



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 467 OF 1996

HARJIT KAUR ROOPRA (Suing as the

administrator of the estate of DARSHAN

SINGH ROOPRA-Deceased).....PLAINTIFF

-VERSUS-

LALJI BHIMJI SANGHANI.....DEFENDANT

JUDGMENT

1. Harjit Kaur Roopra, the administrator of the estate of Darshan Singh Roopra (*“the deceased”*) instituted a suit against the defendant on behalf of the deceased’s estate by way of the plaint dated 28th February, 1996 and amended vide the consent order dated 23rd November, 1998 and adopted on 11th December, 1998.

2. The plaintiff pleaded in her plaint that sometime in the year 1974 the deceased and the defendant entered into a verbal agreement whereby the defendant was to purchase the property known as L.R. NO. 209/47/5 Mtama Road, Parklands, Nairobi (*“the suit property”*) on behalf of the deceased and that the same was to be held in trust for the deceased until payment in full of the purchase price arising out of the sub-contractual works done by the deceased.

3. The plaintiff pleaded that soon thereafter, the deceased and his family moved onto the suit property and remained there and further pleaded that the deceased died on 4th November, 1981.

4. It is pleaded in the plaint that subsequently, various maintenance works were undertaken on the suit property and that by the year 1976 the defendant had recovered the purchase price from the deceased and had set off the sum of Kshs.215,000/.

5. It is further pleaded in the plaint that despite a series of verbal requests by the plaintiff, the defendant has utterly failed to transfer the suit property in the plaintiff’s name and that sometime in 1995, the defendant demanded that the plaintiff vacates the suit property so that he can hand over the same to his daughter.

6. In the amended plaint, the plaintiff sought for the reliefs hereunder:

(i) A declaration that the suit property is vested in fee simple in equity in the plaintiff.

(ii) A declaration that the suit property which is registered in the name of Lalji Bhimji Sanghani is held by him in trust for the plaintiff.

(iii) An order that the defendant executes a conveyance of the suit property in fee simple to the plaintiff.

(iv) The defendant be restrained whether by himself, his servants or agents or otherwise howsoever from transferring, alienating or in any other way whatsoever dealing with the property known as L.R. NO. 209/47/5 Mtama Road, Parklands, Nairobi until the final determination of this suit by this court.

(v) Costs of the suit.

(vi) Interest on costs.

7. Upon service of summons, the defendant entered appearance and filed his statement of defence and counterclaim on 13th March, 1996 to

deny the plaintiff's claim.

8. The defendant denied that he and the deceased entered into any verbal agreement over the suit property and further denied that the suit property was at any one point held in trust for the deceased or that the purchase price would be paid from monies due to the deceased from the defendant.

9. The defendant pleaded that the deceased and his family were merely tenants on the suit property paying a monthly rent of Kshs.1,000/ which was later increased to Kshs.1,500/, further pleading that it was agreed between the parties that the deceased was at liberty to make any improvements to the suit property at his own risk.

10. In his counterclaim, the defendant reiterated the contents of his statement of defence and finally sought for an order that the plaintiff is not entitled to possession of the suit property and a further order that the plaintiff do vacate the suit premises and give possession to the defendant.

11. The plaintiff responded with a reply to defence and a defence to counterclaim largely reiterating the contents of the plaint.

12. It is noted that the suit property constitutes the subject matter of the dispute. With the establishment of the Environment and Land Court (ELC) under Article 162(2) (b) of the Constitution and the subsequent enactment of the Environment and Land Court Act, 2011 ("the Act"), all disputes relating to land and the environment are to be heard by the ELC. However, Section 30(1) of the Act provides that all related proceedings which are pending before any other courts or tribunals with competent jurisdiction will continue to be heard by the same courts until such time as the ELC becomes operational or as directions will be given by the Chief Justice or the Chief Registrar.

13. To that end, the Honourable Chief Justice issued practice directions dated 9th November 2012 published vide Gazette Notice No.16268 pursuant to the provisions of Section 30 of the Act, thereby allowing the subordinate courts and the High Court to continue hearing any land or environment matters where hearing had commenced.

