



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.14 OF 2018**

**CHINA JIANGXI INTERNATIONAL KENYA LTD. ....APPELLANT**

**VERSUS**

**MOSES ADERO OTIENO.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. Japheth Bii, RM delivered on 3<sup>rd</sup> May, 2018 in Mbita PMCC No.17 of 2017)*

**JUDGMENT**

[1] A plaint dated 3<sup>rd</sup> November 2017, was filed against **CHINA JIANGXI INTERNATIONAL (K) LTD.** (Appellant) by **MOSES ADERO OTIENO** (Respondent) at the magistrate's court in Mbita for a claim of Kshs.209, 000/= arising from an alleged breach of a tenancy agreement entered between the two of them on the 4<sup>th</sup> July 2016, in respect of a house situated within Rusinga Island - Homa Bay County owned by the respondent.

[2] It was pleaded that it was a term of the agreement that on termination of the tenancy the appellant would carry out necessary repairs in the house, but in breach of the term the appellant failed to carry out the repairs thereby causing the respondent to do so at a cost of Kshs.180, 000/= and to suffer a loss of Kshs.29, 000/= being the rent for September, 2017.

[3] The respondent therefore prayed for judgment against the appellant in the sum of Kshs.209, 000/= together with costs and interest.

In its statement of defence dated 28<sup>th</sup> November 2017, the appellant denied the claim by the respondent and contended that no landlord/tenant relationship existed between the respondent and itself and if such existed, then it was fully complied with to the extent that the house was fully repaired on termination of the tenancy.

[4] At the hearing of the suit, the respondent testified as **PW1** and produced the contractual agreement (**P. Exhibit 1**) and what he called an inventory of damages (**P. Exhibit 2**). He also produced a demand letter (**P. Exhibit 3**) directed at the appellant and a copy of a bank statement

**(P. Exhibit 4).**

The appellant did not lead any oral or documentary evidence in support of its defence and after consideration of the respondent's evidence by the court, a conclusion was reached that the respondent proved his case. Judgment was therefore entered in his favour against the appellant in the sum of Kshs.180, 000/= being repair costs and Kshs.29, 000/= being loss of rent for the month of September 2017 (i.e. Kshs.209, 000/=) together with costs of the suit and interest.

[5] Being dissatisfied with the judgment, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 4<sup>th</sup> June 2018.

The appeal was canvassed by way of written submissions and in that regard, the appellant's submissions were filed herein on 25<sup>th</sup> March 2019, by the firm of **Anyumba & Associates Advocates** while those of the respondent were filed on 1<sup>st</sup> March 2019, by **Odhiambo S.E. & Co. Advocates**.

[6] Having considered the appeal in the light of the supporting grounds and the rival submissions, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind, that the trial court had the advantage of seeing and hearing the witnesses. Having done so, it is the opinion of this court that the existence of the agreement between the appellant and the respondent was not substantially disputed by the appellant.

[7] It was indeed agreed that the appellant would lease or let premises belonging to the respondent at a monthly rent of Kshs.29, 000/=

payable quarterly until the expiry of the contract.

The appellant's obligation were clearly stipulated and so were those of the respondent as the landlord.

Among the respondent's obligation were that he would on the expiry of the contract inspect the premises and give an inventory of damages, if any, which shall be repaired and/or replaced at the tenant's costs.

**[8]** However, there was no specific obligation for the appellant to meet the costs of any repairs. Such obligation was not stipulated as being among the obligations of the appellant as the tenant. Even if it is accepted that the appellant was obliged to meet the costs of repairs that may have been undertaken by the respondent, it was the duty of the respondent to prove that the repairs were carried out at a cost of Kshs.180,000/=.

**[9]** A mere inventory of damages (**P. Exhibit 2**) without proof of work been done and necessary receipts and/or invoices to establish the costs incurred was insufficient for purposes of proving that the respondent incurred costs of repairs and replacement of damaged parts in the sum of Kshs.180,000/=.

The obligation to establish the claim against the appellant lay on the respondent and not on the appellant even if no rebuttal evidence was led on its behalf.

**[10]** As for the claim of Kshs.29, 000/= respecting the rent for the month of September 2017, it was not disputed that the appellant vacated the premises in the month of August 2017. Its obligation to pay the rent for September 2017 was therefore extinguished on account of non-occupation of the premises during that month.

**[11]** For all the foregoing reasons, it was clear that the respondent failed to establish and prove his claim against the appellant even on a balance of probabilities. The contrary conclusion reached by the trial court in that regard was therefore erroneous. It would therefore follow that the respondent's opposition to this appeal is unsustainable.

**[12]** In sum, the appeal is allowed to the extent that the judgment of the trial court be and is hereby set aside and replaced with a judgment dismissing the respondent's suit with costs. The appellant shall also have the costs of the appeal. Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**09.04.2019**

**[Delivered and signed this 9<sup>th</sup> day of April, 2019]**