REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 296 of 2002 & 41 of 2003

CHRISANTUS OMARIBA.....1ST PLAINTIFF
ALFAKISARD OMURWA.....2ND PLAINTIFF
PAUL OMWENGA.....3RD PLAINTIFF
DAVID OKIOMA t/a MOCHENWA TRADING COMPANY.....4TH PLAINTIFF
VERSUS

TING'A TRADING CO. LTD.....DEFENDANT

CONSOLIDATED WITH HCCC NO. 41 OF 2003

TINGA TRADING COMPANY LTD.....PLAINTIFF

VERSUS

PETER OGWARA.....1ST DEFENDANT
ALIFAKZARD OMURWA.....2ND DEFENDANT
PAUL OMWENGA T/A MOCHENWA TRADING CO.....3RD DEFENDANT

JUDGMENT

The original plaint in **HCCC No. 296 of 2002**was filed on 5th December 2002 by the four plaintiffs herein together with one Raburi Nyangoya who was the 3rd plaintiff. However, on 20th May, 2008 an amended plaint was filed with leave of the court and the name of Raburi Nyangoya was struck out. The plaintiffs were described as male adults of sound mind trading as Mochenwa Trading Company.

In paragraph 3 of the plaint it was pleaded that the plaintiffs and the defendant are the registered proprietors of two parcels of land known as **Kisii Town/Block III/266** and **265**respectively. In or around 1981 the plaintiffs and the defendant entered into a contract whereby the defendant was to construct a storey building on behalf of the plaintiffs at the plaintiffs' parcel of land, **Kisii Town/Block III/266**, hereinafter referred to as "**the suit property**." The building was to be put up together with another one on the defendant's own plot in such away that the two buildings would appear like one, though standing on the two adjoining plots.

At the commencement of the project the terms of engagement were not clear as to how the plaintiffs would repay the construction costs to the defendant. Subsequently the parties held a joint meeting on 23rd May 1982 and agreed that the construction cost of the entire building was totaling upto **Kshs. 6,497,054/=**. The cost was to be shared equally between the parties and therefore the plaintiffs were to pay to the defendant a sum of **Kshs. 3, 248,527/=**. It was a further term of the agreement that the plaintiffs were to repay the aforesaid debt over a period of twenty years at the rate of **Kshs. 15,430.50**per month. The defendant was given the title document to the suit property to hold as security until the entire debt was repaid. The same was held in trust by M/s D.A. Onyancha Advocates.

The aforesaid mode of repayment of the debt was varied on 19th June 1983 following a joint meeting between the two parties. It was agreed that the defendant would take over the running and management of the suit property until it recovered its debt in full. The

building had various tenants and the understanding was that the defendant would manage the suit property and collect the accruing rents until it recovered the debt of **Kshs. 3,248,527/=**due to it from the plaintiffs.

The plaintiffs averred that the defendant has been managing the suit property since June 1983 and upto the time of filing the suit the defendant had, inspite of several requests and demands, refused to give any accounts to the plaintiffs so as to establish whether the debt had been repaid.

In paragraphs of 9 and 10 of the amended plaint it was pleaded as hereunder:

> **"9. It is the contention of the plaintiffs that the debt had to be cleared within the shortest period, say within six years and consequently, the plaintiffs shall pray that the defendant be ordered to produce a proper and accurate account of how they have been transacting business at the plaintiff's premises since 1983 to date. And an order do issue that any amount paid over and above the principal be refunded to the plaintiffs with interest.**
>
> **10. The plaintiffs' claim against the defendant is for an order that the debt by the defendant is cleared and the proper accounts be taken and if it were to be found that the defendant owes the plaintiffs any sum, same be repaid to the plaintiffs and the defendant do vacate the premises forthwith."**

The plaintiffs' prayers were as follows:

> **"(a) An order that the amount owed by the plaintiffs to the defendant has been paid fully.**
>
> **(b) An order that any amount paid over and above the principal amount be refunded to the plaintiffs with interest from the date of accrual.**
>
> **(c) An eviction order do issue against the defendant from Kisii Town/Block III/266.**
>
> **(d) Costs of and incidental to this suit.**
>
> **(e) Any other or further relief this court may deem fit to grant."**