14. Having considered that the suit was instituted in 1996 and had been partly heard by the time the ELC was fully established, I find that this court had jurisdiction to hear the suit.

15. At the hearing of the suit, the plaintiff relied on the testimonies of five (5) witnesses while the defendant testified as the sole witness for the defence case.

16. The plaintiff who was PW1 gave evidence that before his demise, the deceased worked as a contractor with Nyota Construction which later changed its name to Motorways Construction. She then stated that together with the deceased she moved into the suit property sometime in 1974 with their ten (10) children and that at the time of testifying, they still resided on the suit property.

17. The plaintiff testified that they purchased the suit property through the defendant and that the consideration was to be deducted from the cost of work done for the defendant by the deceased.

18. It was the plaintiff's evidence that her family undertook a number of works and repairs on the suit property and that a few of the deceased's sons offered assistance in his business, adding that she now wishes to have the suit property registered in her name.

19. During cross-examination, the plaintiff stated that the deceased was a partner at Nyota Construction together with Sohen Singh though he had no partnerships upon its conversion to Motorways Construction.

20. Satnam Singh Rooprumele who was PW2 testified that he was at all material times a partner at Motorways Construction together with the deceased who was his father, and his brothers. He reiterated the averments by PW1 that the deceased and the defendant had a working relationship and that the deceased and his family lived on the suit property which was purchased by the defendant on behalf of the deceased.

21. The witness further testified that the defendant visited the suit property in 1995 and informed the deceased's family that he wished that they vacate so that his daughter who had recently undergone a divorce would move therein.

22. It was the testimony of PW2 that the deceased's family was in shock at the demands made by the defendant since they had all along lived on the suit property without any demand for rent or demands to vacate. However, PW2 admitted that sometime in 1994 the family of the deceased issued a cheque in the sum of Kshs.54,000/ on income tax.

23. The witness stated that the family of the deceased used to pay the water and electricity bills in respect to the suit property, further stating that they have been residing on the suit property continuously since 1974 and that if the defendant was of the view that the suit property did not belong to the deceased, then the family of the deceased would not have applied any efforts towards making improvements on it.

24. In cross-examination, it is the testimony of PW2 that prior to moving into the suit property, the deceased and his family resided in a rental house in Juja.

25. The witness reiterated that though the suit property was registered in the name of the defendant, the same was to be held in the interest of the deceased upon full payment of the purchase price, while admitting that he did not witness the parties enter into the agreement but was merely informed of its existence by the deceased, which information was further given to the deceased's wife (PW1), sons and a close friend.

26. PW2 also asserted that while it is true that various improvements were made to the suit property by the family of the deceased, the exact

cost incurred could not be ascertained though he was certain that it was a substantial figure.

27. During re-examination, the witness gave evidence that an agreement was entered into between the defendant and plaintiff sometime in 1984 whereby the defendant agreed to transfer the suit property to the plaintiff upon payment of a balance of Kshs.1,000,000/ arising out of a construction project which the defendant sub-contracted to the family of the deceased but this was not to be.

28. PW3 was Haubhajan Singh Chama and he gave evidence that he was at all material times known to the plaintiff's family and a close friend of the deceased.

29. The witness stated that he was in the company of the deceased at the time the negotiations were made between the deceased and the then owners of the suit property, the Ismaili family. In this respect, the witness testified that the agreed consideration was Kshs.225,000/ and since the deceased did not have the funds, he spoke with the defendant who agreed to pay the consideration and set off the amount against work done by the deceased.

30. It was the evidence of PW3 that he never met the defendant in person though he is aware that he runs a business under his own name.

31. The witness further stated that though the suit property was not registered in the name of the deceased, he is certain that the same was owned by him.

32. In cross-examination, PW3 testified *inter alia*, that as per the arrangement made, the consideration paid out by the defendant towards the purchase of the suit property was to be repaid by the deceased through sub-contract works.

33. Suriner Singh Ropra in his evidence as PW4 adopted the contents of his witness statement and in cross-examination, he testified that the defendant was issued with a cheque of Kshs.54,000/.

