



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 271 of 1999

JOHN MUCHAI MUNIU.....APPELLANT

VERSUS

DANIEL NG'ANG'A KABERERE.....RESPONDENT

JUDGMENT

The appellant herein was the plaintiff in the lower court. The facts in this dispute are straight forward but need to be repeated in this judgment. The two parties entered into two agreements for sale. The appellant agreed to sell to the respondent a parcel of land known Loc.16 Kimandi/Wanyaga/201, at an agreed price of Kshs.220,000/-. On the other hand, the respondent agreed to sell to the appellant a developed plot at Thika being plot No.SSS/8/74 which was subsequently changed to Thika Block II/654 at the agreed price of Ksh.170,000/-

The parties agreed to offset the purchase price of the two properties which led the respondent to pay to the appellant a sum of Kshs.50,000/=. The appellant transferred and gave respondent possession of his property Loc.16/Kimandi/Wanyaga/201 immediately but the respondent did not part with possession of his property plot No.SSS/8/74.

It was agreed that the respondent would pay rent from his said property to the appellant. In fact he did so from 1982 to 1995 when he stopped. In 1995 the plaintiff filed the suit in the lower court claiming *inter alia* orders of transfer of the suit property, payment of damages, and, significantly the payment of monthly sum of Kshs.3,960/= from August 1995 when the suit was filed until the final determination of the case.

The lower court gave judgment in favour of the appellant in terms of the following orders;

1. **The plot No.SSS/8/74 situated along Garissa Road in Thika which was subsequently changed to Thika Block II/624 should forthwith be transferred to the plaintiff free from the encumbrances.**
2. **The little rent which the defendant passed was sufficient in the circumstances otherwise as from the beginning of July 1999 the plaintiff should take over the plot.**
3. **Should the defendant refuse to transfer the said plot then the Executive Officer must go ahead and execute all the necessary documents to facilitate this transfer.**
4. **The defendant is ordered to pay costs of this suit.**

I am told from the submissions made by counsel that all orders have been fulfilled and complied with but that the appellant is aggrieved by order No.2 in that rent should have been paid until such time that the respondent transferred the suit to the appellant.

I have looked at the submissions and related them to the pleadings and the judgment of the learned trial magistrate. In the record at page 14, the following statement by the appellant appears;

“The plot is still in his name. From 1982 to 1983 since 1982 July, till 1985 August the defendant has been paying to me the rent in respect of that developed plot. After 1995, he has been paying irregularly.”

At page 18 of the record the respondent stated as follows;

“From 18th June, 1982 to 1995 I did not transfer the plot to the plaintiff. I was paying him all the money for rent till 1995.” At page 19 the respondent stated as follows before the learned trial magistrate; **“the rent here is Kshs.1,500/-. A year ago the rent was increased. I did not add rent when others were adding. I have no rent files. I have only receipts. I do not have them now. My advocate did not tell me to produce the rent cards. I told the plaintiff about the loan he agreed I borrow the money. I am ready to pay the plaintiff the rent from 1995. I get Kshs.1,500/= per month per room and there are 8 rooms which are being used.”**

I have noted and considered the submission on the issue of trust and whether or not it ought to have been pleaded in this case. Whereas that is an academic position I believe sufficient material exists in the record that I have just set, out to determine this issue. There is what I would call an admission on the part of the respondent that he used to pay rent to the appellant which he however stopped. There is also an admission that he is ready to pay the appellant rent from 1995. That alone is sufficient evidence of liability.

I find on my part that, the order by the learned trial magistrate was against the flow of evidence adduced by the parties and in particular the respondent himself. In that regard, this being an old case it is only prudent that it is completed and determined at this stage. The learned counsel of the appellant has computed the sum due and payable

from August 1995 to October 1998 at Kshs.3,960/- per month for all rooms, that is, 38 months and from November 1998 to June 1998 at Kshs.12,000/= per month per room that is, 8 months leading to at total Kshs.246,480/-. This sum I find should be paid by the respondent to the appellant. There has not been sufficient evidence to justify the claim for 17,000/= for breach of contract. To that extent the appeal succeeds with costs to the appellant. Orders accordingly.

Dated, signed and delivered at Nairobi this 27th day of September, 2010.

A. MBOGHOLI MSAGHA

JUDGE