The defendant filed amended statement of defence and stated that the plaintiffs' suit is bad in law and does not disclose any reasonable cause of action. In paragraphs 6 and 7 of the amended defence the defendant pleaded as hereunder:

> **"6. Further and without prejudice to the foregoing the defendant shall aver at the hearing that it was lawfully and willfully given possession of the entire suit premises by the registered trustees of Mochenwa Trading Company in order to recover a debt of Kshs. 3,248,527/= owed to the defendant at a monthly rent of**

Kshs. 6,000/= until fully recovery of the debt.

7. The defendant's debt is to take 541 months to clear from 19th June 1983 as per minutes Nos. 9-83 and 10-83 of the said date."

The defendant further denied that it was to submit any accounts to the plaintiffs as alleged in the plaint or at all.

In **HCCC No. 41 of 2003**Tinga Trading Company Limited filed a suit against Mochenwa Trading Company Limited. Upon realizing that Mochenwa Trading Company was not a limited liability company the plaint was amended and the defendants were stated as **Peter Ogwara, Alfakzard Omurwa** and **Paul Omwenga** trading as Mochenwa Trading Company. The orders sought therein were as follows:

"(a) An order allowing the plaintiff to realize the security deposited with the firm of M/s D.A. Onyancha & Company Advocates.

In the alternative:

The defendants do pay the amount now due and payable to the plaintiff or remain in possession of the premises until the amount due and owing is fully utilized by way of deduction of monthly rent of Kshs. 6,000/=.

In further alternative:

(a) An order for specific performance be issued in terms of paragraphs 11, 12 and 15 of the plaint.

(b) General damages.

(C) Costs and interest.

(d) Any other relief as this Honourable court may deem fit to grant."

Prior to the filing of the amended plaint in HCCC NO. 41 of 2003, the defendants had filed a statement of defence and denied the plaintiff's claim in its entirety. No amended defence was filed subsequent to the filing of the amended plaint. Under **order VIA rule 1 (6)** of the **Civil Procedure Rules**, where a party has pleaded to a pleading which is subsequently amended, if he does not amend his pleading he is taken to rely on it in answer to the amended pleading.

On 12th March, 2003 the court ordered that the two suits be consolidated and heard together. The proceedings were recorded in HCCC No. 296 of 2002.

Three people testified for and on behalf of the plaintiffs. These are **Chrisantus Joseph Omariba Bosire, David Omuna Okioma**and **Henry Juma Nyakundi**.

Chrisantus Joseph Omariba Bosire, PW1, told the court that Mochenwa Trading Company was started sometimes in 1961 or thereabout. He was the chairman of the company. The other members were:

1. Alfakisard Omurwa

2. Kaburi Nyangota

3. Nemwel Okindo

4. Silvester Ogeto

5. Peter Ogwara

6. Paul Omwenga and

7. David Okiomo.

Some of the above persons were deceased at the time of the hearing.

The suit property was allocated to the company by the County Council of Gusii in 1981. It was a lease hold for a term of 99 years from 1st May 1967. According to the Certificate of Lease the suit property is registered in the names of **Okindo Maeto, Silvester Ogeto, Peter Ogwara Ombae, Alfakisard Omurwa Okioma** and **Paul Omwenga Onchwati,** trading as Mochenwa Trading Company. However, the proprietorship section of the certificate of lease shows that the aforesaid persons are trustees of the company. The plaintiffs were unable to develop the suit property and they agreed with the defendant who owned the adjoining plot that the defendant, (Tinga Trading Company Ltd.), would put up one building on the two plots and thereafter the construction costs would be shared equally. The same came to **Kshs. 6,497,057/=**. It was agreed that the plaintiffs would pay to the defendants a sum of **Kshs. 3,245,527/=** being one half of the total construction cost. The plaintiffs were to lease their one half of the building and pay the defendant a monthly sum of **Kshs. 15,430.50** over a period of 20 years. That agreement was made on 23rd May 1982. The plaintiffs' minute book was produced as **P. Exhibit 2** and the aforesaid mode of payment was not disputed.

