



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 81 of 1999

HARRISON K. NZOMBAPLAINTIFF

VERSUS

JOHNSON WAMBUA MUSOMBA

CHRISTOPHER K. MUNA.....DEFENDANT

J U D G M E N T

The plaintiff, Harrison K. Nzomba filed this case against the 1st defendant, Johnson Wambua by a plaint filed in court on 3.7.1997. The plaintiff subsequently amended the plaint several time the last amended plaint being dated 11.3.2002. The 2nd defendant Christopher K. Mwina was found as a party to the proceedings by an amendment of 13.10.1997. The plaintiffs claim against the defendants on alleged contract entered into on 23.5.1988 in which the 1st defendant agreed to sell to the plaintiff a commercial plot measuring 17 ft x 100ft number 25, Kilome market in Makueni, at a price of Kshs. 53,500/- and that it was agreed that it would be subdivided into 2 and plaintiff registered as owner with Masaku County Council and the 1st defendant gave the plaintiff the plan of the said property. The plaintiff further pleaded that they entered into a further agreement dated 1.5.1997 into a further agreement dated 1.5.1997 in which accounts were taken of how much the plaintiff had paid to the 1st defendant plaintiff was found to have overpaid the 1st defendant and the 1st defendant acknowledged the overpayment. It is the plaintiffs contention they agreed that the plaintiff occupies the rest of the plot at Kshs. 950/- but pay Kshs 450/- and balance be offset for the overpayment found on 1.5.1997.

The plaintiff further contends that the 1st defendant started to threaten the plaintiff with eviction from 9.5.1997 purporting to have sold it to another which is a breach of his agreements. The this court ruled on 16.11.2000 discharged injunction granted to the plaintiff and defendant were allowed to take possession of that he can why be entitled to a refund of the consideration paid to 1st defendant and the 2nd defendant to pay ½ of Kshs. 44279/- and general damages. It is further pleaded that in the pretext that a notice had been issued by Public Health Officer, the defendants demolished part of the premises and carried away Kshs. 600,000/- on 15.6.1998. It is further the contention of the plaintiff that Scorp Guaranteed Auctioneers and Court Brokers unlawfully carried out distress for rent and carried away property worth Kshs. 120,000/- as reflected in the proclamation and he claims the same. That the defendant again sent auctioneers on 17.9.1999 who locked the main door to the shop. As a result of the above breaches, the plaintiff seeks the following prayer;

1 (a) General damages for breach of the agreements dated 23.5.1988 and 1.5.1992, unlawful distress for rent and eviction without the due process of law.

1(aa) The value of the unlawfully distress properties Kshs.120,000/-

(ii) a A permanent injunction restraining the 1st defendant from transferring the suit premises to the 2nd defendant or any

other person.

(ii) b The converted monies kshs. 600,000/-

(iii) Costs of this suit and interest at current court rates.

On 30.5.2002 when the suit came up for hearing the plaintiff made a further amendment to the amended plaint of 11.3.2002 whereby the court allowed the plaintiff to amend orally paragraph 3A to read 1988 and he abandoned prayer ii (a) and the last paragraph of paragraph 8A of the plaint. Paragraph ii a was seeking an order of permanent injunction and that prayer was therefore done away with. 2nd part of paragraph 8A was seeking specific performance of these agreements dated 23.5.1988 and 1.5.1997 and a permanent injunction restraining the transfer of the suit property to 2nd defendant. Again the prayer for specific performance of the alleged contracts and injunction were done away with. The defendants filed individual further amended defences dated 21.3.2002. It was the defence counsel's submission that they filed a joint defence but that submission does not tally with the record.

In his defence the 1st defendant admits having been approached by the plaintiff with a view to seeking ½ of his plot No. 25 Kilome market for Kshs. 53,500/- and that an agreement was drafted given to the plaintiff for typing but he never had it typed nor did he return the agreement for signature by the 1st defendant nor did he pay the agreed sum of Kshs. 53,500/- and that the agreement is invalid and not enforceable. The 1st defendant denies that any sub division of the plot was carried out and it was a term of the agreement of 23.5.1988 that the plaintiff was to continue paying rent for plot 25B.

The 1st defendant further denies that the elders' award of 1.5.1997 annexed to an agreement but they were meant to take accounts of outstanding rents and when he discovered the elders tricks his family wrote to the plaintiff denouncing their findings.

