



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE NO. 237 OF 2010**

**NASSOR MOHAMED NAHDY.....PLAINTIFF**

**VERSUS**

**ABDALLA AHMED OMAR.....DEFENDANT**

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

1. Vide a plaint dated 9<sup>th</sup> July 2010 and filed on 12<sup>th</sup> July 2010 later amended on 27<sup>th</sup> January 2018 the plaintiff brought this claim in regard to L.R No. 30/X/MN owned by Aisha Binti Shafi – deceased. The plaintiff pleaded that the plot was developed with a shop and residential part but was later renovated and leased to the then tenant Ahmed Omar to operate a restaurant for 10 years with effect from 28<sup>th</sup> February 1962. After the death of Ahmed, the premises was let to Salim and subsequently Abdalla Ahmed Omar – the defendant jointly with Mohamed Salim on a monthly tenancy.

2. The plaintiff pleaded that during the tenancy of the defendant, he did without their consent or knowledge pulled down the old building and constructed thereon a building comprising two restaurants, one office and was proceeding to construct a storey building. The particulars of illegality are stated thus;

- (a) The defendant started work on the proposals and demolished the old house unilaterally without knowledge of the plaintiff.**
- (b) The defendant demolished the old house without consent of the plaintiff before a written agreement between them.**
- (c) The defendant purported and did unlawfully draw out plans that were not shown to nor agreed to by the plaintiff.**
- (d) The defendant fraudulently inserted the plaintiff's name on the drawings without knowledge of the plaintiff.**
- (e) The defendant forged the plaintiff's signature on the drawings.**
- (f) The defendant failed to obtain approval of the City Council of Mombasa for the building.**

3. The plaintiff pleaded further that the defendant put reliance on an oral contract which did not materialise and proceeded to let the rooms out and receive rents to the exclusion of the plaintiff. It is the plaintiff's case that the defendant holds the income received from the property in trust for him. The plaintiff accused the defendant of forging his signature in the documents presented to the City Council. Thirdly, the plaintiff states that the defendant has deprived him of the use of the suit premises. He prays for possession, damages and mesne profits:-

- (i) Of the same land and premises.**
- (ii) Mesne profits at the rate of Kshs.200,000 per month until possession is delivered.**
- (iii) An injunction restraining the defendant from remaining in the premises.**
- (iv) Damages.**

4. The plaintiff pleaded that all attempts to have the defendant to deliver up possession of the building and land failed. He therefore urged the Court to enter judgement in his favour for;

- (a) A declaration that the defendant holds the building and the benefits accruing there from in rent and mesne profits in trust for the plaintiff.**
- (b) An order that the defendant pays to the plaintiff the said benefits, rents, mesne profits whatsoever to the plaintiff.**
- (c) A declaration that the defendant is a trespasser.**
- (d) An order that the plaintiff do have possession of the said land and premises and eviction of the defendant from the premises.**
- (e) A mandatory injunction to compel the defendant to demolish, remove, or pull down, the illegal structures thereon.**
- (f) A prohibitive order to stop, prohibit, bar or in any other way restrain the defendant from carrying on any trade, or commercial activity or any in the said land or premises.**
- (g) Damages.**
- (h) Any other orders this Honourable Court would be pleased to grant.**
- (i) Cost of this suit.**

5. The defendant opposed the suit by filing a defence and counter-claim on 2<sup>nd</sup> August 2010. The defendant pleaded that he was unaware if the plaintiff was appointed trustee or the legal representative of his deceased brother Ali Nahdy or trustee of the pleaded Wakf. The defendant denied that he has unlawfully entered upon the suit land and demolished the existing structures and developed a new building without the consent of the plaintiff.

