



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 39 of 2002

JOHN OTIENO OPIYO.....PLAINTIFF

VERSUS

KIPTURGO ANDANY.....DEFENDANT

JUDGMENT

By an amended plaint dated the 1st March, 2002 the plaintiff filed suit against the defendant seeking the orders of this court to permanently restrain the defendants, his agents and or servants from selling or otherwise disposing of **L.R. NO.498/52** situated at Eldama-Ravine Township (*hereinafter referred to as the suit land*) and or improvements erected thereon by the plaintiff or otherwise interfering with the plaintiff's enjoyment or quiet possession of the premises thereon. In the alternative, the plaintiff prayed that the defendant be ordered to pay him the sum of Ksh.1,410,000/= which is the full value of the improvements erected by the plaintiff on the suit premises and/or an equivalent share in L.R. No.498/62 calculated as at the date of judgment together with damages and interest thereon. The plaintiff further prayed to be awarded the costs of the suit.

The basis of the plaintiff's claim is the allegation that by a verbal agreement entered between the plaintiff and the defendant in 1997, they agreed that they would contribute equally for the construction cost of a business premises on the suit land. Pursuant to the said oral agreement, the plaintiff commenced construction on the suit land (*which is owned by the plaintiff*). According to the plaintiff, the defendant reneged on his part of the agreement by failing to make any contribution for the construction of the said business premises. The plaintiff averred that in total, he expended the sum of Ksh.1,410,000/= to erect the said premises. He further averred that he charged his property, namely Baringo/Perkerra-101/321, to Barclays Bank of Kenya

o secure a sum of Ksh.750,000/= which he used to construct the said building.

The plaintiff further averred that he constructed the said business premises on the understanding that the defendant would reimburse him the costs of construction. After the completion of the construction of the said business premises, the plaintiff became aware that the defendant intended to sell the suit premises without first compensating him for the costs that he had incurred in constructing the said business premises. In it's view of the above reasons, the plaintiff was seeking the orders of this court to restrain the defendant from disposing off the said business premises until the defendant compensate him either by paying him the amount he had expended in erecting the said business premises or alternatively by this court decreeing that he is entitled to a share in ownership of the suit land.

The defendant filed a defence and a counterclaim. He admitted that he had entered into an oral agreement with the plaintiff by which they would share the costs of erecting a business premises on the suit land on consideration that the costs contributed by the plaintiff would be offset by the rent which would be paid

by the plaintiff who was in occupation of the said suit premises. The defendant averred that the total costs of construction of the said premises was Ksh.315,000/= and not Ksh.1,410,000/= as claimed by the plaintiff. He further averred that he had fulfilled his part of the bargain by contributing half of the costs of the construction of the said business premises. He therefore urged this court to dismiss the plaintiff's suit with costs and award him rent arrears calculated at a monthly rate of Ksh.15,000/= per month with effect from October, 1999 to the date of the delivery of the judgment. He also prayed for the court to order the defendant to give him vacant possession of the said suit premises. He further prayed to be awarded the costs of the suit.

During the hearing of the suit, the plaintiff called four witnesses who testified in support of his case. He testified as PW1. He called PW2 Patrick Sakwa Kisia, PW3 Dickson Taplot Aswani and PW4 Isaac Watoro Njoroge. The plaintiff testified that in 1987, he saw a vacant plot within Eldama-Ravine Township which he was interested in leasing. He looked for the owner of the plot. He negotiated with him the rent. He recalled that the owner of the plot was the defendant. The defendant allowed him to occupy the property at a monthly rent of Ksh.300/=. The rent was increased over time that by 1997 the plaintiff was paying a monthly rent of Ksh.4,000/=. The plaintiff testified that he constructed temporary timber structures on the said plot. He conducted his business on the said plot. He recalled that due to the temporary nature of the structures on the said plot, thieves took advantage and stole his property in the said premises. In 1997, he proposed to the defendant that a permanent structure should be erected in the said plot to minimize the instances of theft of his property. The plaintiff testified that the defendant agreed with his suggestion that a permanent structure should be erected on the said property. The plaintiff testified that he agreed with the defendant that they would equally share the cost of constructing the said permanent building. The plaintiff would recover share of his costs by offsetting it from the rent.