The 1st defendant contended that he had sold and transferred this plot prior to the filing of this suit and orders sought cannot be enforced against the defendants. The 1st defendant denied knowing about Kshs. 600,000/- and put the plaintiff to strict proof. He also denied that distrained goods were worth Kshs. 120,000/- as claimed by plaintiff and that in any event the 1st defendant had sought to having distress because rent of 25,000/- was owed.

The 1st defendant filed a further amended counterclaim in which he admits receiving Kshs 13,000/- from the plaintiff for sale of rear portion of the plot but the council refused to approve it and he refunded that cash. That the plaintiff owed him rent of Kshs. 25,621 as of 9.5.1997 which claims from plaintiff and that the plaintiff also owes rent at the rate of Kshs. 2500/- per month from 30.4.1997 to both defendant and loss of mesne profits until 16.4.2000 as from 26.10.1999 when he sold the plot to 2nd defendant and he prays that

(a) Plaintiffs case be dismissed with costs

(b) Judgement be entered for 1st defendant for Kshs. 25621/-

(c) Rent due as from 30.11.1997 at the rate of 2500/- per month till October 1997.

(d) On the alternative to the above the parties be allowed to take to determine how much the plaintiff owes the 1st and 2nd defendant and 2nd defendant

(e) Costs of the suit.

The 2nd defendant in the further amended defence dated 21.3.2003 pleaded that he was a stranger to the agreements made between the plaintiff and 1st defendant that he is a bonafide purchaser for value of the suit premises and is the lawful registered owner and therefore the suit against him is bad in law and vexatious. He intends that the plaintiff has illegally occupied the premises as a result of which the 2nd defendant lost Kshs. 2,500/- as from 26.4.1995 till 16.4.2000 when he vacated plaintiff vacated the He denied the claim of Kshs. 600,000/-. He seeks the following from the plaintiff,

- a) That plaintiff's suit be dismissed with costs.
- b) Mesne profits from 26.10.1997 till 16.11.2000.
- c) Costs of the suit.

The hearing of the plaintiff's case commenced on 30.5.2002.

Briefly, the plaintiff's evidence is that he had rented the 1st defendant's plot No. 25 Kilome market. Later they entered into a sale agreement whereby the 1st defendant agreed to sell to the plaintiff half of the said plot at a cost of Ksh. 53,500/-. He paid in instalments but on day of the agreement he paid a sum of Kshs. 20,000/- and the 1st defendant used to take things from the shop as well as cash till he paid in full. He produced the said sale agreement as P. Ex. No.1. They went with 1st defendant to Masaku County Council to have the plot transferred to his name and 1st defendant signed the form Ex. No.2. He paid the fees of 300/- receipt (Ex.No.3) The plot measured 15 x 100ft. he was in occupation till 1999. 1st Defendant gave him the plan of the plot. P.Ex.No.4.

On 1.5.1997 both the plaintiff and 1st defendant called elders to calculate how much money had been given to the 1st defendant it was found that a total of Kshs. 178,029/00 had been paid, rent was 81,000/- and sale price was 53,500/- which totalled 134,400/- and the balance to be paid was Ksh. 44,279/00. It was further agreed that the plaintiff be paid 50% of the rent of the remaining portion till every payment was recovered. Both parties signed willingly. Later the 1st defendant sold the plot to 2nd defendant and plaintiff filed the suit No. 591/1997 in lower court. On 5.5.1998 the 1st defendant demolished part of the building as shown in photographs (P.Ex.6). The plaintiff said that he had kept his money, cash Kshs 600,000/- between the iron sheets and the wall which went missing. His books of accounts and records were carried away on 2.9.1999 when auctioneers visited the premises in presence of his wife. His goods were proclaimed and carried away whereby he lost goods worth Kshs. 120,000/-. He denied that he owed the 1st defendant any rents but instead, he was owed.

It is Mary Ndunge Kimomo's (P.W.2) evidence that she is the wife of the plaintiff and is the one who used to run their business in plot No. 25 Kilome market where they were tenants of the 1st defendant. She was at work on 5.5.1998 when about 10 people went to her premises. She knew five of them by name. They went straight and started to demolish side B of the plot which was made of 3 rooms. They claimed to have been sent by the 2nd defendant. She reported to police and by the time police arrived demolition was about complete. She said that the people carried away some of her goods records and books of account. The premises were repaired by 1st defendant and on 10.9.1999 her goods were proclaimed and later taken away. She did not record what was taken. She was not aware that the plaintiff had bought the suit premises from 1st defendant. She was only informed by P.W.1. She was also not aware that any money had been kept in the premises that was demolished.