6. The defendant pleads that he entered into an agreement with the plaintiff on representation and inducement that the plaintiff had authority to so construct at a consideration of Kshs.300,000 and that the defendant was to demolish wattle structure on the suit premises and thereafter put modern commercial and residential structures. The defendant set out the particulars represented to him *inter alia* that;

- (i) The plaintiff stated and represented by deeds and conduct that he was the owner or beneficial owner of the suit premises;*
- (ii) The plaintiff, who has an office behind the suit premises, all along witnessed the demolition of the daub and wattle house as well as the construction of the new premises, activities which were undertaken in the open over a period of one (1) year or thereabouts;*
- (iii) The plaintiff represented and intimated to the plaintiff that he was able and willing to grant a long term lease to the plaintiff with regard to the site which comprises the suit premises;*
- (iv) The plaintiff stated and represented that he was not in funds to erect on the suit property a commercial cum residential structure in place of the daub and wattle structure now demolished.*
- (v) The plaintiff demanded a sum of Kshs.300,000/= as consideration for allowing Mr. A.S.A Omar to demolish the old daub and wattle house on the suit property paving way for the development of the new structure;*
- (vi) The plaintiff received in cash a sum of Kshs.300,000/= paid in three tranches on diverse dates;*
- (vii) The plaintiff knew and approved of the demolition of the daub and wattle house and he frequented the site during the exercise.*
- (viii) The plaintiff signed the building plans before their approval by the Municipal Council of Mombasa;*
- (ix) The plaintiff concurred with Mr. A.S.A Omar that the approved construction works should be effected in such a way so as to avoid a partial demolition of part of a roof of a neighbouring house which encroached on the suit premises.*

7. The defendant further pleaded that on the basis of their agreement and mutual trust, the defendant and another person who was already in possession as tenant of the suit premises undertook the new planning and construction at great expenses. That upon completion, the plaintiff demanded that the defendant executes a document which did not contain the agreed terms of the outstanding issues of ground rent and repayment of the money expended.

8. The defendant proceeded to give particulars of his expenses as follows;

- (i) The said Mr. A.S.A Omar expended a sum of Kshs.9,000,000 or thereabouts in erecting the new structure;*
- (ii) The said Mr. A.S.A Omar took time off his hotel business and work for well over one year to supervise the demolition and construction works on the suit property;*
- (iii) The business of the said Mr. A.S.A Omar ground to a halt after he demolished the old daub and wattle house and engaged in the*

construction works of the new structure;

9. In the counter-claim the defendant reiterated averments made in his defence. He added that by reason of the oral agreement, he has an overriding interest over and in respect of the suit property and will pray for a declaration to that effect. The defendant urged the Court to dismiss the plaintiff's claim. In place thereof, to enter judgment for him in the following terms;

**(a) That Mr. A.S.A. Omar has solely developed the new commercial cum residential structure on Mombasa Block XVI/30 Mombasa Island with the express authority of the plaintiff, valid sanction of the Municipal Council of Mombasa and for good consideration.**

**(b) That Mr. A.S.A. Omar has an equitable permanent tenancy and an overriding interest in and over the development on Mombasa Block XVI/30 Mombasa Island for good consideration (by way of ground rent) to be agreed upon between the plaintiff or the proprietor of Mombasa Block XVI/30 Mombasa Island and the said Mr. A.S.A Omar.**

**(c) An order of specific performance of the oral agreement between the plaintiff and Mr. A.S.A. Omar for the grant in respect of Mombasa Block XVI/30 Mombasa Island of an equitable permanent tenancy to Mr. A.S.A. Omar.**

**(d) In the alternative, an injury as to damages for breach of the oral agreement made between the plaintiff and Mr. A.S.A. Omar is ordered and appropriate award to Mr. A.S.A. Omar be made by court upon such inquiry.**

10. After the close of the pleadings and determination of all the interlocutory applications, the suit was set down for hearing. Nasur Mohamed Nahdy testified as **PW1**. He said that he is a retired Chief Kadhi of Kenya. **PW1** stated that the defendant is a tenant in a Wakf property located on plot No. 30/XVI/M.I along Kenyatta avenue. That his late grandmother who owned the house donated its income for the running of Shibu Mosque. **PW1** averred that this brother Ali Mohammed Nahdy was the administrator of her estate. That the grandmother who was called Aisha left a will to the effect that the property was given to the Mosque and God.