The defendant had taken the entire ground floor on the two plots and the plaintiffs were leasing the 1st and 2nd floors as lodgings. The plaintiffs were unable to pay the agreed monthly instalments and subsequently it was agreed that the defendant takes over the remaining two floors which were being rented out to various tenants by the plaintiffs at a monthly rent of **Kshs. 6,000/=**.

After some time the plaintiffs tried to review the said rent upwards but that move was resisted by the defendant. The defendant continued to credit the plaintiffs' loan account in the sum of **Kshs. 6,000/=** only per month. It was not stated or agreed how long this arrangement was to last.

All along there was no agreement between the parties as to whether any interest was to accrue on the sum of **Kshs. 3,245,527/=** but according to the initial repayment agreement it is clear that no interest was to accrue on that amount.

In cross examination, PW1 stated that the rent of Kshs. 6,000/= was not in respect of the whole of the suit property, it was for the 1st and 2nd floors only. The parties held many meetings in an effort to review that rent but they did not come to any agreement.

The evidence of PW1 was corroborated in all material aspects by **David Omuna Okioma, PW2**. The two witnesses complained that the defendant had continued to rent out the suit property without giving to them any account of the money collected therefrom. They contended that the defendant, having been collecting rent for over twenty years, had repaid itself the agreed debt sum. PW2 added that the defendant was collecting rent for the whole of the ground floor and the 3rd floor. The total rent should have amounted to Kshs. 15,430.50. The two parties were supposed to meet regularly to find out how much the defendant had collected but the defendant became unco-operative.

Henry Juma Nyakundi, PW3, a Certified Public Accountant practicing as Nyakundi and Associates testified on behalf of the plaintiffs. He compiled a report on the rental income. The report states that there was a court order directing him to prepare a statement of account in respect of the operations of the business in the suit premises. But upon perusal of the file I did not come across such an order. In

cross examination, he clarified that he had merely received witness summons requiring him to attend court and testify at the instance of the plaintiffs. PW3 interviewed all the tenants in the building, past and present, regarding their monthly rents since 1981 to June 2003. Thereafter he compiled a report which was produced as **P. Exh. 4**. He said that the building has a ground floor, 3 floors and a pent house. On the ground floor, one part of it is referred to as **room No.1**and between 1982 and 2003 a total of **Kshs. 1,683,750/=** was collected by the defendant as rent. On the other part known as **room No. 2**a total of **Kshs. 650,000/=**was collected as rent from January 1987 to June 2003.

As regards the first and second floors, a total of

Kshs. 7,889,000/=was collected between 1982 and 2003. In respect of the third floor between 1983 and 2003 the total rent collected was **Kshs. 403,497/=**. The total rent collected upto June 2003 was **Kshs. 10,694,247/=**. PW3 also prepared a supplementary report which showed that the rent collected between June 2003 and May 2006 was **Kshs. 4,715,000/=**.

In cross examination, PW3 stated that his report did not take into account the aspects of income tax and maintenance costs of the suit property.

The defendant also called three witnesses. **Clement Okenye Aboki, DW1**, is an Advocate of the High Court of Kenya. He was the defendant's advocate sometimes in 1991. On 25th November 1991 he was instructed by his client to write to the plaintiffs and inform them that the defendant was not agreeable to any increment of rent in respect of the suit property. He wrote a letter that was produced as **D. Exh. 1**. A portion of that letter reads as follows:

> **"That according to minute 10 of 1983 you agreed that our client takes possession of the building and he pays on account a sum of Kshs. 6,000/= towards offsetting the costs of building. The cost of the building as on 30-6-91 inclusive of agreed interests of 18% and after deducting the monthly sum of Kshs. 6,000/= with effect from 1-7-83 was sum of Kshs. 9,675,971.15.**
>
> **That since 1983 you have continuously been getting from our client statements of account for each full year that is despite what you agreed in the above minute, you wrote a letter dated 24-4-89 increasing the amount from Kshs.6,000/= to Kshs.9,000/= for (sic) 1986 to 1987 and Kshs. 20,000/= from the year 1988 without consulting our client and this is a breach of the agreement. Our client have on several occasions tried to call on your company to come and enter into a compromise but your company has always refused to entertain that call. In the circumstances we demand from you the immediate payment of the sum of Kshs. 9,675,971.15 being the amount outstanding as on 30-6-91."**

It is not clear whether the above letter was ever responded to but it is evident that the defendant continued to credit the plaintiff's account in the sum of Kshs. 6,000/= per month.

Charles Muchogi Mayaka, DW2, is one of the share holders of the defendant company. He was the company secretary from 1965 upto 1983. He confirmed that the construction cost of the entire building was Kshs. 6,497,054/= and the cost was to be shared equally between the plaintiffs and the defendant. He further stated that on 23rd May 1982 it was agreed between the parties that the plaintiffs were to

collect rent from the portion of their building and pay the defendant a sum of Kshs. 15,430.50 a month for a period of twenty years. When the plaintiffs failed to pay the rent as agreed, it was resolved that they surrender their building to the defendant. The defendant was to pay rent at Kshs. 6,000/= per month towards offsetting the agreed construction cost. That arrangement was to go on for 541 months which is equivalent to 45 years and the rent was not to be increased over the said period of time. However, the issue of the repayment period was not captured anywhere in the minutes. After sometime the parties tried to re-negotiate the issue of repayment of the said debt but did not come to any agreement. DW2 added that the defendant borrowed a sum of Kshs. 1,000,000/= from Kenya Commercial Bank Limited to assist it in putting up the building. The defendant charged its property to secure the said loan. The charge was registered on 24th April 1982. The interest on the said loan was 16% per annum. The witness produced a copy of the charge document as **D. Exh.4**and a certificate of official search in respect of the defendant's property as **D. Exh.5**. According to the witness, the defendant had not recovered the construction cost that was due to it from the plaintiffs. He also denied the plaintiffs' assertion that the defendant was to account for the rents collected from the suit property.

Patroba Nyabuti Mochama, DW3, is also a shareholder of the defendant. He is the company secretary since 1986. He produced the company's minute book as **D. Exh.6**. He testified that the cost of construction of the entire building was to be shared equally between the plaintiffs and the defendant without any interest. He further stated that the repayment sum of Kshs.15,430.50 that was initially agreed upon was to last for 20 years and if the debt was to be repaid at the rate of Kshs. 6,000/= per month it was going to take 45 years. In his view, the defendant was entitled to continue collecting rent from the suit premises upto the year 2028. He said that there was a tenancy agreement with the plaintiffs that fixed the monthly rent for the entire portion of the plaintiffs' building at Kshs. 6,000/= per month. However, that agreement was not shown to this court. It was up to the defendant to determine the mode of managing the said building as long as it credited the plaintiffs' loan repayment account in the sum of Kshs. 6,000/= per month, DW3 stated. The defendant was not obliged to account to the plaintiffs for the money collected from the tenants in the suit premises, he added.

DW3denied that the defendant had collected a total of Kshs. 10,729,017/= up to June 2003 as shown in **P. Exh. 4**.

In cross examination, DW3 stated that the defendant was collecting a total of Kshs. 72,000/= per month from the plaintiffs' portion of the building. That notwithstanding, the defendant was not obliged to credit the plaintiffs' loan account in any sum exceeding Kshs. 6,000/= per month.

The parties filed written submissions which I have carefully considered.

None of the five registered proprietors of the suit property in HCCC No. 296 of 2002 testified. **Okindo Maeto**and **Silvester Ogeto Mokaya**died before the suits were filed. The 3rd and 4th plaintiffs died in the course of the long hearing and no substitution was ever done. The 1st plaintiff who testified as PW1 is not named in the certificate of lease as being one of the proprietors of the suit property but there was no dispute that he is one of the members/shareholders of Mochenwa Trading Company. It is however evident that the five registered proprietors of the suit property were so registered as trustees.