John Matibu Nzesia (P.W.3) was one of the elders invited by P.W.1 along with John Musau to take accounts between the plaintiff and 1st defendant to ascertain how much the 1st defendant had so far paid. He denied being involved when the accounts process started but was involved on the last day which was 1.5.1997 when it was found that the 1st defendant had so far received 178,779/00. The plaintiff only

owed Kshs. 134,500/- made up of the sale price Kshs. 53,500/- and rent amounting to Ksh. 81,000/-. The 1st defendant was found to be owing the plaintiff Ksh. 44,279/10 and that all the parties signed on the findings. He denied that anybody was drunk during the account taking process. He was not aware of the sale agreement of 23.5.1988 between the plaintiff and defendant and only learnt of it on 1.5.1997. He never even saw the written agreement.

The 1st defendant testified that plot 25 Kilome market used to belong to him but he sold it to 2nd defendant on 19.4.1997 and was paid a total of 320,000/- and the 2nd defendant also paid rates and rents to the council (Ex. No.20 and 22). He said that the plaintiff had been his tenant from 1983 till 15.11.2000 when plaintiff vacated. Rents had risen from Ksh. 250/- in 1983 to 2500/- from 1993 to 15.1.2000. He recalled having attempted to enter into a sale agreement over a plot at the shop (D.EX. a and b) but the council failed to approve the sale. He said that the plaintiff was always late in payment of rents and he would take goods from the shop or took cash when available. They did not reconcile the rent accounts for many years and in 1997 they got 2 elders each, John Musau and John Nzesia for plaintiff and Tom Mukuu and Mbotela Wambua for 1st defendant to curve ways with how much rent had been paid and if any was unpaid. Resolutions were made by elders on 1.5.1997. He denied having been present when it was signed and he signed later at 7.30 p.m. when drunk but promised to cancel it if anything went wrong. Elders were not charged with issue of sale of land. He did not agree with resolutions because they used the figure 925/- to calculate rates due instead of 2500/-. He was the person owed. Kenya and it should at Kshs. 107,070/- for which he counterclaims. Plaintiff continued to defence on 2.9.1999.

1st defendant also recalled he proposed to sell to plaintiff plot 25 Kilome market. He drafted the agreement and was to be typed and signed before Kilungu Magistrate but plaintiff did not pay the deposit or return it for signature. And it was rendered null and void.

Even after 1.5.1998 defendant continued to default in rents and 1st defendant instituted scope awarded who levied distress on 2.9.1999 and carried away the goods for sale by auction on 17.9.1999. Only 4000/- was realised and 2000/- paid to 1st defendant. He denied that he ever demolished the suit premises nor did he take the 600,000/- claimed as he was not present.

Christopher Kivuva Mwina (D.W.2), the 2nd defendant testified that he purchased the disputed plot from the 1st defendant on 19.4.1997 for Kshs. 320,000/- after he ascertained that the owner was the 1st defendant. He produced in evidence the informed agreement, the formal agreement drawn by and Advocate as Exh. 19 and 20. The plot (25) was transferred to him on 29.5.1997 after he paid the fees Dex.24. He found the plaintiff renting the premises and he refused to vacate or pay rent. Rent stood at 80821/00 and he instructed Scope Guarantee Auctioneers to levy distress. They proclaimed the goods and levied distress and goods were sold after the plaintiff failed to pay. They were advertised (Dex.17), then goods realised Ksh. 4,800/-. He demanded stealing Kshs. 60,000/- on 15.5.1998. He had received a notice for Health department asking him to do repairs. He notified the tenant who blocked his attempt to carry out repairs. He denied that the photographs P.16 were in respect of that plot. He later took over the plot in 2000 when the plaintiff moved out, and demands Ksh. 2500/- per month which the plaintiff had failed to pay.