11. **PW1** continued that after his brother died, he was authorised to collect rent which was then used for the maintenance of the Mosque. That the defendant became a tenant in the suit premises after the death of his father. The witness stated that the defendant pulled down the old house and built another. When asked, the defendant alleged that **PW1** had given him permission to do so. **PW1** continued that he did not know the defendant was building and denied giving the defendant any permission to build.

12. According to **PW1**, the defendant told him he wanted to renovate the house. That he asked the defendant to put the request in writing and recover the renovation money from the rent. However, nothing was made in writing and their house got demolished while **PW1** had travelled. That after he demolished the house, the defendant started avoiding him hence the reason for filing this suit. **PW1** confirmed that the defendant had built the ground floor and was stopped when he started building the 1<sup>st</sup> floor. He added that the defendant is doing businesses on the premises but is not paying rent since 2009.

13. **PW1** denied receiving Kshs.300,000 from the defendant. He further denied signing any building plans. That after seeing a building plan bearing his signature and name, he made a complaint to the police. **PW1** concluded his evidence by stating that no one was allowed to demolish the house under the law but renovations/repairs is allowed. He urged the Court to grant judgement as per plaint.

14. In cross-examination by Mr. S. M. Kimani counsel for the defendant, **PW1** stated he filed the case as an agent and trustee of Shibu Mosque. **PW1** stated that Mzee Shigog is not a member of the Committee of Shibu Mosque but Mzee Shigog was only asked to help in running of Shibu Mosque. That **PW1** was appointed trustee by his late brother Ali Mohamed. He did not have a building plan of the house made by his grandmother. He lives near the suit property. That they were friends with the defendant before the case was filed. Munir is his nephew and a witness in the case and Munir lives on a part of the suit plot. That his grandmother had other plots beside the suit plot.

15. **PW1** continued in cross-examination that the defendant had rented the whole plot in dispute. That the demolition was done in 2009 while the witness had gone to Oman. **PW1** did not know if Munir made a report of the demolition to the police. That he is the one who instructed his advocate to write the letter when the defendant was avoiding him. That if they reached an agreement with the defendant, probably he could continue however the defendant refused to see him. **PW1** said the agreement was for renovation not demolition. That the house built by the defendant is made of cut stones which he built without authority of the plaintiff. He could not remember the letter of 4<sup>th</sup> June 2009. The witness was stood down for further cross-examination unfortunately, he passed on before he was recalled.

16. Munir Mohamed Sketty testified as **PW2**. He is a nephew to **PW1** as well as the legal administrator of his estate. He adopted his witness statement filed in court on 21/11/2016 as his evidence in chief. He was continuing this case on behalf of Nassor Mohamed Nahdy. He stated that he was aware the defendant approached his deceased uncle to carry out renovations at his expense and that he would be refunded. That **PW1** asked the defendant to put the request in writing but the defendant did not comply.

17. **PW2** stated that the documents forwarded to the Mombasa Municipal Council were not signed by his uncle. That in 21/5/2009, **PW1** wrote to the Town Clerk on the issue of unapproved building that was being built on the suit property. The Chief Building Inspector wrote to the defendant to stop the construction and demolish the said structure that was at the ground level. **PW2** testified that the suit premises is currently occupied by 5 tenants, a yard and workshop for welding purposes. That the building is on prime area for business operating nearly 24 hours so the income should not be less than Kshs.500,000 per month. That Mr. Abdalla must pay for the building.

18. **PW2** was put to cross-examination and answered that the house once donated as a Wakf cannot change hands. That the house was demolished without authority. That **PW1** had given conditions for renovations which the defendant did not follow. That he knew the registered owner of the suit plot is Aisha Binti Shafi. That Aswan Cafe was their tenant paying rent of Kshs.15,000 p.m. and Sheikh Nassor was collecting rent on behalf of the Mosque. **PW2** said he had the Wakf deed which Wakf was not registered on the title. **PW2** was shown a letter dated 28/9/2016 by Wakf Commissioners of Kenya which letter showed that Shibu Mosque is vested in the Wakf Commission from

1929 and rental income vested to the Mosque from 1944 – 1945.