Section 126of the **Registered Land Act**provides as follows:

> **"126 (1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words "as trustee", but the Registrar shall not enter particulars of any trust in the register.**

(2) An instrument which declares or is deemed to declare any trust, or a certified copy thereof, may be deposited with the Registrar for safe custody; but such instrument or copy shall not form part of the register or be deemed to be registered.

(3) Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust, but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof, and no person dealing with the land, a lease or a charge so registered shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Act."

It is not clear whether **David Omuna Okioma**, **PW2**, has any relationship with Alfakisard Omurwa Okioma. PW2 testified and said that he is a member of Mochenwa Trading Company. That was not disputed by the defendant. He has proprietary interest over the suit property in view of the fact that the five registered proprietors were trustees of the company.

To resolve this long standing dispute, it is important to look at the parties' minute books and particularly with regard to the minutes of the meeting held on 23rd May 1982. That meeting was attended by representatives from both parties. It was specifically agreed that the total construction cost was

Kshs. 6,497,054/= and the defendant was to be paid by the plaintiff half of that cost being Kshs. 3,248,527/=. That amount of money was to be paid over a period of 20 years by monthly instalments of Kshs. 15,430.50 with effect from 1st June 1982. The sum of Kshs. 3,248,527/= was inclusive of interest. That is expressly stated in the defendant's minute book. There was however no indication that any further interest was to be charged. A careful and judicious interpretation of the repayment clause reveals that it was not the intention of parties that any further interest be charged. That is why the sum of Kshs.15,430.50 was to remain constant over a period of 20 years. The court was told that the officials of the two companies and possibly their members were good friends.

There is no dispute that the plaintiffs had difficulties in effecting the repayments as agreed and by 19th June 1983 when the parties met again the plaintiffs were in arrears. It was therefore agreed that the plaintiffs do surrender the portion of their building to the defendant. As at that time the plaintiffs were renting out the 1st and 2nd floors as lodgings and were collecting Kshs. 6,000/= per month. It was agreed that the plaintiffs would allow the defendant to run that business on experimental basis for a period of 2 months. The rent was then agreed at Kshs. 6,000/= per month. According to PW1 and PW2, the defendant had leased out the entire first floor. PW3 testified that the tenant was the District Education Office. After the two months' period parties did not agree as to how the repayments were to be effected.

From the evidence of DW1, it appears that up to 1991 the only amount of money that was being credited to the plaintiffs' loan account by the defendant was Kshs. 6,000/= per month. See **D. Exh.1**. DW3 admitted that the defendant was collecting a total of Kshs.72,000/= per month from the suit property. According to him the defendant was not under any obligation to account to the plaintiffs for that rent. Its only obligation was to credit the plaintiffs' loan account in its books in the sum of Kshs. 6,000/= per month and continue to do

so until its debt of Kshs. 3,245,527/= is realized in full. That being the case, the defendant had a right to continue managing the suit property until the year 2028, DW3 stated.

On the other hand, the plaintiffs' contention is that the defendant has collected much more money than it was entitled to and it should not only vacate the suit property and hand it over to them but should also pay any amount collected over and above the agreed sum of Kshs. 3, 245,527/=. The plaintiffs do not know how much the defendant has so far collected because they have been kept in the dark.

The defendant's advocate cited **JOHN NJOROGE MICHUKI -VS- KENYA SHELL LIMITED**, Civil Appeal No. 227 of 1999 where the Court of Appeal held as follows:-

> **"As regards contracts between persons not under a disability or at arms length, the courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the judges know the business of the parties better than the parties themselves – see walls –vs- smith, (1882) 21Ch.D 243 at page 266. Indeed, in constructing a contractual document, the grammatical and ordinary sense of the words is to be adhered to, unless such construction would lead to absurdity or some repugnance or inconsistency with the rest of the documents, in which case the grammatical or ordinary sense of the words may be modified so as to avoid that absurdity and inconsistence but no further."**

He submitted that courts do not make contracts for parties but only give effect to the clear intentions of parties.