Mbotela Wambua (D.W.1) a son of the 1st defendant was one of the 4 people asked to take accounts and ascertain how much rent was paid to 1st defendant and what was due. He agreed with evidence of P.W.3, D.W.1 on who was present and who represented who. He said his job with Nzesya was to check the receipts and chits signed by his father had signed upon receipts of goods from the shop. The other 2 elders recorded what transpired. They worked on the accounts on 23.4.1997, 27.4.1997 and 1.5.1997. He identified Ex. No.7 as the book in which findings were reduced, and it was found that rents received by 1st defendant were Kshs. 178,779/00 and was entitled to Kshs. 204,400/- less what he had received. A balance of Ksh. 25,621/- was still owed to 1st defendant. He denied that the plaintiff and 1st defendant signed as they were not present but they did so later (Dex.5). he denied any knowledge of a sale agreement between the plaintiff and 1st defendant. D.W.3 denied that he even went to demolish the shop in dispute nor did he steal Ksh. 600,000/- from the plaintiff's business. He was never charged for

stealing. He denied that Pex.7 was used in the accounts done and that these findings were that the 1st defendant was owed money but it is now alleged that he owes.

Boniface Victor Magoju recalled that he used to work with Scope Guarantee auctioneers and they received a letter of authority from Nyamai Advocate to levy distress. They proclaimed the goods on 2.9.1999 for Ksh. 85,824/- rent arrears. He did not pay up and they collected the goods. They were paid for the services. After the days expired they advertised the goods for sale on 9.7.2001 and realised Kshs. 4800/-. He denied that the goods they collected could have been worthy Ksh. 130,000/-. He denied seeing any court order before he levied distress neither did he know that the matter was pending before the court.

Having summarised the pleadings and the evidence adduced, the issues that stand out and which need to be determined are as follows:-

1. Whether the sale agreement dated 23.5.1988 is valid and enforceable and whether the elders' resolutions dated 1.5.1998 and agreement dated 23.5.1988 do constitute an enforceable agreement.
2. If the agreements are valid, whether general damages for breach of the said agreements can issue.
3. Were the suit premises demolished by the defendants?
4. Whether the plaintiff lost Kshs. 600,000/- and whether he is entitled to a refund.
5. Whether the distress for rent was unlawful.
6. Whether the plaintiff is entitled to be paid Ksh. 120,000/- being the value of distressed goods.
7. Who will pay the costs of the suit.

As regards the counter claim, the issues for determination are as follows:

1. Whether the plaintiff owed any rent to the defendants.
2. If above 5 is affirmative what was the rent payable.
3. Whether accounts can be taken to determine whether rents are owed to defendants and doing so how much rent is to be paid to each defendant.
4. Who will pay the costs of the counter claim.
5. Is the plaintiff's suit time barred.

In 1988 when the sale agreement was shifted the law governing the disposition of an interest in land was amended by Act 5 of 1996. Section 3 of the Law on Contract Act provided as follows

"No suit shall be brought upon a contract for the 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 allowed 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;

(I) has in part performance of the contract taken possession of the property or only part thereof

or;

(ii) being already in possession continues in possession in that performance of the contract and has done some other act in furtherance of the contract.”

Though there was a written document, it was never signed by either of the parties. The plaintiff has already in possession as a tenant. He was supposed to continue paying rent. The court has not been told anything else that the plaintiff did in furtherance of the contract. Though the plaintiff claims to have paid a deposit of Ksh.20,000/- there is totally no evidence that he did or when he did. The 1st defendant denies that he was paid and that the plaintiff totally failed to have the agreement typed and signed before a magistrate as agreed. If indeed the plaintiff had paid his money and was keen on effecting the contract, he should have ensured that the money was acknowledged by the plaintiff. The plaintiff purported to have the plot transferred to him and produced a receipt PEX.3 in which he paid transfer fees and application for transfer was filed PEX No.2 I do note that the name of the applicant is not indicated on the form nor was the transfer recommended by the council. That is where the matter ended and the transfer was never effected. There is no explanation as to why the plaintiff did not pursue this transfer. It was soon after the drafting of the purported sale agreement of 23.5.1988. There were terms on how the plot was to be paid for. The plot should have been paid for in 12 months time which was not the case. The plaintiff has not shown when he paid the 53,300/- I find that even if the court were to go by the then law applicable to contracts in disposition of land in 1988, the agreement for sale of plot 25 marked P Exh. No.1 does not amount to a valid contract. The parties never even honoured the signed especially by the 1st defendant who is the party to be charged and the plaintiff did nothing towards furtherance of the contract.