19. **PW2** was also shown an earlier case concerning the will of her great grandmother. **PW2** said Sheikh Nassor (**PW1**) was living far from the plot. **PW2** stated that he learnt of the demolitions when he saw a lot of dust coming from the suit premises. That he went and asked the defendant to stop but the defendant refused to talk to him. Thus he reported the matter to **PW1** after **PW1** had returned. That **PW1** sent him to call the defendant so many times so that the matter could be resolved. That the defendant was told to stop demolition until a formal agreement was done. **PW2** recognized the letter dated 4/1/2009 done by **PW1** which granted permission to the defendant to finish the ground floor but not go up before an agreement is reached. **PW2** stated further that he saw it was submitted in this case. That the documents of approvals from the Municipal are all forgeries. The witness agreed that neither him nor **PW1** had contributed money for the new building.

20. In re-examination, **PW2** stated that it is the house which is a Wakf not the land. That Aisha owned both the house and the land and it's the house which was leased to the defendant. That he has not been shown a Wakf placing Shibu Mosque to the Wakf Commissioners. That the Mohamed K. Shah the author of the letter of 28/9/2016 is an employee of not a Wakf Commissioner. **PW2** said he was the next in line to collect rent after the death of Ali and Nassor. That there was no agreement between Sheikh Nassor (**PW1**) and the defendant hence no permission given to the defendant to demolish the house or build. This marked the close of the plaintiff's case.

21. Mohamed Shali testified as **DW1**. He stated that he is the Secretary of the Wakf Commissioners of Kenya which is established by statute. **DW1** said that he received an enquiry about the trusteeship of Masjid Shibu. That according to the records found, the Wakf Commissioners are the trustees of Masjid Shibu therefore he wrote the letter dated 28/9/2016 to confirm – produced as **Dex 1**. **DW1** stated there is a case reported between Aisha Binti Safi and Masjid Shibu which showed that the Wakf Commissioners never succeeded in becoming the owner of the suit house and land. The witness said he had not seen receipts of rental income sent to Shibu Mosque.

22. In cross-examination by Abubakar advocate for the plaintiff, the witness stated that as Secretary and Chief Executive Officer (CEO) he does not require authorisation to give evidence in Court. That his letter referred to a certificate of title but he did not annex a copy. Moreover, he did not have a Wakf deed consecrating the Mosque as a Wakf. That if the Wakf is not recognised by law as was the case of Aisha's property, if the owner dies, the property reverts to the estate.

23. Salim Ali Kiza gave evidence as **DW2**. He said that he is a construction practitioner holding a diploma in Civil Engineering from Mombasa Polytechnic. **DW2** adopted his witness statement dated 11/3/2011 and added that the defendant and Mzee Nassor (**PW1**) were his friends. **DW2** stated that he advised the defendant to obtain approvals for the permanent building he wanted to do in place of the mud house at the suit premises. The witness testified that he designed the architectural and structural plans for a 3 storey building. That after the plans were signed by **PW1**, he presented them to the Municipal Council for approval.

24. **DW2** continued that he inspected and advised the defendant on every step of the construction including obtaining of occupational permits. He produced the drawings as **Dex 2(a)**. In cross-examination, the witness said he is registered with the Engineers' Board of Kenya although he did not have his certificate in Court. That the defendant has not told him that **Dex 2(a)** designed by him was fraudulent. That the document was signed by **PW1** and the defendant but he was not present when they signed the document. The witness agreed that from the plan as drawn, you cannot tell who owned the development. The witness also conceded that he is not an architect.

25. The defendant testified as **DW3**. He stated that he operated a business called Aswan Café where they are 4 partners i.e. Mohamed Salim Ahmed, Swaleh S. Ahmed and Salah S. Ahmed. He produced the certificate of registration as **Dex 3(a)**. The defendant continued in evidence that he requested the plaintiff to allow him improve the hotel built on the plot No. 3 by building a new house. That **PW1** was the administrator of plots owned by Aisha Binti Shafi. That **PW1** allowed him to draw a plan for him to see and sign. It is his evidence that he gave **PW1** Kshs.100,000 when the plan was ready and **PW1** signed the plan. That the balance of Kshs.200,000 was paid by the other partners when the construction was on-going. That he got approval which letter he produced as **Dex 4**.

