



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 59 OF 2018

DAVID AMBULI NGOTA.....APPELLANT

VERSUS

ROSE AMONDI..... RESPONDENT

JUDGMENT

The Appellant, **DAVID AMBULI NGOTA**, had sued the Respondent, **ROSE OMONDI**, for the sum of Kshs 102,734/55 as compensation for the cost spent on repairs to property that had been allegedly damaged by the Respondent, together with the reimbursement in respect of a water bill which the Appellant paid on behalf of the Respondent.

1. After giving full consideration to the case, the trial court dismissed the case.
2. It was the finding of the trial court that it was not clear whether the damage on the Plaintiff's premises was caused by the actions of the Defendant or by normal wear and tear.
3. Being dissatisfied with the judgment, the Appellant has submitted that the trial court erred by holding that the damage was not caused by the Defendant.
4. According to the Appellant, the evidence which he made available to the court proved that when the Respondent vacated the suit premises, the same had suffered serious damage.
5. The extent of the damage to the property was captured in the Report of **CHRISCA REAL ESTATE**, which is a firm of Property Valuers.
6. The Appellant submitted that he proved that the damage caused to the suit property was as a result of negligence and total recklessness on the part of the Respondent.
7. Pointing out that the Respondent had conceded that the house was in a good condition at the time she moved into it, the Appellant submitted that the degree of damage caused to the house cannot have been as a result of wear and tear.
8. As regards the cost of the repairs and also the payment for the water bill which the Appellant had paid, the Appellant pointed out that he provided receipts for each such expenditure. The water bill which the Respondent had left unsettled, was paid through Mpesa; whilst the sums spent on materials and the labour for the repairs, was supported by receipts which the Appellant produced in court.
9. In response to the appeal, the Respondent submitted that the trial court ought to have rejected the Inspection Report prepared by **CHRISCA REAL ESTATE** because the said inspection had not been carried out jointly between the Tenant and the Landlord.
10. The Court's attention was drawn to the terms of the Lease Agreement, pursuant to which the Landlord and the Tenant were supposed to conduct a joint inspection of the premises before taking up or leaving the said premises.
11. According to the Respondent, an inspection which had not been conducted jointly by the Landlord and the Tenant was lacking in its veracity.
12. Secondly, the Respondent submitted that it was an express term of the Tenancy Agreement, that the Landlord would be liable for damages arising from irresistible force, fair wear and tear and structure repairs.
13. Therefore, I understand the Respondent to be saying that unless the Appellant had tendered proof that the "damage" to the suit premises were caused by her negligence, the Respondent could not be held liable.

14. Being a first appellate court I have the duty of re-evaluating all the evidence tendered, and then making a finding. Of course, I did not have the benefit of seeing any witness when he or she testified, therefore, if the learned trial magistrate based any particular determination upon consideration of the demeanour of a witness, I would have to make an allowance in that respect.

15. In the case of **MKUBE Vs NYAMURO [1983] KLR 403**, the Court of Appeal held as follows;

“A Court, on appeal, will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

16. **PW1, DAVID AMBULI NGOTA**, testified that his tenant, **ROSE OMONDI**, never maintained the premises which she had rented from him.

17. He said that there were breakages, and that some things were missing. He also gave particulars of some other defects.

18. He engaged a professional valuer to carry out an assessment of the extent of the damage, and of the cost for repairing the said damage.

19. **PW1** said that the cost of the repairs was Kshs 99,000/=, and that he personally incurred the said expense.

20. He also testified having paid Kshs 3,364/55, through Mpesa towards settling a Water Bill which the Respondent had left outstanding.

21. **PW2, NOBERT KISANYA**, was a Property Valuer. He carried out an assessment of the house which the Defendant was renting from the Plaintiff, and he found that there was extensive damage to the property.

22. The witness produced the Report prepared by **CHRISCA REAL ESTATES**, which is a firm of Registered Valuers, Surveyors, Managing Agents and Land Economists.