The plaintiff testified that he secured architectural drawing for the building to be constructed on the said plot. He commenced construction on the said plot. He however testified that the defendant failed to make any contribution towards the construction of the said premises. He testified that due to the fact that he had already invested money in the initial construction of the said premises, he was forced to borrow money from Barclays Bank after he had charged his property as a security. He testified that he borrowed in total the sum of Ksh.800,000/=. Ksh.550,000/= was borrowed as a term loan whilst Ksh.250,000/= was borrowed as an overdraft. PW4 Isaac Watoro Njoroge, the Assistant Manager of Barclays Bank Nakuru East Branch confirmed that the plaintiff had borrowed the said sum of Ksh.550,000/= secured on the strength of the plaintiffs in respect of parcel No.Baringo/Perkerra 101/321. He confirmed that the plaintiff borrowed the said money for the purposes of expanding his business. The plaintiff repaid the said amount advanced to him by the Bank in full.

The plaintiff testified that he expended a total sum of Ksh.850,000/= in the construction of the said building. He however produced a bundle of the receipts which added up to a sum total of Ksh.676,805/=. He testified that he could not be able to produce the other receipts that could add up to the sum of Ksh.850,000/=. The plaintiff testified that he was the only one who paid for the entire cost of construction of the said premises. The plaintiff later instructed a valuer who valued the cost of construction of the said premises at Ksh.1,410,000/=. The plaintiff admitted that since he started constructing the house in 1997 he had not paid any rent to the defendant. He recalled that he had agreed with the defendant that during the course of the construction of the building he would pay no rent. He however testified that he was to pay an increase rent of Ksh.6000/= per month once the construction of the building was completed. He testified that the construction of the building was completed in December 1999.

The plaintiff recalled that after the completion of the building, he was surprised when the defendant demanded that he pays an increase rent of Ksh.20,000/=. He refused to pay the amount. It is this refusal that led to the dispute between him and the defendant. He testified that the defendant in the year 2002 sent auctioneers to distress for rent against him ostensibly because he had failed to pay the rent. It is this action by the defendant that prompted the plaintiff to file the present suit. The plaintiff testified that the only amount that the defendant had paid him as costs of construction was Ksh.17,000/=. The plaintiff urged this court to order the defendant to pay him the cost of construction of the building on the suit plot. He also prayed to be awarded costs of the suit.

PW3 Dickson Aswani was the mason who constructed the said building in the suit premises. He testified that during the entire period that he constructed the suit premises, he was paid by the plaintiff. He denied the suggestion by the defendant that the defendant had delivered the construction materials to the construction site during the time that he was building the said premises. PW2 Patrick Sakwa Kisia is Quantity Surveyor by profession. After the plaintiff had testified, it became apparent to this court that the issue in dispute between the plaintiff and the defendant was the cost of construction of the premises that are now occupied by the plaintiff as a tenant of the defendant. The court directed the plaintiff and the defendant to agree on a Quantity Surveyor who would value the works undertaken on the suit premises during its construction. It is apparent that the plaintiff and the defendant could not agree on a Quantity Surveyor to undertake the work. PW2 was therefore appointed by the Architectural Association of Kenya (*Quantity Surveyors Chapter*) to value the costs of construction of the suit property pursuant to the order of this court.

PW2 visited the suit premises in company of the plaintiff and the defendant. He prepared a report which he produced in court as plaintiff's exhibit No.11. He valued the costs of construction of the building on the suit premises to be Ksh.816,632/=. During the hearing of the case, he testified that if depreciation was not taken into account, the cost of construction was Ksh.934,568/=. He recalled that when he valued the cost of construction of the suit building, he took into account the pre-existing works that had been undertaken on the plot before the construction of the suit premises commenced. He reiterated that the figure that he arrived at reflected the correct value of the cost of construction of the building at the time that the said building was constructed. He testified that he also took into account depreciation. He further testified that the valuation report that was prepared by the plaintiff which stated the value of the property to be Ksh.1,410,000/= and that which was prepared by the defendant which stated the property to be valued at Ksh.315,000/= were not correct because they were prepared by Land Economists and not by Quantity Surveyors.

When the defendant was called upon to defend himself, he called three witnesses. He testified as DW1. Joseph Kipturgo, the son of the defendant testified as DW2. DW3 was Charles Kipkoskei Koima, a transporter. In his testimony, the defendant admitted that he had entered into an oral agreement with the plaintiff by which he was to jointly construct a permanent building on the suit plot with the plaintiff. He testified that he fulfilled his part of the bargain by contributing the building stones and the timber that were used to construct the said building. He recalled that he also contributed a total sum of Ksh.500,000/= towards the construction of the said building. He denied the testimony of the plaintiff which was to the effect that he had contributed nothing towards the construction of the said building. He testified that during the entire period that the said building was under construction, it was supervised by his son DW2. The defendant did not however produce any document in support of his contention that he had expended the sum of Ksh.1,500,000/= towards the construction of the said building. He denied that the plaintiff had used the sum of Ksh.1,500,000/= towards the construction of the said building. He testified that the person who delivered the building materials to the construction site was DW3 Charles Kipkoskei Koima. He reiterated that he had jointly contributed towards the construction of the building on the suit plot.