26. **DW3** continued that he also applied and paid for the demolition license as shown in **Dex 5 and 6**. That once demolition was completed, he began construction and that **DW2** and Salim was in charge of the construction. Further that the construction was inspected by the Municipal Council as shown in the inspection notices produced as a bundle as **Dex 7**. That when they were about to finish building, Munir (**PW2**) came and said they had no permission to add any additional floor unless he gets fresh permission from **PW1**. That Munir demolished the partitions of the first floor thus forcing him to go see Nassor. It is then that Nassor wrote the letter dated 4/1/2009 stopping the construction. This letter was produced as **Dex 8**.

27. **DW3** stated further that he completed the ground floor and sought and obtained occupational permit dated 21/5/2009 produced as **Dex 9** before he began operating. Later he travelled to Yemen and while there, he got a call informing him about the Court order. The witness produced demand letters from Hayanga & Company as **Dex 10**. He also produced receipt for payment of ground rent for plot see 16 by his neighbours to demonstrate that there are others paying ground rents. **DW3's** testimony is that Mzee Nassor wanted the house built to become theirs and **DW3** refused as he had incurred costs in putting up the building – amounting to approximately Kshs.8.9 million.

28. That he did a valuation of the structure and it came to about Kshs.18 million. **DW3** said the hotel has been there since 1953. That he was only claiming the development put up not the land. **DW3** continued further that Munir wanted him to pay Kshs.15,000 for storing building materials at his place but they did not agree. He denied the allegation that he was building at night. He asked the Court to be allowed to pay ground rent like the others.

29. In cross-examination, **DW3** said he was operating business in the plaintiff's building from 2000 until when he demolished the structure. That he was paying rent of Kshs.3,000 but he was not given a receipt. That before him, it was his father operating the business. In 2010, he invited and included his brothers – **Dex 3(b)**. That permission to build was given to him orally by **PW1** pursuant to an agreement reached between the two of them. That **PW1** signed the plan in his (**DW3**) presence then he gave **DW2** to follow for him the approval process.

30. **DW3** stated that the notice of approval was issued on 9/6/2008 and hording and demolition permit given on 8/9/2008. That the demolition permit refers to plot No. XVIII/MI/30 while the suit plot is No. XVI/MI/30. That the inspection notice at page 8 indicated the

foundation was ready for inspection on 26/5/2008 and 6/6/2008. Further the occupation permit refers to 2 floors but he was given the permit before finishing the building. That according to the letter at page 23, they were to agree and PW1 gave him a form to sign but he refused. **DW3** denied he was to recover the cost of building from the rent. That as per the valuation report, the owner of the plot is given as Ali Mohamed Nahdy and annual rental income is given at Kshs.1,800,000. He had nothing in court that shows PW1 gave him the house. That the house is his while the plot is theirs.

31. In re-examination, **DW3** stated that the plaintiff did not spend a cent in the building. That Sheikh Nassor did not tell him how much he wanted in rent and he has not demanded any. That the plaintiff stopped construction in January 2009 and between January – May 2009, he had not received a demand for rent. He denied that he had refused to pay rent. That he built the house for their family not for the interest of the plaintiff. That the inspection notices were prepared by the Municipal Council and he only noticed plot No. XVIII IN Court today. **DW3** did not understand why the plaintiff is claiming the house – that they want to take advantage of him.

32. Ali Ahmed Ali testified as **DW4** and he stated that he is a cashier with Aswan Café. He knew the deceased plaintiff because they were neighbours at Florida estate and that he used to visit Aswan Café before the building was demolished. **DW4** stated he was employed by the defendant from 2004 and found daily payments to Sheikh Nassor. **DW4** continued that he was aware that the defendant agreed with the plaintiff to have the old building where the hotel was to be demolished. **DW4** admitted that he never accompanied the plaintiff to the defendant's office. That when the demolition began, Mzee Nassor came and saw the on-going works on his way to his office which was within the same compound.