The law relating to contracts for disposition of land was amended in 2002. For a valid contract be concluded, Section 3 of the Law of Contract Act provides that the contract must be in writing, signed by all parties, the signature of each party has to be attested by a witness who is present when the contract is signed by that party. The agreement dated 23.5.1988 would not satisfy any of the above requirements and would not be a binding contract on either of the parties. It remained but in draft form and not enforceable in any court of law.

The second issue is whether the elders' findings on plot No. 25 Kilome market amounts to a binding contract. P.W.3 the elder who represented the plaintiff and D.W.3 the son of the 1st defendant who represented the 1st defendant at the arbitration denied that the issue of the sale of the plot was their concern as they reconciled the records of account. They were dealing with issue of rent. The 1st defendant produced an agreement between the plaintiff and 1st defendant dated 11.1991 which the 1st defendant notified the plaintiff that because they had not signed the draft agreement recorded by the plaintiff, that he was requesting that clerk to Masaku County Council or to effect any charge to the plot. 1st defendant denies that the elders findings of 1.5.1988 is what they agreed upon. Though the plaintiff says the 1st defendant signed it, the defendant claimed to have been drunk and did not know the contents.

Looking at the said agreement, it was basically dealing with the issue of rent as between the plaintiff and 1st defendant over the disputed plot. Apart from P.W.3 and D.W.3 denying that the issue for arbitration related to the sale agreement of 1988, they went ahead to have the plot subdivided into 2, 25ft and B to be shared between the plaintiff and 1st defendant but it is the courts finding that the elders could not purport to act on an agreement that was void and go ahead to make further resolutions or provisions on the purported agreement which is non-existent. In my considered view the elders findings of 1.5.1997 seemed to have been agreed to by both parties as relates to rents. The 1st defendant's allegation that he was drunk is contrary to what D.W.3 said, that infact the 1st defendant and plaintiff were not present at the meeting. I do find that the elders made findings on outstanding rents but not on the division of plot 25 Kilome. As earlier found the sale agreement of 23.5.1988 was supposed to have been concluded in twelve months. The elders resolutions were made about 9 years later. The court has considered Pex.No.5 the elders finding produced by the plaintiff and Dexh.5, produced by defendant are similar. The elders found that the 1st defendant had been overpaid by about Kshs. 44,000/-. 1st defendant denied that the figure was correct because rent was reduced from 2500/- to 925/- by elders without his consent. I have considered the evidence of P.W.1, P.W.3, D.W.1 and 3 who were present at that meeting, I do believe and find that

1st defendant voluntarily signed to what the parties agreed that is, that he was overpaid in rents by the plaintiff by about Kshs 44,000/-.

To reinforce the conclusion I have reached above that the elders resolutions did not amount to a sale agreement of plot 25 Kilome Market, the 1st defendant had entered into a sale agreement with the 2nd defendant on 19.4.1997 DEX 19(a) and (b) and he had first received 80,000/- towards the sale. The agreement was concluded before an advocate on 27.10.1997.

By 29.5.1997 an application had been made to the 2nd defendant and it was approved (Ex.22 and 27) after relevant fees were paid (Ex. Nos 23 and 24). It would be absurd for the 1st defendant accepting to a subdivision of the plot in dispute when he had first entered into a sale agreement with 2nd defendant 2 weeks earlier. The court finds that the elders' award did not amount to a valid sale agreement. However, it seems that that parties agreed on how much rent was owed and the 1st defendant was found to have been overpaid by about 44,000/=.

Did the defendant demolish the suit premises and if so why?

By 3.6.1997, the application for transfer of plot 25 Kilome market had been approved and so the plot belonged to the 2nd defendant. That was confirmed by the letter from Makueni County Council (Ex. 26) which indicated that the plot was transferred to 2nd defendant on 3.6.1997. The plaintiff was still occupying the said premises and since he was a tenant of the 1st defendant, he must have accepted as a tenant by 2nd defendant. The 2nd defendant produced a copy of closure notice dated 5.5.1998 (Ex. 29) whereby he was asked to do some repairs on the plot on the premises would be closed. That notice has not been challenged. He produced Ex. 30 dated 6.5.1998, notice to plaintiff that he intended to do repairs as per notice from Health division and that he did go there with works but the plaintiff called police and they abandoned the work. Though the 2nd defendant is not specific on what they did it seems they did some work. 1st defendant was not involved. Infact P.W.2, plaintiff's wife wrote down names of those who went to the plot. Since the Health department notice is not denied I hold that the 2nd defendant was justified in going to do repairs on that plot. It was his and he gave plaintiff the requisite notice.