34. Narinder who testified as PW5 similarly adopted the contents of his witness statement and further confirmed that the purchase price in respect to the suit property was Kshs.215,000/ which sum he personally paid to the defendant in 1976 and that there is no reason as to why the suit property should not be transferred to the family of the deceased.

35. The witness also testified that between the year 1974 when the deceased and his family moved into the suit property and 1996 which is the year of filing the suit, none of the members of the deceased's family paid any rent over the suit property.

36. During cross examination, PW5 stated that the defendant would sub-contract various works to the deceased and thereafter charge a commission of 10% for the works done.

37. The witness went on to state that at no point did they pay any land rates or land rent since the suit property was in the name of the defendant.

38. The defendant through his evidence as DW1 testified that he knew the plaintiff and her family at all material times and that the deceased was his sub-contractor. It is the defendant's testimony that at no point did the deceased purchase any house from him, neither did the parties enter into any agreement relating to sale of the suit property.

39. The defendant went on to state that he leased the suit property to the deceased and his family at an initial rent price of Kshs.1,000/ which price later increased to Kshs.1,800/.

40. It is the testimony of the defendant that previously, the suit property was registered in the joint names of the defendant and one Shamjki Jina Patel but the joint ownership terminated upon the split of the partnership between the duo.

41. In cross-examination, the defendant stated that originally, the suit property had been advertised for sale in the local newspaper and that he negotiated the purchase price with the then proprietor, Ashakali Hussein Merali, on his behalf and on behalf of his then business partner, Shamjki Jina Patel.

42. The defendant further stated that he bought the suit property so he could receive some returns from it and that the deceased requested that the property be leased to him. However, the defendant added that rent was not paid in respect to the suit property between 1974 when the deceased took possession and 1991, neither did he demand rent from the deceased during that span.

43. It is the evidence of the defendant that he is unable to tell whether any modifications were done on the suit property since he has not visited the suit property in a long time.

44. DW1 testified that he took out a mortgage back in 1998 and applied the suit property as security and which mortgage was discharged at a later date. He further stated that at the time of taking out the mortgage, the deceased's family were his tenants.

45. The defendant maintained that he never held the suit property in trust for any person and that he is claiming for unpaid rent from the family of the deceased.

46. In re-examination, the defendant restated that the plaintiff and her family were tenants in the suit property.

47. The record shows that Harjit Kaur Roopra who was at all material times the plaintiff in this case passed away on 17th September, 2006 and that her son, Narinder Singh Roopra, applied for and was granted letters of administration intestate vide the court order made on 4th of October, 2007. By way of a consent letter dated 17th December, 2007 the name of Harjit Kaur Roopra was substituted with that of Narinder Singh Roopra as the plaintiff.

48. At the close of the hearing, the parties filed and exchanged written submissions as directed by the court. The plaintiff submitted that based on the testimonies of the respective plaintiff's witnesses, there is overwhelming evidence to prove that there existed a verbal agreement between the deceased and the defendant in respect to the suit property, which evidence was backed by the testimony of the defendant that the deceased and his family have always had possession of the suit property since its purchase in 1974 and that rent payments were never demanded from the deceased between 1974 and 1991.

49. The plaintiff further submitted that the verbal agreement is valid and enforceable in every respect pursuant to the provisions of Section 3(3) of the Law of Contract Act before its amendment in 2003 which were considered by the Court of Appeal in the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR** thus:

“Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

50. It was the plaintiff's contention in addressing the counterclaim that the deceased's family enjoyed uninterrupted possession of the suit property and the defendant took no action to recover possession thereof, further admitting that he did not claim any rent from them for 17 years, hence he cannot be heard to now seek to recover possession of the property, pursuant to the doctrine of adverse possession.

51. In this respect, the plaintiff drew this court's attention to the provisions of Section 7 of the Limitation of Actions Act which stipulates that any action to recover land cannot be brought at the end of 12 years, as well as Section 17 of the Act which expresses that upon expiry of the period during which a person can bring an action for recovery of land, such a person's title to the land in question becomes extinguished.