33. The witness stated that his role included purchasing building materials and paying the workers. That he kept records of the same which expenses totalled to Kshs.8,068,087. **DW4** added that the defendant used to pay some professionals directly. That the building process took about 8 – 9 months. That the defendant stopped them from doing the 1<sup>st</sup> floor citing lack of agreement. The witness said that the defendant gave him Kshs.200,000 to take to Mzee Nassor on two separate occasions but the payment was not acknowledged in writing.

34. In cross-examination, **DW4** said he was the head cashier. That he did not know what Nassor and the defendant discussed. That there was no problem when they began the demolitions except problem arose when they reached the 1<sup>st</sup> floor. He also had no details of the disagreement.

35. The valuer Antony Khaemba testified as **DW5**. That he was instructed by Abdalla Shariff to inspect, measure and take photos on the suit plot. He carried out the instructions and upon valuation of the development without land, he put the value at Kshs.18,750,000. That he did not need records of materials used on site for purposes of his valuation because the house was complete. The witness said that he would give an increase of value at 5% every year putting the current value at Kshs.26,000,000. This put to a close the defence case.

36. The parties' advocates then filed their closing submissions. The plaintiff filed theirs on 3<sup>rd</sup> July 2019 while the defence was filed on 27<sup>th</sup> February 2020. I have taken time to read the same which constitutes mostly a summary of the evidence adduced. I will make reference to the case law cited within the body of my analysis. From the evidence adduced and the submissions filed, I frame the following questions arising for determination;

- (i) *Whether or not the defendant is a trespasser on the suit land?*
- (ii) *Whether or not a tenancy relationship existed and what was the terms of that tenancy?*
- (iii) *Whether or not there was permission to demolish the old building owned by the plaintiff?*
- (iv) *What rights accrued to the defendant after construction of the new building?*
- (v) *Is the plaintiff entitled to the orders sought in the plaint? OR*
- (vi) *Is the defendant entitled to judgement as prayed in the counter-claim?*
- (vii) *Who meets the costs of the suit?*

37. The plaintiff urged this Court to declare the defendant as a trespasser. The plaintiff gave evidence in details on how the defendant came into occupation of the suit premises. He began by telling this Court that it was the defendant's father that first got into a lease agreement of 10 years from 1962 with Ali Mohamed Nahdy. Upon the death of the defendant's father, the defendant took over the operation of the business together with the son of a previous tenant called Salim. The tenancy relationship continued until the relations between the plaintiff and the defendant became sour as a consequence of the new building put up on the demised premises. However, there has not been produced notice to terminate the defendant's tenancy. Consequently, I find no basis laid why the declaration of trespass order should be made.

38. The next question then is what was the nature and or terms of the existing tenancy. The plaintiff filed a tenancy agreement dated 28/2/1963 executed between Nassur Mohamed Nahdy and Sharriff Ahmed Omar Bin Asheikhbubakr. The agreement was for hire of the whole building standing on plot X:30/XVI altered from present dwelling status to a restaurant. The building was let on a monthly rent of Kshs.400 for a period of 10 years with liberty to renew.

39. The defendant inherited this tenancy which then became month to month after the expiry of the 10 years lease. The plaintiff stated that the rents received from the building was used for the maintenance of Shibu Mosque. **DW1** in his evidence stated that Shibu Mosque was a Wakf managed by the Wakf Commissioners of Kenya but he never produced a Wakf deed. **DW1** also confirmed that the plot and building comprised as plot 30/XVI/M.I was never converted into a Wakf. Consequently, the plaintiff (**PW1**) having signed the first tenancy to the defendant's father and subsequently allowed the defendant to use the premises did not require a Power of Attorney or letter of authority to

bring this suit. In my view the plaintiff in stating the purpose the rent was put to did not divest him authority to sue the defendant in case of a disagreement. The nature of the tenancy between the parties herein was that of month to month, having its foundation on the original lease of 1963.