The defendant further testified that since the completion of the construction of the building, the plaintiff had paid him nothing towards the settlement of the rent. In his view, once the building was completed, the plaintiff ought to have paid him a monthly rent of Ksh.24,000/=. He however conceded that at the time the building was completed, the plaintiff was paying a monthly rent of Ksh.6000/=. He reiterated that the plaintiff ought to pay him rent from the time the building was completed to the time of the delivery of this judgment. He testified that if this court were to find that he owed money to the plaintiff, then the said amount should be offset from the rent owed to him by the plaintiff. He reiterated that the plaintiff had not used the sum of Ksh.1.5 Million to construct the said building. He further reiterated that he had substantially contributed towards the construction of the said building. He urged this court to dismiss the plaintiff's case and grant him judgment as prayed in his counter claim.

DW2 and DW3 corroborated the testimony of the defendant. DW2 testified that he supervised the workers when they constructed the said building on the suit land. He testified that during the material period, he was working elsewhere. He only got the opportunity to supervise the construction during the

weekends. He testified that he was the one who used to pay the workers. He however did not produce any documentary evidence in form of receipts in support of his testimony that he had paid the construction workers. DW3 testified that he delivered building materials to the construction site under the instructions of the defendant. He however conceded that he was not sure if the plaintiff was involved in the purchase of the said building materials.

After the close of both the plaintiff's and the defendant's case, the parties agreed by consent to file closing written submission. The plaintiff and the defendant duly filed their closing written submissions. I have read the pleadings filed by the parties in support of their respective cases in this suit. I have carefully considered the evidence that was adduced by the plaintiff and the defendant together with their respective witnesses. I have also carefully considered the written closing submissions filed by the plaintiff and the defendant. The issues for determination by this court are as follows;

- (i) Did the plaintiff and the defendant enter into an agreement for the construction of the building in the suit property?
- (ii) What were the terms of the said agreement?
- (iii) Who paid for the costs of construction of the building in the suit land?
- (iv) What was the rent that was agreed to be paid by the plaintiff after the completion of the construction of the building in the suit land?
- (v) What are the appropriate orders that would issue pursuant to the determination of above issues in dispute in this case?

Certain facts are not in dispute in this case. It is not disputed that the defendant is the registered owner of the suit parcel of land known as L.R. No.498/52 situated within Eldama-Ravine Township. It is further not disputed that at the time the plaintiff took occupation of the suit land as a tenant, the said parcel of land was vacant. No structures had been constructed thereon. The plaintiff constructed temporary timber structures on the said parcel of land. Due to the increased incidences of theft of his property on the said leased premises, the plaintiff requested the defendant to construct a permanent building on the said parcel of land.

I have considered the evidence adduced in respect of what transpired between the plaintiff and the defendant before an oral agreement was reached to construct a permanent building on the said parcel of land. It is clear to this court that the plaintiff and the defendant agreed to have a permanent building constructed on the said parcel of land. The terms of the agreement were that both the plaintiff and the defendant would jointly contribute towards the cost of construction of the said permanent structure. I believed the plaintiff when he testified that the defendant agreed that he would offset his part of the cost of construction by not paying rent for a particular period of time. I further believed the plaintiff when he testified that contrary to their agreement, the defendant failed to contribute his part of the costs towards the construction of the said permanent building.

I further believed the plaintiff when he testified that he was forced to borrow a loan from Barclays Bank of Kenya to enable him complete the construction of the said building. The plaintiff produced receipts which confirmed that he was intimately involved with settlement of the day to day expenses during the construction of the said building. The plaintiff produced receipts which confirmed that he had used a minimum sum of Ksh.676,805/= as cost towards the construction of the said building. In his testimony before court, the plaintiff testified that he had used the sum of Ksh.850,000/= to construct the said building on the said plot owned by the defendant.

Although the defendant testified that he had contributed a sum of Ksh.500,000/= towards the construction of the said building, he did not produce any documentary evidence in form of receipts to support his evidence. This court observed the demenour of the defendant when he testified before court. It was clear to this court that the defendant and his witnesses were economical with the truth. The defendant was not

candid. It was clear to this court that the defendant took advantage of the fact that the agreement between himself and the plaintiff was not reduced into writing to lay claim on the building after the plaintiff had completed constructing it. The plaintiff lived to rue the day he put his trust on the defendant.

