



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 88 OF 2006**

**CHARLES MURIUNGI (Trading as C.M.Steel Erectors**

**and General Building Contractors.....PLAINTIFF**

**-VERSUS-**

**MERCY WANJIRU GACHONGO.....1ST DEFENDANT**

**PISGAH LIMITED.....2ND DEFENDANT**

**ENGINEER EZIO DUBIMI..... 3RD DEFENDANT**

**J U D G M E N T**

In his plaint dated 17/10/2006 the plaintiff is seeking a sum of kshs.4,197,851.65. He is also seeking kshs.18,000/= per month from 1/9/2006. The defendants filed their defence dated 29/12/2006. The defence was amended on 9/11/2015.

The plaintiff's evidence is that he entered into a contract with the defendants whereby he was to build a house for them. This was in 2004. He built a house and completed it. The 1<sup>st</sup> defendant signed the contract. The 3<sup>rd</sup> defendant was the one paying the contractual sum. He completed the construction. There was a principal balance of kshs.2,170,000/=. He is claiming that amount. His further evidence is that after completion of the house there was no one to hand over the house to. The 3<sup>rd</sup> defendant told him not to hand over the keys of the house to 1<sup>st</sup> defendant. For the last ten years he has kept watchmen as casual workers to secure the property. He has been paying them. He is willing to vacate the house if he is paid his money. The suit property is registered in the names of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant gave him some cheques at one time but they were not honoured. The 1<sup>st</sup> defendant is a family friend. He has but a caveat on the property which is 41 acres. At one time the 1<sup>st</sup> defendant offered to give him 2 acres out of the land. He is not interested in the land but would like to be paid his money.

The 1<sup>st</sup> defendant testified that plot number Kilifi/Kijiwetanga/528 is registered in the names of the 2<sup>nd</sup> defendant's company. She is one of the directors of the 2<sup>nd</sup> defendant. There was a contract with the plaintiff to build a house. The entire contractual sum was kshs.7.7 million. There was an addition of about kshs.1.1 million. The plaintiff was paid around kshs.7.5 million. The 3<sup>rd</sup> defendant died on 5/6/2007. According to her, the plaintiff's balance is around kshs.1.1 million. She has been willing to pay the plaintiff. There was mediation conducted by an advocate but the plaintiff kept on increasing the claimant amount.

The defendant further testified that the plaintiff has put his people on the property. The property has been vandalized and several items are missing. Electricity and water was connected but is no longer on site. Most of the fixtures have been taken away. There was a bore hole which has now caved in. Whenever she goes to the premises she is chased away. The plaintiff allows the villagers to cultivate the land whenever it rains. The plaintiff has also registered a caveat on the land. She recently visited the premises and saw people taking her photographs. The following day she was summoned by the Malindi OCS. She has been harassed by the police several times at the instigation of the plaintiff. She has known the plaintiff for a long time as he was introduced to her by her parents. The plaintiff decided to come in between her dispute with the 3<sup>rd</sup> defendant.

The issues for determination is whether the plaintiff is entitled to the amount claimed in the plaint dated 17/10/2006 and whether the defendants have proved the counter claim.

In his plaint dated 17/10/2006, the plaintiff is seeking kshs.4,197,851/65 being the balance of the contractual sum and kshs.18,000/= per month as security charges since 1/9/2006. In his evidence on cross-examination, the plaintiff stated that the initial construction cost was kshs.7 million. He was paid about kshs.6 million. It is his further evidence that the principle debt was kshs.2,170,000/=. He entered into an

agreement with the defendants. The first defendant also signed the agreement. It is his evidence that he was instructed by the 3<sup>rd</sup> defendant who is now deceased not to hand over the premises to the 1<sup>st</sup> defendant. That is why he has been on site for almost ten (10) years.

The 1<sup>st</sup> defendant admit that parties entered into the agreement. According to her the initial contract was for kshs.7.7 million. There was an addition of about Kenya shillings one million. That would make the total contractual sum to be kshs.8.7 million. It is her evidence that around kshs.7.5 million was paid. According to the 1<sup>st</sup> defendant, the outstanding balance is kshs.1.1 million.

The defendant raised a counter claim in the amended defence filed on 30/10/2015. The defendants are claiming general damages for lack of rescission notice or termination of the contract and loss of user of the premises.