Did 2nd defendant take money from the plot. Firstly I wish to point out that there is totally no evidence to prove that 600,000/- was kept on these premises. P.W.2 who ran the business a wife of plaintiff was not aware of it. It is absurd that a business man could keep such an amount of money on the premises where a fire can destroy or thief steal it. There are bank facilities and the court was not told why it was not banked. There was totally no evidence to show that the plaintiff could have carried such monies. What I find interesting is that the plaintiff did not report this loss to the police so that those concerned could be arrested. There is no evidence of any report though P.W.2 said she reported.

Besides, this prayer for 600,000/- case as an afterthought. The 1st plaint did not include this prayer, nor did the 2nd amended plaint of 13.10.1997. it is not until the 3rd amendment of 4.11.1998 that the prayer for 600,000/- was included Kshs. 600,000/- was a colossal sum that one would not overlook or use every means possible to recover it. Even if the plaintiff claims allegedly overpaid to the 1st defendant would have been used up by May 1999. It therefore was that by 2.9.1999 the plaintiff award rent to 2nd defendant for about 3 months. Under the Distress for Rent Act a landlord has right to distress for rent one there is rent due and owing and it is not mandatory that one seeks leave of the court to levy distress. It does not matter that the 2nd defendants levied for rent of 85,821/-. What matters is that rent was due. DEX. No.7. The declaration listed what items were carried away during the distress – 12 chairs, 4 tables, assorted shop goods, mandazi, 3 soda crates, 2 lamps, Ajanta wall clock. P.W.2 who was in the shop denied making a list or knowing the value of the goods. Not even an estimate value was put to each item. All they claim is that the goods distressed were worth Kshs. 120,000/-. In my view that claim is baseless without support of evidence of how much was taken away. D.W.3 said the goods produced were broken chairs and tables though they did not indicate so in the proclamation. Without knowing the nature of the claim than values I do find the plaintiff's claim to be baseless. The goods were said to have been

sold at 4,500/-. The goods were cultivated from the premises after 7 days when the plaintiffs failed to pay. After 14 days the goods were advertised in Kenya Times on 9.2.2001 and sold. In my view the auctioneers followed procedures. They can not be faulted in their conduct of the distress for rent. The distress was warranted and properly carried out and earlier found their claim of Kshs. 120,000/- baseless.

The plaintiff made a blanket claim for general damages for unlawful eviction, breach of contract, unlawful distress but never addressed the sum that could have been awarded even in counsel's submissions. All in all I find that the plaintiff has not proved any of the prayers sought and the plaintiffs suit is therefore dismissed with costs. The 1st defendant will not be entitled to his claim of Kshs. 25621/- because the court found that he admitted owing 44,279/- which was supposed to be paid in form of rents and which covered the period upto May 1999.

As regards the claim for Kshs. 2500/- per month from 26.10.97 to November 2000 the 1st defendant has no right to claim that sum because he had sold the plot to 2nd defendant. It is only 2nd defendant who can make such a claim and consequently there would be no need to take accounts. In any case taking of account may prove fruitless since the plaintiff claimed to have lost all his books of accounts. That prayer must fail and so will that for costs. The 1st defendant will bear his own costs. Counterclaim is dismissed.

The 2nd defendant claim mesne profits at the rate of 2500/- for 16.10.1998 when he purchased the plot to 16.11.2000. As found above the rent found to have been overpaid to 1st defendant could have covered the period up to 1.9.1999. That is why the court had found that distress for rent could only apply to from June to August 1999. Under the circumstance, the 2nd defendant would only be entitled to mesne profits from June 1999 to the date when the plaintiff vacated on 16.11.2000. The 2nd defendant had not entered into any agreement for rent with the plaintiff and I hold that the terms they would applicable will be those rent by 1st defendant. On 1.5.1997 it had been agreed for whole plot to be 1850/-. I have used the same figures above and I do find that 2nd defendant will be entitled to mesne profits at the rate of Ksh. 1850/- per month from June 1999 to November 2000 which translates to (18 months x 1850) Kshs. 33,300/-. The court will therefore enter judgement for the 2nd defendant against plaintiff for Kshs. 33,300/- being mesne profits. The 2nd defendant will also have costs of the counterclaim.

Dated and delivered at Machakos this 31st day of March, 2006.

R. V. WENDOH

JUDGE