I agree that the task of this court is to interpret the intentions of the parties as may be gleaned from the various minutes. The parties' intention initially was for the plaintiffs to manage their building and collect rent therefrom and out of that rent pay the defendant a monthly sum of Kshs. 15,430.50 to offset the debt of Kshs. 3,245,527/=. Had that arrangement been implemented without any breach on the part of the plaintiffs the entire debt would have been repaid over a period of 20 years. However, the plaintiffs were not able to effect the repayments as agreed. The default started around 1983. From the evidence on record it appears that by that time the defendant was already leasing out the entire ground floor and the plaintiffs were operating a business of lodgings on the 1st and 2nd floors. After the meeting of 16th September 1983 the defendants took over the management of the suit property. I believe the monthly rent of Kshs. 6,000/= was in respect of the lodgings only. But even if the said rent was for the whole of the suit property, there was no agreement as to whether the same was subject to any review or not and further, it was not agreed as to how long the arrangement was to go on. The common sense interpretation of that contractual arrangement would be that the rent ought to have been subject to upward review from time to time, just like the defendant kept on hiking the rent charged by itself to various tenants. For example, DW3 testified that from January 1998 a tenant by the name **Wilkister Rasugu** had leased all the floors except the ground floor in respect of both the plaintiffs' and the defendant's buildings. The rent was Kshs. 26,000/= per month. The rent was thereafter increased to Kshs. 45,000/= per month and eventually to Kshs. 60,000/= per month. There are six shops on the ground floor. 2 shops belong to the plaintiffs and 4 to the defendant.

The defendant is currently collecting a total of Kshs. 72,000/= from the said property yet it continues to credit the plaintiffs' account in the sum of Kshs. 6,000/= only per month. The defendant is likely to increase the rent in the near future.

It is inequitable for the defendant to continue to benefit itself at the expense of the plaintiffs. The aim of equity is to do justice between parties. In **FIBROSA SPOLKA AKCYJNA –VS- FAIR BAIRN LAWSON COMBE BARBOUR LTD.** [1943] A.C at Page 61, Lord Wright delivered himself thus:

> **"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."**

Even assuming that the defendant continues to collect a rent of Kshs. 72,000/= per month, the yearly rent is Kshs. 864,000/= and over the same period it would credit the plaintiffs' account in the sum of Kshs. 72,000/= thus retaining a balance of Kshs. 792,000/=. And if the defendant remains in the suit premises until 2028 as it desires, even without increasing the rent for the next 18 years (which is unlikely) it will earn a profit of **Kshs.792,000x18=Kshs.14,256,000/=**. At the same time, the plaintiffs' loan account would have been credited with a paltry sum of Kshs.1,296,000/=. That is unconscionable!

The relationship between the plaintiffs and the defendant was not that of a landlord and tenant. If the defendant was a tenant of the plaintiffs it would not be obliged to account for any income generated out of the plaintiffs' property. The defendant was given the suit premises in absolute good faith to rent it out and recover the outstanding debt. In the circumstances the parties ought to have reviewed the monthly rent payable by the defendant. It is unfortunate that their efforts to agree on the rent were unfruitful. If the plaintiffs were leasing out their property and repaying the defendant the construction cost out of the rents collected they would have been hiking the rents over the years. It does not make any commercial sense for a party to continue occupying another person's property at a fixed amount of rent for a period of 45 years yet the one in occupation is deriving a huge financial benefit from that occupation.

In **KENYA COMMERCIAL FINANCE COMPANY LTD. –VS- NGENY & ANOTHER**[2002]1 KLR 106 at Page 120, it was held as follows:

> **"As a general rule, courts will not interfere where parties have contracted on arms length basis. However, by its equitable jurisdiction this Court has the power and would set aside any bargain which is found to be harsh, unconscionable and oppressive or where having agreed to certain terms and conditions thereafter imposes additional terms upon the other party then the cause of equity can and may intervene to relieve the party upon which those additional obligations have been imposed by setting the same aside."**

That equitable principle applies as well to this court.

