



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 838 OF 2001

JOHN GACHUHI KAMENYA.....PLAINTIFF

VERSUS

SAMUEL NJUGUNA GITAKA.....1ST DEFENDANT

HANNAH NJERI GATUTHU.....2ND DEFENDANT

ESTHER MUMBI GATUTHU.....3RD DEFENDANT (DECEASED)

MONICAH WAITHIRA GATUTHU.....4TH DEFENDANT

GODWIN MUHIA T/A GODAN AUCTIONEERS.....5TH DEFENDANT

JUDGEMENT

1. The plaintiff sued the 5 defendants arising out of an alleged breach of contract.
2. The 1st defendant failed to enter appearance or file a defence, and judgement was entered against him.
3. Thereafter, the defence which had been filed by the other 4 defendants was stuck out.
4. Accordingly, when the case came up for trial, it proceeded by way of Formal Proof.
5. The plaintiff and 3 other witnesses testified.
6. It was the plaintiff's case that in the year 1978 he entered into a contract with **GATUTHU NJUGUNA** (*now deceased*). Pursuant to the said contract, Njuguna leased a shop to the plaintiff.
7. At the time when the 2 persons entered into the contract, Njuguna was unwell. In order to assist Njuguna cater for his medication, the plaintiff paid him a deposit of Kshs. 200,000/-.
8. It was the evidence of the plaintiff that the deposit was supposed to be utilized "*to cover the rents?*".
9. But the plaintiff also testified that he continued paying rents to Njuguna.

10. In 1988, Njuguna died. Thereafter, the plaintiff says that he continued paying rents to the 2nd, 3rd and 4th defendants, who were the widows of Njuguna.
11. On 8th October 2000, the plaintiff received a letter from Waweru Gatonye & Co. Advocates, demanding Kshs. 81,000/- on account of rental arrears.
12. In response to the notice, the plaintiff asked the advocates to recover the rental arrears from the deposit of Kshs. 200,000/-. However, the plaintiff received no response to his letter.
13. On 1st November 2000, the plaintiff found the shop locked by the 5th defendant.
14. Thereafter, the shop was leased to a third party, after the plaintiff's goods were removed from it.
15. The plaintiff claimed that the value of goods which were removed from the shop was Kshs. 1,262,642/-. He therefore claimed that sum from the defendants.
16. Secondly, the plaintiff claimed Kshs, 444,000/- in respect to the costs of the developments which he made at the shop. The said developments included *a steel door; built-in shelves; 2 stores; ceilings; grills at the counter; and an office.*
17. Thirdly, the plaintiff asserted that he used to make profits of Kshs. 3,380/- daily. Therefore, in respect to the 114 days when the shop was locked, until it was leased to another tenant, the plaintiff claimed Kshs. 385,320/-.
18. Meanwhile, as regards the deposit of Kshs. 200,000/-, the plaintiff asked that the defendants should recover the rental arrears of Kshs. 81,000/-, and then return the balance of Kshs. 119,000/-.
19. In total, the plaintiff's claim was for Kshs. 2,221,022/-, plus costs and interest.
20. **PW3, JOSEPH GICHUHI WAWERU**, testified that he is a carpenter. He also did welding.
21. His testimony is that it is he who carried out the works constituting the developments which the plaintiff made at the shop. **PW3** charged a fee of Kshs. 444,000/-, and the plaintiff paid him.
22. A "*cash receipt?*" dated 1st July 1997 was produced in court, as proof of the payment.
23. However, I note that although the plaintiff had testified that, amongst the work done by **PW3** there were grills at the counter and an office, Waweru did not make any reference to those 2 items.
24. I also find it hard to believe that the carpenter-cum-welder rendered services worth 444,000/-, and then only charged for it after completing the task.
25. **PW2, CHARLES MWAURA GACHUHI**, is a son to the plaintiff. He used to assist his father to run the business at the suit premises.
26. He testified that the business entailed *animal feeds; cooking fat; sugar and other assorted goods.*
27. On 31st October 2000, PW2 was at the shop, when the 5th defendant locked it up.
28. **PW2** also testified that he was at the shop on 2nd December 2000, when the 5th defendant carried away all the "*properties?*" from the shop.
29. He added that when **PW5** was removing the items from the shop, none of the members of the plaintiff's family were present.