52. The plaintiff also made reference to inter alia, the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi [2018] eKLR** wherein the Court of Appeal elaborately discussed the doctrine of adverse possession, though the court eventually found that the ingredients for adverse possession had not been met in that instance hence obtainment of the title in question under the doctrine of adverse possession could not succeed.

53. On the subject of the cheque for Kshs.54,000/, it was the plaintiff's contention that the same could not constitute rent but was solely for purposes of income tax.

54. The plaintiff further argued that going by the conduct of the defendant, the deceased and his family were under the impression that the suit property would be transferred to them which explains their decision to undertake repairs and modifications on the property, hence the defendant is estopped from turning around to claim that the property does not belong to the family of the deceased. To buttress the point, the plaintiff cited the case of **Inwards and others v Baker [1965] 1 ALL ER 446** in which the Court of Appeal held that where a party had undertaken works on a certain property with the expectation of being permitted to remain there, equity would not permit such expectation to be defeated by a party seeking to evict such person.

55. In respect to the doctrine of constructive trust, it was the plaintiff's submission that in the present instance, a constructive trust had been created over the suit property in favour of the plaintiff. The case of **Hussey v Palmer [1972] 3 ALL ER 744** was quoted, in which the court rendered that where a person contributes to the purchase of a house, the owner thereof holds the house on a constructive trust for him or her, proportionate to the contribution made.

56. The plaintiff submitted that since the family of the deceased paid the sum of Kshs.215,000/ to the defendant for purchase of the suit property, then a constructive trust arises in their favour.

57. In closing, the plaintiff argued that contrary to the claims by the defendant that the suit is statute barred, the same is properly before this court since the cause of action arose in 1995 when the defendant sought to evict the family of the deceased from the suit property.

58. On his part, the defendant submitted that contracts relating to the sale of land or any interest arising therefrom must be in writing and that in the current circumstances, the plaintiff has not shown that any proper agreement was entered into for sale of the suit property in the manner alleged hence the suit is bad in law and raises no cause of action against him.

59. According to the defendant, the purported agreement between the parties contravened the provisions of Section 3(3) of the Law of

Contract Act hence the same ought to be disregarded, as was the position taken by the court in the authority of **Patrick Tarzan Matu & Another v Nassim Shariff Nassir Abdulla & 2 Others [2009] eKLR** where it struck out a plaintiff's suit for being in contravention of Section 3(3) (*supra*).

60. The defendant further submitted that there is evidence to show that he rented out the suit property to the deceased.

61. It is the defendant's contention that the plaintiff did not provide details as to when the purported payment of the purchase price was made hence there is no basis on which the court can accept their version of events as true.

62. The defendant is of the submission that he remains the rightful owner of the suit property and the plaintiff has not demonstrated any entitlement to the same, which is to say that the plaintiff's suit is deserving of dismissal with costs.

63. I have considered the various pleadings, the evidence tendered in court and the contending submissions which culminated the matter. I identified the following as the main issues pending for determination:

a) Whether the plaintiff's suit is time barred and discloses any cause of action.

b) Whether there existed a verbal agreement between the deceased and the defendant.

c) Whether the defendant held the title to the suit property in trust for the deceased.

d) Whether the plaintiff is entitled to the reliefs sought in the plaint.

e) Whether the counterclaim has merit.

64. I will address the substratum of the issues hereinbelow.

a) Whether the plaintiff's suit is time barred and discloses any cause of action.

65. It is noted that this particular issue was raised in the statement of defence. It was incumbent upon the defendant to tender evidence showing when time begun to run. It is apparent from the evidence tendered on both sides that this is an action based on continuing trust hence it is difficult to ascertain when time begun to run. I find that this action is therefore properly before this court.

66. In short, the defendant failed to present credible evidence to prove that the suit was time-barred.

b) Whether there existed a verbal agreement between the deceased and the defendant.

67. On this issue, I considered the evidence of the plaintiff's witnesses that the deceased entered into a verbal agreement with the defendant over the purchase of the suit property way back in the year 1974. The plaintiff went on to submit that such agreement was made prior to the amendment to the Law of Contracts Act in 2003 which requires agreements of such nature to be put in writing.