40. The gist of this dispute is whether or not the plaintiff gave the defendant permission to demolish the old building comprised of daub & wattle and put up a new modern structure. The plaintiff's case is that the permission given was for renovation not repairs. The burden was thus upon the plaintiff to show that no permission to demolish & build was given as alleged by the defendant. In his oral evidence, the plaintiff stated that the structural and architectural plans bearing his name and signature presented to the Mombasa Municipal Council for approval were forged as he never signed the same. The following documents were presented in evidence by the plaintiff challenging the permission;

(a) *Planning permission No. P/355/08 dated 15/5/2008.*

(b) *Receipts dated 15/5/2008 for payment of the planning permission issued to the defendant.*

(c) *Development control comments on P/355/08 dated 5/6/2008.*

(d) *Letters drawn in January 2009 by the plaintiff to the Council and responses by the Council.*

41. It is not in dispute that the agreement if any was reached between the defendant and the plaintiff was oral and that the discussion was held between the two of them. However, on the plaintiff's part, he stated that no agreement had been reached by the time the defendant undertook the demolitions/constructions. Whether or not an agreement was reached, it was a matter strictly between the two parties. In the circumstances, I am persuaded to hold that the burden of proving on the nature of the permission given (the oral agreement) became the responsibility of either of the parties because it is one's word against the other. Consequently, I will determine the dispute if permission was by considering the evidence adduced by both the Plaintiff & the defendant to ascertain who has discharged the burden.

42. In the exhibits produced i.e. the planning permission registration number P/355/08, the details of the applicant is recorded as "**SELF**"; Name of owner under general information is given as Abdallah S.A. Omar on plot number 30/XVI/M.I. The receipts are also issued in the defendants' name. On the submitted plans comment sheet, the defendant is named as the owner. On the drawings/plans (*Dex 2a*) there is a signature under owner and plot authority. Under plot authority there is a stamp bearing the name of the plaintiff and the plaintiff's signature (which is contested) appeared only on one document.

43. DW4 who was working as the defendant's cashier merely reiterated the evidence as told to him by the defendant in regard to the alleged oral agreement. He said that he ushered the plaintiff (PW1) to the defendant's office. He also said that before this case, the plaintiff would pass by the hotel as it was in the same compound with his office. The witness however did not give the date he alleged that the plaintiff discussed the issue of permission to demolish the old building and put up a new one. Similarly, the defendant did not specify the date/month when the plaintiff granted him the permission to bring down the old building and construct a new modern house.

44. The defendant stated that he was allowed to carry out the renovations but they were to agree. It is not clear when the agreement was subsequently reached and it was to be agreement concerning what issue. He also said that he paid the plaintiff (PW1) Kshs.100,000 on the date the plaintiff signed the document. The witness did not elaborate what the compensation was intended for. Further he said the balance of Kshs.200,000 was paid by his partners. This Court caught the impression that the partners can only be his brothers they were running the business with. Instead, DW4 comes and say that it is the defendant who sent him to take the balance Kshs.200,000 to the plaintiff on two separate occasions. This then creates a contradiction on who paid the balance if any.

45. The Supreme Court of the United Kingdom later stated as follows in the case of ***RTS Flexible Systems Ltd Vs Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14, [45];***

***"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."***

46. The defendant pleaded that the *plaintiff, who has an office behind the suit premises, all along witnessed the demolition of the daub and wattle house as well as the construction of the new premises, activities which were undertaken in the open over a period of one (1) year or thereabouts* thus representing to him that he had no objection to the new construction. If this was the case, then the conduct of the plaintiff ought to have started from the beginning. In this instance, the beginning shows the terms of the agreement were yet to be agreed on. For example, would the parties relationship change from that of a normal tenant to that of ground tenant; would the amount of rent payable change?

47. The defendant relied on the plaintiff's letter of January 2009 which letter read in whole basically asked him to stop further constructions until a consensus is reached. The letter only allowed for finishing what was built to be put to use and not sanitizing the whole process. The plaintiff indeed contested the signature on *Dex 2(a)*. However, none of them had the signature examined to corroborate the evidence if indeed the plaintiff signed this document or not. In my view, the signature cannot be used as the only evidence to prove existence of the oral agreement where the terms of that arrangement has not been brought out.