23. The Report sets out in detail, the particulars of the damage found at different parts of the house.

24. By his calculations, the cost of all the materials required to repair the damage throughout the whole house was Kshs 82,680/=.

25. He estimated the cost for the labour required to carry out the repairs as being Kshs 16,536/=; bringing the Grand Total to Kshs 99,000/=.

26. During cross-examination, **PW2** testified as follows;

“Probable causes of damage of this nature would be caused by hitting house hold items by objects and normal wear and tear.

The house was about 10 years and before occupation, the house had been repaired. We were not informed the age of the house. We got the age by assessment.

It was not clear to us what the cause of the damages was.”

27. After **PW2** testified, the Plaintiff closed his case.

28. Thereafter, the Defendant gave her evidence.

29. She testified that she had rented the house in issue for a period of 4 years.

30. She said that although it was the responsibility of the Landlord to carry out repairs, the Plaintiff did not carry out any repairs during the 4 years.

31. **DW1** categorically denied having damaged any of the items which the Valuer had cited in his Report.

32. **DW1** attributed some of the damages to the normal wear and tear. As an example, she said that the wooden curtain boxes wore out through wear and tear.

33. Having re-evaluated the evidence on record, I first note that the receipts which the Appellant annexed to his submissions herein, were not produced as exhibits before the trial court.

34. The record of the proceedings shows that when the Plaintiff filed suit, he simultaneously filed a List of Documents dated 1st April 2015. The said List of Documents cited only 2 documents, being the Report of the Property Valuer, and the Plaintiff's Mpesa Statement.

35. During his testimony, the Plaintiff produced the Tenancy Agreement; the Water Bill; his Mpesa Statement; and a Demand Letter dated 24th November 2014.

36. On his part, the Property Valuer (**PW2**) produced the Report dated 27th January 2015.

37. Just before **PW2** testified, the Plaintiff's advocate drew the attention of the trial court, to the fact that the Plaintiff had filed a Further List of Documents.

38. Although it appears that the Plaintiff intended to produce, as exhibits, the documents identified in his Further List of Documents, he was never recalled to the Witness Box to produce the same.

39. Accordingly, the learned trial magistrate was right to have held that there was no evidence before the court, which could have enabled the Court to assess the cost of the repairs which had been undertaken by the Plaintiff.

40. It is well settled that the party who wishes to have the court make a determination based on factual matters, has the onus of adducing such evidence as would enable the court to hold that the facts had been proved.

41. **Section 107** of the **Evidence Act** provides as follows, on the issue of Burden of Proof;

“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 those facts exist.”

42. As the Plaintiff desired to have the court hold that he had spent the sum of Kshs 99,000/= on carrying out repairs, the burden of proof lay upon him.

43. In the absence of the receipts, I find that the Plaintiff failed to discharge that burden.

44. The Plaintiff was also supposed to prove that the Defendant was responsible for the damage done to the suit premises, as his claim was pegged on the following assertion in the Plaint;

“12. It is the Plaintiff's case that the damage caused to the property was as a result of negligence and total recklessness of the defendant.”

45. As that was the Plaintiff's assertion, he had the onus to prove it.

46. I find that the Plaintiff did not lead any evidence to prove either that the Defendant had been negligent or that she had been totally reckless, thus causing the damage cited in the Report of **PW2**.

47. More significantly, the Property Valuer expressly said;

“It was not clear to us what the cause of the damages was.”

48. Bearing in mind that piece of evidence, coupled with the further statement, to the effect that, the probable cause of damage of the nature seen by the Valuer was hitting household items with objects, and wear and tear; I find that the Plaintiff failed to prove that the damage was caused by the Defendant.

49. Accordingly, there is no merit in the appeal. The appeal is, therefore, dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU

This 13th day of May 2020

FRED A. OCHIENG

JUDGE