The evidence on record does establish that the two parties entered into the construction agreement in November 2003. It is established that the contractual sum was kshs.7,385,000 as per the agreement dated 10/11/2003 and signed on 18/11/2003. The agreement indicates in the handwritten notes that the total contractual value was kshs.7,385,000: I will take that to be the contractual sum. The evidence shows that certain variations were done to the original contract. There is a letter dated 4/2/2004 by the plaintiff to the 1<sup>st</sup> defendant. The letter does not clearly state the value of the extra work. I will go by the evidence of the 1<sup>st</sup> defendant that the extra work was to cost kshs.1.1 million. This gives a total contractual sum of kshs.8,484,000/=.

The plaintiff wrote several letters demanding payment of the balance of the contractual sum. The demanded amount kept on changing. In his letter dated February 2006, the plaintiff claimed kshs.2,170,000/= as the principal balance. There is a letter dated 4/1/2005 claiming kshs.2,215,000/= as the balance. On 18/2/2005 the plaintiff demanded kshs.2,415,000/=. On 29/3/2015 a sum of kshs.2,415,000/= was claimed as the outstanding balance. On 26/1/2006 a letter addressed to M/s Karongo advocate demanded kshs.2,170,000/=. In that letter the contract value is given as kshs.7,385,000/=. Another letter addressed to Walker Kontos Advocates dated 23/2/2006 claimed kshs.2,170,000/= as the principal balance.

M/s Walker Kontos Advocates wrote on 30/1/2006 indicating that the 1<sup>st</sup> respondent was to pay the outstanding balance. It is clear that the advocates were acting for the deceased. It is clearly stated in the letter that the deceased was contemplating paying the **“actual balance of kshs.2,170,000/= upon your fulfillment of the following conditions”**.

Given the evidence of the plaintiff, it is established that he was paid kshs.6,315,000/=. The plaintiff testified that he was paid kshs.6,000,000/=. The plaintiff has consistently claimed the sum of kshs.2,170,000/= as the outstanding balance. I will take that amount to be the balance due to the plaintiff out of the contractual sum of kshs.8,485,000/=. The contractual sum takes into account the extra work admitted by the 1<sup>st</sup> defendant which was estimated to be worth kshs.1.1 million.

Although the plaintiff testified that he was instructed not to give the keys to the 1<sup>st</sup> defendant, it is clear that the plaintiff was aware that the 1<sup>st</sup> defendant had signed the sale agreement and had interest in the property. She is a director of PISGAH LIMITED, the registered owners of the land. On 4/2/2004 the plaintiff wrote a letter addressed to the 1<sup>st</sup> defendant referring to the construction of the main house and servant quarter. The plaintiff's decision not to release the property to the 1<sup>st</sup> defendant is not supported by any evidence. He was fully aware that the 1<sup>st</sup> defendant was one of the owners of the property. The 1<sup>st</sup> defendant testified that the plaintiff was introduced to her by her parents. The plaintiff unilaterally decided not to hand over the premises to the 1<sup>st</sup> defendant. He has been in occupation of the premises from the time they signed the agreement in 2003.

Both parties filed valuation reports. The house stands on a 41.62 acres piece of land. The reports indicate that the house is dilapidated and requires extensive renovations. Bismark Valuers Ltd estimated the value of the damage at kshs. 2 million. Inter Consult Valuers Limited who were retained by the plaintiff only gave the value of the building at kshs.7,750,000/=.

From the evidence on record, I do find that the plaintiff is entitled to the balance of the contractual sum. I do find that the balance payable to the plaintiff is kshs.2,170,000/=. In view of the fact that the plaintiff unlawfully refused to handover the house to the 1<sup>st</sup> defendant and totally barred the 1<sup>st</sup> defendant from accessing the property, I do find that the claim for security is not payable. Further, since the matter has been pending in court for many years and the plaintiff has been using the house and the land for over ten (10) years, I do find that the sum of kshs.2,170,000/= shall not attract any interest for all that period. Interest shall only be payable after the delivery of this Judgment. It shall not be backdated since the plaintiff has benefited from the property.

In the end, the plaintiff is awarded a sum of kshs.2,170,000/= being the balance of the contractual sum together with costs. The above amount to attract interest after the delivery of the Judgment. The counter claim is disallowed. This suit is determined in the above terms.

**Dated and signed at Marsabit this..... day of ..... 2017.**

**SAID CHITEMBWE**

**JUDGE**

**Dated, signed and delivered at Malindi this 11th day of July, 2017**

**WILDON KORIR**

**JUDGE**