receipt may not be kept. I agree with the trial Court that the Appellant failed to proof that, first that he possessed the items and secondly that the items were stolen and thirdly that the employees and or agents of the Respondents were responsible. It is stated in evidence that the police were present during the joint inspection/ opening of the house. What was so hard to file a complaint with the police, have the complaint investigated and if found culpable charge whoever was responsible. The Appellant stated in evidence that he reported the matter to the police but failed to present the police abstract or a complaint in that regard. The Court rejects this claim in its entirety.

75. As to whether the Court should interfere with the award of Kshs 20,000/- being general damages to the Appellant, it is to be appreciated that this Court will only interfere with the damages awarded by the Learned Hon Magistrate where it is established that the judge took into

account some erroneous principle or that he misapprehended the evidence.

76. In the case of **Butt vs Khan [1981] 1KLR 349** Law LJ stated;

> **"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on some wrong principles, or that he misapprehended the evidence in some material respect, and s arrived at a figure which was inordinately high or low."**

77. Further in the case of **Henry Hidaya Ilanga vs Manyema Manyoka [1961] EA 713,** Court applied the rule laid down by the **Privy Council** in **Nance vs British Columbia Electric Railway Co Ltd (4), (1951) AC page 613** when discussing the parameters to be observed by an appellate Court in deciding whether to disturb an award of damages by a trial judge, when it observed that;

> **"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

78. The Appellant has not specified in what way the learned trial Magistrate applied a wrong principle of law or took into account some irrelevant factor or leaving out of account some relevant one; or in what way the amount awarded was so inordinately low that it must be a wholly erroneous estimate of the damage.

79. The Appellant submitted that the trial Courts award in the sum of Kshs 20,000/- was too low and should be enhanced to Kshs 200,000/- on account of the statutory violations highlighted in the preceding paras. It is to be appreciated that the Learned Magistrate considered the statutory violations, inconvenience including ridicule visited on the Appellant and hence the basis of the exemplary award of damages. I find no grounds to fault the award given by the Learned Hon Magistrate and the Appellant having failed to give reasons to warrant its disturbance, I decline this ground.

80. Having now carefully considered the appeal and all the material placed before me I find that the appeal partially succeeds and I make the following orders;

a. The judgement of the trial Court be and is hereby set aside and substituted as follows;

b. Prayer (a) is spent.

c. Prayer no (b) is disallowed.

d. Prayer no (c) is allowed in the sum of Kshs 37,631/- against the 1st Respondent with interest of 14% from 1/6/2015 until payment in full.

e. Prayer no (d) in the sum of Kshs 25,000/- in lieu of notice to terminate the subject tenancy with interest at 14% p.a from 1/6/2015 till payment in full.

f. Prayer no (e) is disallowed.

g. Prayer no (f) is disallowed.

h. Special damages as prayed in prayer no g is disallowed.

81. General damages 20,000/- in favour of the Appellant with interest of 14%.

82. The costs of the appeal and the lower Court suit shall be met by the Respondents jointly and severally.

83. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Njagi Wanjiru for the Appellants

1st and 2nd Respondents absent but served

Ms. Phyllis Mwangi – Court Assistant