



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Law, Potter JJA & Kneller Ag JA)**

**CIVIL APPEAL NO 61 OF 1981**

**BETWEEN**

**CHANDARIA.....APPELLANT**

**AND**

**NJERI .....RESPONDENT**

**JUDGMENT**

This is an appeal by the defendants (“the landlord”) in a suit instituted by the plaintiff (“the tenant”) in the High Court, to recover the sum of Kshs 21,000 paid by the tenant as a deposit upon the executing of a lease between the parties whereby the tenant leased at a monthly rent of Kshs 6,000 a house belonging to the landlords which was occupied by a number of sub-tenants. The tenant also claimed damages for wrongful eviction, and Kshs 18,000 being rent for three months in lieu of notice of termination by the landlords. The lease, which was unregistered, was not expressed to be for any specified term, and was stated to be determinable by either party on giving three months notice in writing, or if the rent reserved was unpaid for seven days after becoming payable by the tenant. The tenant went into possession on February 1, 1975. By their amended defence and counter-claim the landlords pleaded that the lease was void for want of registration, that the tenant was in arrears of rent for the months of June, July and August, 1975, in spite of repeated demands in writing, and that the landlords accordingly collected the rents from the subtenants from September 1, 1975. They claimed that the tenant owed them Kshs 18,000 being arrears of rent for the months of June, July and August, arrears of rent for two rooms allegedly occupied by the tenant until December 31, 1975, amounting to Kshs 1,750 and Kshs 4,000 the cost of repairs, making in all a total of Kshs 23,750. Of this, the landlords claimed to set off Kshs 21,000 against the deposit paid by the tenant, and they counter-claimed for the balance of Kshs 2,750.

The pleadings raised numerous issues of fact and law, but no issues were framed and recorded by the trial judge (Wilkinson-Guillemard J) as required by Order XIV rule 1(5) of the Civil Procedure Rules. As a result, the learned judge, having heard the witnesses called on both sides, failed to deal with many of the issues which he should have decided. In particular he did not deal with the tenant’s claim for three months rent in lieu of notice; nor did he deal with the landlord’s claim for three months rent for that period, or their claim for rent for the rooms allegedly occupied by the tenant. He contented himself with awarding the tenant Kshs 21,000 being the deposit paid by her, from which he deducted the Kshs 4,000 allegedly spent by the landlords on repairs although he said there was no satisfactory evidence as to how this sum was made up. In the event he awarded the tenant Kshs 17,000 with costs. He said that he preferred the evidence of the tenant to that of the witness called by the defendants, because in his view that witness was “an aged and in appearance inferior man and may well have been subjected to pressures about which no evidence was however adduced.” It is difficult to imagine more unsatisfactory reasons of disbelieving a

witness.

In my view the trial in the High Court, and the judgment of the learned judge, were so unsatisfactory as to amount to a complete mistrial. Many important issues were left undecided and not even considered. Much as I regret having to adopt this course I would allow this appeal with costs, and remit the suit to the High Court for retrial on properly framed issues unless the parties can agree to a settlement. It is in my view quite impossible, having regard to the unsatisfactory state of the record, for this Court to substitute its own findings. For instance, the learned judge said "the Court is not satisfied that the plaintiff was wrongfully evicted, but is of the opinion that the tenancy was lawfully terminated under the Notice Clause contained in defence." I do not know what that means. The defence does not plead that any notice terminating the tenancy was ever given. It merely contends that because the tenant ignored letters demanding rent for the months of June, July and August, 1975, the landlords were constrained to collect rents directly from the sub-tenants from September 1.

As I have indicated, I would allow this appeal with costs, set aside the judgment and decree appealed from, and order that the suit be remitted to the High Court for retrial. The costs of the abortive original trial should be in the discretion of the judge who retries the suit. I express the hope that, to avoid the expense, trouble and delay which will be incurred by a retrial, the parties can come to a sensible compromise.

**Potter JA.** I agree that this appeal should be allowed on the terms proposed by Law JA.

**Kneller Ag JA.** I agree.

**Dated and delivered at Nairobi this 12th day of October, 1982.**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

**A.A KNELLER**

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**Ag. JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**