30. **PW4, GEORGE NGIGI KINYANJUI** is a certified public accountant. He testified that the plaintiff had engaged him to audit his business. He therefore inspected the plaintiff's books and prepared Financial Statements and Reports.

31. His Reports reflect the following;

<u>YEAR</u>	<u>RENTS</u>	<u>PROFITS</u>
1996	350,000/-	1,091,314/-
1997	408,000/-	1,203,570/-
1998	212,000/-	861,883/-
1999	212,000/-	956,357/-

32. On the other hand, the plaintiff testified that he made profits of Kshs. 3,380/- daily.

33. By my calculations, the annual profits would then add up to Kshs. 1,233,700/-. However, that figure is neither reflected in the Gross Profits nor in the Net Profits cited in the Profit and Loss Accounts prepared by the auditor.

34. It is also noted that the Licence issued to the plaintiff, by the Municipal Council of Thika is for;

“Wholesale trade on provision stores only?.

35. Therefore, when the plaintiff exhibited receipts to suggest that he was trading in items such as *Fan Belts; New Tyres; Plain sheet (lorry body); Jack; windows for Nissan matatu; Tubes; Gear box; Rims; and compressor*, that would imply that he was trading in goods which were not permitted under the licence issued to him.

36. Those items are definitely not “provisions”.

37. There is a receipt dated 31st October 2000, which was issued by Njuche Ent. Tea packers, for 5 cartons of “Sweatex Tea”. As the shop was locked up on that date, the goods cited on that delivery note cannot have been inside the shop thereafter.

38. Secondly, there are receipts dated 18th June 1998 and 15th October 1999. By saying that goods which were bought by him that far back had remained in the shop until October 2000, the plaintiff was suggesting that the goods were not “moving”.

39. Similarly, the plaintiff has not provided evidence to show the particulars of the goods which he had sold, out of the items which he had stocked in his shop.

40. I hold the view that if the plaintiff was carrying on the profitable business, as he alleged, the stock could not have remained static.

41. Therefore, the receipts and delivery notes given to the court do not reflect the accurate picture of the stocks in the shop.

42. I find that the shop was stocked, but not to the extent claimed by the plaintiff.

43. In my considered view, after taking into account the delivery notes and receipts, together with the audited reports; and after making an allowance for sales which would have been made, I find that the

stock in the shop was worth Kshs. 450,000/-.

44. As it is the 5th defendant who carted away the goods, I enter judgement against him for that sum.

45. Meanwhile, considering that the improvements to the shop were made in 1997, I find no reason why the plaintiff had not raised his claim in that regard earlier. I hold that the said claim was only made as an afterthought, following the eviction of the plaintiff.

46. Had the claim been legitimate, it could have been raised in 1997, or at the very latest, when the plaintiff was responding to the letter from Waweru Gatonye & Company Advocates.

47. Accordingly, the claim for Kshs. 444,000/- is rejected in total.

48. Finally, as regards the claim for the refund of Kshs. 119,000/-, I find that the same should be settled by the Estate of Gatuthu Njuguna. And as the 1st defendant is the Executor of the Will of the deceased, and also because the 1st defendant confirmed that the plaintiff had paid the deposit (of Kshs. 200,000/-) in his presence, I enter judgement against him for the sum of Kshs. 119,000/-.

49. The costs of the suit are awarded to the plaintiff against the 1st and 5th defendants.

50. The decretal sums will attract interest at Court rates from the date of judgement.

51. As regards the 2nd and 4th defendants, I find no basis, in law, for holding them liable, whilst the Executor of the Will of their late husband is already being held liable in respect to the actions attributable to the Estate of Gathuthu Njuguna. Therefore, the suit against the 2nd and 4th defendants is dismissed, with costs.

52. Finally, the suit against the 3rd defendant is struck out, because she passed away. The costs in that respect shall be borne by each of the respective parties.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of May 2017.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Mureithi for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant (Deceased)

No appearance for the 4th Defendant

No appearance for the 5th Defendant

Mr. C. Odhiambo, Court clerk.