Having carefully evaluated the evidence on record, I do hold that the defendant reneged on his part of the oral agreement by failing to pay half of the construction costs. I do hold that it is the plaintiff who solely financed the construction of the commercial building on the suit premises. The plaintiff testified that he used an approximate sum of Ksh.850,000/= to construct the building on the suit premises. The plaintiff had earlier instructed a valuer to value the said building. The valuer arrived at a figure of Ksh.1,410,000/= as the value of the building. The defendant similarly instructed another valuer to value the said building. He arrived at a figure of Ksh.315,000/=.

It is in light of this disparity that this court ordered the plaintiff and the defendant to agree on a Quantity Surveyor who would give the exact cost of construction of the said building. The Quantity Surveyor that the plaintiff and the defendant agreed to undertake the said valuation was PW2 Patrick Sakwa Kisia. In his report which was presented to court as plaintiff's exhibit No.11, PW2 stated that the cost of construction of the said building as at 1999 when the construction was completed was Ksh.934,568/=. PW2 however took into account the depreciation of the building and reduced the figure to Ksh.816,632/=. Having carefully considered the totality of the evidence adduced in this case, I find that the sum that the plaintiff expended in the construction of the suit premises to be Ksh.934,568/=. The plaintiff conceded that the defendant paid him the sum of Ksh.17,000/=. I will therefore enter judgment for the plaintiff as against the defendant for the sum of Ksh.934,568/= less Ksh.17,000/= i.e. Ksh.917,568/=.

The defendant counter-claimed for the rent in respect of the said premises. Both the plaintiff and the defendant agreed that the plaintiff was to pay a monthly rent of Ksh.6000/= once the building was completed. However it is apparent that when the building was completed, the defendant became greedy. He demanded to be paid monthly rent of Ksh.20,000/= after he had conveniently forgotten the fact that it was the plaintiff who improved the rental value of the said property.

Although the defendant has counter-claimed that he should be paid the rent arrears at the rate of Ksh.24,000/= per month with effect from 1997 when the construction of the said building commenced to the date of this judgment, it is clear to this court that the sum which was agreed by the plaintiff and the defendant after the completion of the building was to be Ksh.6000/=. I will adopt the said sum of Ksh.6000/= as the monthly sum which ought to have been paid by the plaintiff as rent. The plaintiff admitted that he had not paid rent since the 1st December 1999 when the construction of the building was completed.

I have agonized on whether to take into consideration the fact that the amount of rent has increased between the time the construction of the building was completed and the date of this judgment. I however decided against factoring in the said increase in rent. This is due to the fact that having considered the peculiar facts of this case i.e. the fact that it was the plaintiff who improved the rental value of the suit premises by constructing it, it would be imprudent to factor in the increase in rent without giving compensation to the plaintiff for having used his own funds, including borrowed money, to finance the construction of the said building. This court could in the circumstances have ordered that the plaintiff be paid interest on the cost of construction. This would however occasion injustice to the defendant because the plaintiff has been in occupation of the suit premises for a period of over seven years without paying any rent.

The orders that commends itself to this court are as follows; judgment is entered for the plaintiff as against the defendant for the sum of Ksh.917,568/=. Judgment is entered in favour of the defendant as against the plaintiff as prayed in his counter-claim for the rent arrears from the 1st December 1999 to the 30th June 2007 at a monthly rent of Ksh.6,000/=. The amount awarded is therefore Ksh.474,000/=. The said amount shall be deducted from the amount awarded to the plaintiff of Ksh.917,568/=. The amount that shall be paid to the plaintiff by the defendant is Ksh.443,568/=. Interest on the above amount shall be paid from the date of this judgment. The plaintiff shall have the costs of the suit. There shall be no

orders as to costs on the counterclaim.

This court makes a further order that the plaintiff shall vacate the suit premises within six months of today's date. This is because of the fact that this court observed that the relationship between the plaintiff and the defendant had deteriorated to the level that it would not be unjust to order that the landlord-tenant relationship continues to subsist. For the avoidance of doubt, if the plaintiff chooses to remain in the said suit premises for the said period of six months, he shall pay the monthly rent of Ksh.6000/=.

It is so ordered.

DATED at NAKURU this 28th day of June, 2007

L. KIMARU

JUDGE