68. While the defendant challenged the validity of the agreement, he did not dispute in his oral evidence that there existed a verbal agreement between the parties, though he refuted the contents thereof.

69. Upon considering the respective positions taken in this respect and the conduct of the parties prior to and after the institution of the suit, I am satisfied that the plaintiff has demonstrated that a verbal agreement was entered into between the parties and going by the reasoning adopted in **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR** (*supra*), I see no reason to deem the agreement invalid.

c) Whether the defendant held the title to the suit property in trust for the deceased.

70. Having already determined that the parties entered into a valid verbal agreement in respect to the suit property, the real dispute lies with the terms thereof.

71. The plaintiff on the one hand is of the firm view that the suit property was at all material times to be held in trust for the deceased and by extension, his family and/or successors based on the verbal agreement that the defendant would purchase the property so that the same would be transferred to the deceased at a later date. This view was also supported by the evidence tendered by the plaintiff's witnesses.

72. On the other hand, the defendant was of the view that the agreement was such that the deceased would enter the suit property as a tenant.

73. What then constitutes a trust? **The Black's Law Dictionary, 8th edition** defined the term using the following wording:

"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."

74. The Black's Law went ahead to set out the elements of a trust which are three (3) fold in nature:

(i) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another;

(ii) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit;

(iii) trust property, which is held by the trustee for the beneficiary.

75. I noted from the plaintiff's submissions that the case rode on constructive and resulting trusts specifically. A constructive trust is defined as follows in the Black's Law:

"An equitable remedy that a court imposes against one who has obtained property by wrongdoing...imposed to prevent unjust enrichment, creates no fiduciary relationship."

76. The definitions of the two (2) kinds of trusts were further articulated by the Court of Appeal in **Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR** cited in the plaintiff's submissions with the court holding that a resulting trust will arise where a person paid some money towards purchasing the property in question.

77. From the pleadings and evidence on record, it is apparent that the deceased and the defendant enjoyed a cordial business relationship in the sense that the defendant sub-contracted various works to the deceased and received commissions on the same. It is also apparent that the sub-contractual relationship between the parties was essentially verbal in nature since none of the parties adduced any evidence to show that the same was put in writing.

78. On this subject, I appreciate the nature of the relationship between the parties coupled with the culture of trust which is known to exist in the community in which both parties were part of and which would explain the tendency to enter into verbal arrangements.

79. From my evaluation of the evidence, it is noted that the plaintiff's case was consistent in terms of the fact that the deceased and his family have lived on the suit property since 1974 and that they never made any payments towards rent.

80. I also noted consistency in the plaintiff's case in the sense that the deceased undertook renovation works on the suit property and further paid the water and electricity bills in utilization of the said property.

81. In any event, there is evidence to show that the deceased whether by himself or through his family members all through paid electricity and water bills over the suit property and the respective account details were registered in his name which goes to show that he and his family utilized the suit property on a regular basis.

82. It is my observation that the abovementioned aspects of the plaintiff's case essentially remained uncontested, with the defendant admitting that he never demanded rent from the deceased or the plaintiff from 1974 to 1991. On the subject of renovation or improvements on the suit property, the defendant indicated that he could not tell whether these had been done for the reason that he did not frequent the suit property.

83. From my evaluation of the evidence also, it is not in dispute that the suit property was purchased by the defendant and registered in his name. I looked at a copy of the indenture made on 4th of October, 1974 between Ashakali Hussein Merali and his wife Shirin Ashakali Hussein Merali on the one part (*"the third parties"*), and the defendant and Shamji Jina Patel on the other part. This document was attached to the defendant's bundle and confirms that the defendant and Mr. Patel purchased the suit property from the abovementioned persons at the consideration of Kshs.215,000/ and that at a later date, Mr. Patel and the defendant executed an indenture dated 14th July, 1995 for a complete transfer of the suit property from Mr. Patel to the defendant at a consideration of Kshs.115,000/.

84. From the above facts, it is apparent that at the time of purchasing the suit property from the third parties and prior to the aforementioned indenture, the said property was jointly owned between the defendant and Mr. Patel.