48. What then are the rights accruing to the defendant after construction of the new building? The defendant put reliance on the letter by the

plaintiff dated 4/1/2009 to say that he was given permission to build hence the building is his and should be allowed to pay ground rent like some of his neighbours. It is not disputed that the cost of putting up the new structure was wholly incurred by the defendant. The letter of 4/1/2009 as written asked the defendant to stop building upwards but allowed him to finish the ground floor **“Sehemu ya hotel,”** until they had agreed. The plaintiff went ahead to state that it was a mistake for the construction to be done without any formal/written agreement reached. The letter still talked of a need for parties to agree thus it did not confer any ownership rights on the defendant.

49. The defendant put reliance in the holding of the Case of *Inwards & others Vs Baker (1965) 2QB 29*. That **“Where a person expended money on the land of another in the expectation, induced or encouraged by the owner of the land that he would be allowed to remain in occupation, an equity was created such that the Court would protect his occupation of the land.”**

50. The facts in *Inward & others Vs Baker supra* is quite distinct from the facts of this case where the terms/details of the oral agreement reached between the two parties are not clear. Secondly, the defendant besides stating that he was given permission to demolish the old house and construct the new building did not say the plaintiff promised to allow him own the constructed building. Thirdly, as at the commencement of the construction of the new structures, there existed a landlord/tenant relationship between the plaintiff and the defendant. The defendant in asking the Court to declare him as the owner of the constructed building is equivalent to asking the Court to re-write the contract between the parties. The same applies to the prayer for an order to pay ground rent.

51. Going by the evidence on record, it is not the landlord (plaintiff) who requested the defendant to carry out the building works. Neither was it the plaintiff who asked him to stop him from operating his business. If the initiative to improve the daub & wattle house was the defendant’s idea, then on what basis should the plaintiff demand for compensation beyond that of landlord-tenant relationship? It appears to me that there was even no agreement for the defendant to stop paying rent. The plaintiff said that the defendant stopped paying rent from 2009 to which the defendant answered that no demand was made.

52. The old premises demolished was habitable and the hotel was running. No evidence was led by the plaintiff as to its economic value but the plaintiff stated that according to the will of Aisha – deceased it was not meant to be demolished i.e. attachment of sentimental value. The plaintiff was therefore entitled to payment of compensation for the demolished house together with outstanding rent arrears. Equally, the defendant having expended money albeit against the authority of the plaintiff is in equity entitled to recover such monies. This is so because from the evidence of the plaintiff, he conceded that the defendant was to recover expenses used in renovations which he had consented to. I have also taken into account that the impugned structure will remain for the benefit of the plaintiff (and or estate of Aisha).

53. Consequently, this Court taking into account the pleadings and evidence adduced, find that the defendant is entitled to recover the monies expended for building the structure and not otherwise which amount was given by the defendant and DW4 as Kshs. approximately 8,068,086 and which this Court rounds up to Kshs.9 million. The same shall be recovered less the value of the demolished house (to be agreed and or assessed by the court).

54. The court does grant prayer (a) of the counter-claim **that Mr. A.S.A. Omar has solely developed the new commercial cum residential structure on Mombasa Block XVI/30 Mombasa Island with the express authority of the plaintiff, valid sanction of the Municipal Council of Mombasa and for good consideration.** The remainder of the prayers in the counter-claim is dismissed for want of merit.

55. The plaintiff’s claim succeeds in part in terms of the following prayers;

**(a) A declaration be and is hereby made that the defendant holds the building and the benefits accruing there from in rent and mesne profits in trust for the plaintiff subject to recovery of the sum of Kshs. 9 million by the defendant (less outstanding rents and value of the demolished daub & wattle house).**

**(d) An order is issued that the plaintiff shall have possession of the said land and premises and/or eviction of the defendant from the suit premises once after the defendant has fully recovered the amounts expended in putting up the structure as stated in (a) above.**

**(f) Each party to meet their respective costs of the suit.**

**Judgement dated & signed at Busia this 16<sup>th</sup> Day of September 2020**

**A. OMOLLO**

**JUDGE**

**And delivered electronically via email to the parties’ advocates this 21<sup>st</sup> Day of September 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**