The plaintiffs have never benefited from their property for over 28 years, yet the defendant would like to continue managing the suit property for a further 18 years. The defendant did not adduce sufficient evidence to challenge the evidence of PW3 who testified as an expert witness. PW3 clearly demonstrated that the defendant had collected more than Kshs. 15,000,000/= upto May 2006. Even if it were to be argued that part of that money accrued from the defendant's part of the building, at least 50% thereof must have been generated from the suit property. I refuse the defendant's contention that it was not supposed to account to the plaintiffs for the rent collected all those years that it has been in occupation of the suit property. I am convinced that todate the defendant has collected much more than Kshs.3, 248,527/= which was the agreed debt. Whatever arguments the defendant may have for wanting to continue holding on to the suit property on account of the

unclear arrangement that it had with the plaintiffs, this is a fit case for this court to tamper with the unfair bargain and employ its equitable jurisdiction to bring to an end the defendant's unjust enrichment at the expense of the plaintiffs.

In **MADHU PAPER INTERNATIONAL LTD. & ANOTHER –VS- KENYA COMMERCIAL BANK LTD. & 2 OTHERS**[2003] KLR 31 the court cited **CHASE INTERNATIONAL IVESTMENT CORPORATION & ANOTHER –VS- LAXMAN KESHRA & OTHERS** [1978] KLR 143 where it was held that the basic elements presupposed by the doctrine of unjust enrichment are (1) that the defendant has been enriched by receipt of a benefit; (2) that he has been so enriched at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit in the circumstances of the case.

I find that the defendant has enriched itself at the expense of the plaintiffs and the plaintiffs have no other remedy than to seek this court's intervention, all negotiations with the defendant having borne no fruit.

In view of the foregoing, I dismiss all the prayers by Tinga Trading Company Limited in HCCC No. 41 of 2003. On the other hand, I grant prayer (a) in the plaintiffs' suit (Mochenwa Trading Company), having established that the amount that what was owed by the plaintiffs to the defendant has been fully repaid.

With regard to the plaintiffs' prayer for eviction of the defendant, I hereby terminate the defendant's management of the suit property and order the defendant to hand over forthwith the running and management thereof to the plaintiffs. However,from the evidence that was tendered before this court, the suit property is occupied by various tenants. It is doubtful whether the defendant is occupying any part thereof. Those tenants are paying rent to the defendant. It would be unfair to order their eviction because they are innocent parties. The relationship between them and the defendant is one of landlord and tenant and there is no legal basis for terminating their tenancies. Change in ownership or management of business premises does not necessarily terminate any lawful tenancy. In the circumstances, all the tenants in the suit property shall henceforth be liable to pay their respective rents to the plaintiffs or any of the surviving plaintiffs or their agent. If the defendant is in occupation of any part of the suit property, it shall henceforth pay to the plaintiffs such rent as may be agreed upon or assessed by the Business Premises Rent Tribunal.

As regards the prayer for refund of all the money collected by the defendant over and above the principal sum together with interest, the same cannot be granted. This is because the plaintiff did not adduce sufficient evidence to show the exact amount that is refundable. In any event, part of that claim may be time barred. I dismiss prayer (b) of the plaintiffs' claim.

Considering the nature of this case and the orders made hereinabove, I am persuaded that the appropriate order as regards costs of the suit is that each party bears its own costs.

Dated signed and delivered at Kisii this 21st day of May of 2010

D. MUSINGA
JUDGE.
21/5/2010

Before D. Musinga, J.
Mobisa – cc
Mr. Minda HB for Mr. Kerosi Ondieki for the plaintiffs
Mr. Bosire for the defendant

Court: Judgment delivered in open court on the 21st day of May, 2010.

D. MUSINGA
JUDGE.