85. I take note that while the defendant disputed the testimonies by the plaintiff's witnesses that the purchase price of Kshs.215,000/ was paid to the defendant by the deceased over the suit property, the defendant did not refute that he received commissions in respect to the projects which were sub-contracted to the deceased. In my view, it is plausible that payments from the sub-contractual works were used to offset any debts owing to the defendant.

86. On the subject of the purported tenancy agreement between the parties, I considered the evidence of the plaintiff that the deceased was never a tenant of the defendant as against the defendant's position that there all along existed a tenancy/lease relationship between the defendant and the deceased.

87. As earlier noted, the defendant acknowledged that the deceased did not pay any rent to him between the years 1974 when he and his family entered into the suit property and 1991, and since 1995; neither did he demand for rent payments during that period yet the deceased's family all the while remained in occupation on the suit property though I noted from the defendant's bundle that the letter dated 10th October, 1974 to the deceased by the defendant to inform him that the rent payable would amount to Kshs.1,000/ and a report of accounts for the year 1986.

88. From the foregoing, I am of the view that the defendant is contradicting himself since on the one part he admits to not having demanded any rent payments from the deceased while on the other part he provided an account of the income received in 1986 over the suit property.

89. The defendant also presented copies of land rate demand notes which showed that he and Mr. Patel were responsible for making

payments towards land rates in respect to the suit property which the plaintiff acknowledged as the true position since in any case the suit property is registered in the name of the defendant.

90. The defendant further gave oral evidence that between the years 1991 and 1994, the plaintiff paid rent in the monthly sums of Kshs.12,000/ which were later increased to Kshs.18,000/ as shown in a cheque issued in 1994 for the sum of Kshs.54,000/. Alongside the cheque, there is a written note indicating that the sum constitutes rent payment for 3 years at the sum of Kshs.18,000/ per year.

91. On the part of the plaintiff, the position is that the aforesaid amount of Kshs.54,000/ was not rent but a sum which the defendant pressured the deceased's family to pay for the reason that he was being followed up on income returns by the Kenya Revenue Authority (KRA). The defendant did not refute that he was required to give yearly accounts of his income tax returns.

92. If at all the plaintiff was a tenant of the defendant, then the defendant in my view ought to have demonstrated a consistency in demand for rent and payments or lack thereof. The only evidence placed before this court is the cheque for Kshs.54,000/ which I have misgivings with, going by the previous conduct of the defendant in not demanding rent and in not explaining the nature of relationship between the parties in the years during which no demand for rent was made. If it is at all true that the deceased and his family utilized the suit property as tenants, then the defendant has not explained why he did not require them to pay rent.

93. From the foregoing, I find the averments by the plaintiff to be more believable in comparison to those of the defendant.

94. Looking at the circumstances of the case and the conduct of the parties, I am led to the conclusion that it was their intention to create a trust hence I can only imply a trust. In so finding, I borrow from the decision by the Court of Appeal in the case of **Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR** that a trust is implied by the court where the aim is to give effect to the intention of the parties therein.

d) Whether the plaintiff is entitled to the reliefs sought in the plaint.

95. Going by the foregoing analysis, I have arrived at the conclusion that the plaintiff having proved the claim is consequently entitled to the reliefs being sought therein.

e) Whether the counterclaim has merit.

96. Based on my finding above, the counterclaim automatically fails.

97. In the end, judgment is hereby entered in favour of the plaintiff and the following orders are made:

(i) A declaration is hereby made that the suit property is vested in fee simple in equity in the plaintiff.

(ii) A declaration is hereby made that the suit property which is registered in the name of Lalji Bhimji Sanghani is held by him in trust for the plaintiff.

(iii) An order is hereby made that the defendant executes a conveyance of the suit property in fee simple to the plaintiff and in default, the Deputy Registrar of this court is authorized and directed to step in and do so in the defendant's place.

(iv) The defendant shall pay the plaintiff's costs of the suit plus interest thereon at court rates.

(v) The counterclaim is hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Nairobi this 28th day of February, 2020.

.....

J.K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant