



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1150 OF 1983

PETER NJENGA
.....PLAINTIFF

versus

JAMES FINLAY & ANOTHER
DEFENDANT

JUDGMENT

Two consolidated suits, viz 1150 of 1983 and 2167 of 1983 were heard together.

In the first one the plaintiff Peter Njenga (Njenga) brought action by plaint, against James Finlay (EA) Holdings Ltd (Finlay and Endesha Ltd (Endesha) praying for judgment against them for; discharge of a charge against title No Ngong/Ngong 2353; delivery of Reg certificate of it, general damages, costs and interest at court rates. To this claim Finlay and Endesha filed a joint defence in effect contending that Njenga had verbally consented to the title being retained as security against Endesha's indebtedness to Finlay even after the loan against which the charge had been registered had been fully repaid and that he was estopped from claiming the discharge of it before Endesha's indebtedness to Finlay was settled.

In the second suit, Endesha sued Njenga for the return in the same condition as they were on March 31, 1983, two motor vehicles KRP 783, a Peugeot 504, and KQL 153, a Renault Roho, which had earlier been given to Njenga for his use while he was a director of it; and Kshs 53,820 which had allegedly been paid by way of premium on the life insurance policy taken on his life and for his benefit. To this claim Njenga filed a defence admitting he had the two motor vehicles but contending that the same were held as security for Kshs 110,011.80 due to him from Endesha, as unpaid salary for two months, terminal benefits, arbitrary deductions which had allegedly been made on his personal emoluments while he served Endesha as a director. He accordingly made the money the subject matter of a counterclaim. He also prayed for general damage. Endesha's reply and answer to the counterclaim was a denial of each and every averment and joined issued on all matters averred.

When the trial started on June 30, 1986 certain developments had taken place. The charge on Njenga's property, above, had been discharged, having been discharged in August 1985. Subsequently, the title certificate to it was returned to his advocate before the trial was concluded. Njenga also abandoned his claim for general damages pleaded in this counterclaim.

The facts giving rise to the foregoing claims are quite straight forward. By a charge registered on November 7, 1981, Njenga charged his property Ngong/Ngong/2353 to secure Endesha's indebtedness to Finlay, to the tune of Kshs 1,100,000 repayable by monthly instalments of Kshs 100,000 with effect from January 1981. However, in the charge it was expressed to be repayable by March 31, 1982. The evidence clearly showed that the loan was fully repaid even before the charge was registered on November 7, 1981.

It is not quite clear why the parties went ahead to have the charge registered even after the alleged loan had been repaid. Finlay and Endesha contend that the charge over Njenga's property was registered to secure further indebtedness of Endesha to Finlay. Perhaps the whole purpose of registering the charge was to satisfy the requirements of the RLA (cap 300) section 65(3) refers). Be that as it may Njenga did not demand the discharge of the charge over his property until October 1982, when he intimated by letter his wish to resign as a director of that company and expressed a wish to sell his shares in Endesha to any interested shareholder of that company. (Exhibit 8 refers). This letter was not replied to. The issue however, appears to have been discussed in Finlays board of directors meeting held on November 15, 1982, attended by Njenga and Brian Granville Ross (DW 1) as representatives of Endesha (Exhibit 9 refers). Finlay refuses to discharge the charge on Njenga's property "until such time as the amount overdue by Endesha had been settled in full" (Exhibit 9 refers). The amount said to be overdue was not part of the debt secured by Njenga's property.

Njenga was not amused by Finlay's refusal to discharge the charge over his property. He wrote a letter of protest to GR Corse Esq (DW 2) expressing his dissatisfaction at the continued retention of his title documents to parcel No Ngong/Ngong/2353, and refusal by Finlay to discharge a charge over the property. He suggested that Endesha looks for alternative security to replace his.

From the tone of the letter it appears the financial position of Endesha was not sound, and that would perhaps explain his wish to resign as a director and to sell his shares in the company.

Consequent upon Njenga's protest, Endesha's board of directors met on December 14, 1982 to discuss his resignation, his wish to transfer his shares and the charge over his property in favour of Finlay. Njenga attended the meeting. Min 13/.82 of that meeting reads in part as follows:

"Mr Njuguna's (Njenga) property had been charged as security against a loan made to Endesha by Finlays through Finlay Industries earlier in the year whereas on the one hand it could be argued this loan had been repaid and therefore the charge removed, in effect the loan was replaced by an increased indebtedness of a similar amount. Finlays stated that they would not be prepared to remove the charge on Mr Njuguna's property unless this was replaced by adequate security."

Njenga appears not to have had much complaint against the above minute, at least for a while. Another directors meeting of Endesha was held on January 18, 1983. Njenga attended that meeting as well. The charge over his property was again discussed, but it would appear that Finlay imposed terms on Endesha. Min 5/83 of that meeting of that meeting reads:

"By putting a charge on the Kisumu property Finlays would still be inadequately covered and Mr Corse stated that Finlays would lift the charge on Mr Njuguna's (Njenga) property only when all the following conditions were fulfilled:

(i) Second charge on Mr Ross's property as security, in addition to the Kisumu property.

(ii) Completion of six monthly instalments of Kshs 100,000 by June 1983.

(iii) James Finlay PLC, Secretaries, to be mandatory signatory on all cheques issued by Endesha Ltd. It was agreed that the secretaries be authorized to arrange to advise the changes to the bank." (Exhibit 13 refers).

Endesha's directors meeting of January 18, 1983, is the last one Njenga attended. He ceased to be a director of that company at the end of April 1983. That meant that he was entitled to payments of his personal emoluments as a director up to and including April 30, 1983. However, it would appear Endesha refused to pay him anything for the months of March and April 1983. Consequently, on March 16, 1983, Lilian Mwaura, advocate of the firm of K Mwaura and Co advocates, on the instructions of Njenga addressed a demand letter to Endesha Ltd, demanding: salary for March and April 1983, Kshs 69,614.80 pension. Renewal of insurance policy for parcel Ngong/Ngong/2353, arbitrary deductions made in the months of November, December, 1982, January, February and March 1983, from his salary; and refund

of expenses incurred presumably on remains of two company cars he had in his possession and for his use. He also demanded certain unspecified personal documents. To that letter (Exhibit 16), Endesha replied through their advocates, Hamilton Harrison & Mathews, by their letter dated March 30, 1983, admitting Kshs 1,861.60, as salary due for March 1983, Kshs 6,392.50 for April 1983, and Kshs 9,634.80 as the balance of pension; in each case after making certain deductions. They denied the remaining claims. As expected Njenga did not accept the money and consequently he refused to surrender to Endesha the two cars I earlier mentioned.

On April 2, 1983, Njenga filed suit No 1150 of 1983 as aforesaid. On May 23, 1983 and May 24, 1983 Endesha and Finlay respectively filed their memo of appearance through their advocates on record. Endesha must have been infuriated by Njenga's court action against them because on June 20, 1983, they filed suit No 2167 of 1983 against him.

Sometimes in November Njenga unsuccessfully applied by summons to restrain Endesha and Finlay from borrowing and lending on the security of his property. The reason for the dismissal of his application are not relevant here.

The agreed issues in both suits are:

- 1) Whether Njenga suffered loss as a result of the delay in discharging the charge over his property; and if so, quantum of damages payable to him and by whom.
- 2) Whether or not Endesha had at the expiry of 11 months from January 1981 repaid the loan upon which his property had been offered as security.
- 3) Whether Njenga was entitled to the return of his certificate of title respecting his property Ngong/Ngong/2353; the discharge of the charge over his property having been effected sometimes in August 1985.
- 4) Whether Njenga wrongfully impounded and detained motor vehicle KRP 783 and KQL 153.
- 5) If so, whether Endesha is entitled to their return in the same condition they were in on March 31, 1983, when he was supposed to have surrendered them to Endesha. In the alternative whether Endesha is entitled to their value as it stood on the at date.
- 6) Whether Njenga was entitled to terminal benefits.
- 7) If so, how much

The 3rd issue does not now arise as on July 4, 1986, the land certificate respecting parcel No Ngong/Ngong/2353 was returned to Njenga through his advocates on record. Similarly issues (6) and (7) have been resolved Endesha having admitted in the course of the proceedings in this case, owing Njenga salary for March and April 1983, Kshs 63,454.80 as pension, Kshs 3,057 in respect of petrol bills, and Kshs 2,340 being the April 1983 insurance premium for Njenga's life policy. This in effect meant that Endesha abandoned the claim of Ksh 53,820 comprised in paragraph 4 and prayer (b) of their plaint. Njenga on his part abandoned the claim of Kshs 12,000 alleged to be arbitrary deductions from his salary. It was also agreed between the parties that the March and April salary is Kshs 19,000 not Kshs 23,000. Endesha indicated its willingness to pay that money to Njenga.

In his submissions in civil case No 1150 of 1983, counsel for the plaintiff Mr Mwirichia, urged that I find that the plaintiff was not party to the continued retention by Endesha and Finlay of the title documents to his property. In his view there were ulterior motives for the holdover of the plaintiff's property documents. Mr Kwach, for the defendants submitted among other things that the plaintiff had consented to the holdover he is complaining about. He also submitted that Endesha had not repaid the loan Njenga's property secured and therefore, Finlays could not discharge the charge over the plaintiff's property. Further that soon after the loan was fully repaid Finlays took steps to discharge the charge complained of.

He blamed the plaintiff for refusing to pay the legal fees occasioned by the discharge of the charge over his property.

On the first issue, the plaintiff did not demand the discharge of the charge over his property until October 1982. He did not explain why he did not do so earlier the loan the property secured having been repaid by October 1981 according to the evidence. I find that for the period between November 1981 and October 1982 he acquiesced to the continued retention by Finlay of his property documents and even to the delay in discharging the charge over his property. There is however, no evidence on record to show he had consented to his property being used to secure increased indebtedness to Finlay by Endesha. The defendant seemed to be saying there was a variation in the terms of the charge over Njenga's property. Under section 71 of the Registered Land Act, cap 300 Laws of Kenya, the period of the charge may be varied, but only by the registration of an instrument of variation by the parties to the charge. The plaintiff was one of the parties to the charge. There is neither evidence to show he consented to the variation nor that there was an instrument registered varying the period of the charge or any term thereof. For the plaintiff to be taken as having consented to the variation, the defendant ought to have shown that the plaintiff made a clear and unequivocal indication consenting to the variation. Secondly that in doing so he intended the defendants to act on it. There is no evidence on record to show there was such indication. The minutes earlier quoted imply that the plaintiff was not happy with the delay in discharging the charge over his property. Furthermore Mr GR Corse (DW 2) of Finlay Industries admitted that Njenga did not consent to the holdover of the charge over his property.

He further admitted that his company unilaterally refused to discharge the charge over Njenga's property even after the indebtedness it had secured had been fully repaid. That admission rendered nugatory the defence both defendants had put up that the plaintiff had raised no objection to the continued holdover of his title to secure Endesha's indebtedness. Any objection he would have raised, would not have been heeded to by Finlays as was made clear by Mr Corse. They were determined to compel Endesha to reduce their indebtedness with them. The only way they saw of doing it was to refuse to discharge the charge on Njenga's property. Finlays were not entitled to hold over the plaintiff's documents and to refuse to discharge the charge over his property without clear and unequivocal instructions or indication by Njenga to do so. Finlays action was therefore wrong.

Mr Kwach submitted that the charge against Njenga's property was discharged by August 1985, but he refused to go and collect the title documents on payment of the legal charges occasioned by the discharge. To that I say that the charge had been registered for the benefit of Endesha and to some extent Finlays. They are the ones to have paid those charges not the plaintiff. Njenga was merely a guarantor.

Having held that the continued refusal by Finlay to discharge the charge over Njenga's property and their continued retention of the title documents to the property was wrongful, I must now consider who was responsible for it, Finlays or Endesha. Finlays were the chargees. They are the ones who did not want the charge over Njenga's property to be discharged. They held no control over the charge or the title documents. Their obligation under the charge was to pay the amount of the debt Njenga's property secured at the right time which they did. It was not within their power to arrange for the discharge of the charge over Njenga's property. Furthermore the terms of the charge did not stipulate that if Endesha did not pay the unsecured debts to Finlays the charge would not be discharged. Finlays decision to refuse to discharge the charge in question was attended by circumstances of willful and wanton disregard of Njenga's rights and feelings and was without any legal process. If they wanted the terms of the charge to be varied the proper course would have been to approach Endesha and indeed Njenga and the same would have been done by the registration of an instrument of variation executed by the parties to the charge. (Section 71 RLA refers). None was registered. There was nothing Endesha could have done to compel Finlays to discharge the charge and release Njenga's title documents the indebtedness Finlays wanted to secure having been incurred under a different arrangement. For that wrongful act on their part Finlays and not Endesha, are liable in damages.

I must now turn to the issue of the loss occasioned by Finlays wrongful action. The damages claimed are of a continuing nature as accrued from the date the charge was due for discharge or at least from the time Njenga formally demanded that the charge be discharged. The plaintiff contended that he intended to

obtain finances from a bank or financial institution on the security of his aforementioned title, to enable him start a competing business to that of Endesha. There is evidence on record that he registered a business called Middle Fart Agencies, apparently to be jointly run with his wife. He had planned to obtain a loan of Kshs 800,000 out of which he hoped to spend Kshs 700,000 to purchase stocks and after allowing a 20% margin he intended to spend monthly Kshs 30,000 on rents and salaries; Kshs 20,000 on petrol and repairs of motor vehicles; Kshs 35,000 on loan repayment and the payment of interest on the loans; Kshs 10,000 on insurance; and Kshs 5,000 on contingencies. He did not give any indication how he expected to spend a staggering Kshs 20,000 on petrol and repairs per month. Nor did he indicate how many employees he expected to have; their various cadres, the salary he expected to pay each cadre, and their respective levels of expertise. There are also material factors the plaintiff should have elaborated upon but he didn't. Among those are the prospects of getting a loan; the availability of men and women of experience in that type of business who he would have employed to help him in running the business; the basis upon which he arrived at the net figure of Kshs 40,000 a month as profit. There is also one aspect he did not mention, deliberately or inadvertently ie what he has been engaged in since he left Endesha at the end of April 1983.

There are certain factors however, which are in the plaintiff's favour. Brian Granville Ross (DW 1), the managing director of Endesha, described the plaintiff as having been hardworking and committed to his work during the time he was sales director of that company. The company was quite happy with his performance. He together with DW 1 were the brains-child of Endesha. They nurtured it until it grew into a big company, although DW 1 called it a middle sized company. By ordinary standards it is a big company. Although at the time the plaintiff left it, Endesha was in a tumultuous financial state, it was not because it was incapable of supporting itself. Rather it was because of financial mismanagement. Finlays had to interfere to control liquidity flow but not its other operations. One other factor which can be said in the plaintiff's favour is that his property was quite highly valued. It secured Kshs 1,100,000 which was owing to Finlay by Endesha. Finlay felt insecure without it and hence their refusal to discharge the charge over it. They should not complain if they are asked to share with the plaintiff whatever benefits they had enjoyed while wrongfully retaining his title documents. After all they knew the property Endesha had offered them as security for the Kshs 1,100,000 did not belong to the debtor but to a third party, whom although by then was a director of Endesha, was a separate and different entity altogether from Endesha. The plaintiff occupied quite a peculiar position at Endesha as a sales director. It meant that he was directly concerned with the company's customers and suppliers. Perhaps it was on that he was building his confidence on when he said "If you are capable of selling you will not lack anybody to sell goods to. "Although that statement is an oversimplification of the complexities of market trends, the plaintiff, I am satisfied was capable of both getting some financial assistance on the security of the property in issue and was capable of making some profit in the business he had intended to start. The facts he gave however, are not sufficient to support a mathematical calculation of the exact amount of loss he may have suffered.

In a situation like the one in the present case a court ought to, and must try to assess on a balance of probability what earnings or profits a plaintiff may have lost and arrive at a reasonable estimate. Mr Kwach, counsel for the both defendants, urged that the plaintiff not having established with particularity the loss he suffered or the basis upon which he made the claim, he was merely speculating when he said he expected to make Kshs 40,000 profit per month. He therefore, urged me to dismiss the claim for damages. Mr Mwirichia, counsel for the plaintiff, thought otherwise. In my view the plaintiff in suggesting that he expected to make a net profit of Kshs 40,000 per month overlooked certain contingencies some which I have enumerated above. Bearing that in mind the figure Kshs 40,000 has been grossly exaggerated and is totally unrealistic. In his submissions Mr Mwirichia appears to have realized this because he suggested that the plaintiff was capable of making at least Kshs 8,500, the equivalent of what he was earning while he was working as a director of Endesha. The plaintiff effectively left Endesha at the end of April 1983. He had by then not got back the title documents to his property Assuming that he had got the charge over his property discharged by the time he left, it was unlikely that he would have managed to get a financier to lend him the money he wanted to start his business within a month. Even if that was possible, the requirement for land control board consent to charge his property would have needed sometime to fulfil. The registration certificate of his business (Exhibit 4) shows that he intended to carry on his intended business at Ngong Hills. He has shown the plot number suggesting that he had ready business premises. However, that notwithstanding the chances were that the business would not have

taken off within the first three or so months after his departure from Endesha. One other factor to consider is that it takes time for people to become aware of a new business enterprise. Even when some people became aware of it unless the proprietor decides to undercut the existing businesses by under pricing his commodities many people, particularly businessmen would be reluctant to leave their existing suppliers of goods to turn to a new entrepreneur whose general demeanor they do not know. Bearing all the foregoing in mind, it was highly unlikely that the plaintiff would have initially made much money. In the foregoing circumstances and in absence of specific data to enable me arrive at some accurate mathematical figure as damages, it is right in my view to pluck a figure from the air which I consider reasonable to award the plaintiff as damages for the loss he might have suffered.

Allowing for a period of four months for preparation, and considering what I said earlier regarding the initial months in business Kshs 5,000 per month for the remaining four months of 1983 is reasonable. It is my view that after the initial four months in business the likelihood of business picking up to give rise to an increased profit margin should not be under estimated. I will accordingly allow for a 50% increase in the turnover and a proportionate increase in average profits from January 1, 1984 to June 30, 1986, both months inclusive at the rate of Ksh 7,500 per month, net. The total due to the plaintiff as general damages is therefore as under:

(1) First 4 months in business (Kshs 5000 x 4)	Kshs 20,000
(2) From January 1, 1984 to June 30, 1986 at the rate of Kshs 7,500 per month for 30 months	Kshs 225,000
Total	Kshs 245,000

Issues No 4 and 5 remain for determination. Njenga admitted having refused to release to Endesha motor vehicle KRP 783 and KQL 153 upon Endesha's refusal to pay him his dues in full. Both the refusal by Endesha to pay Njenga his dues and Njenga's refusal to release the two motor vehicles were wrongful. In neither case does damages flow both parties having mutually provoked each other.

As to whether Endesha is entitled to the return of the two motor vehicles in the same condition as they were on March 31, 1983 that would be an impossibility considering the fact that their condition has deteriorated. Mr Kwach described them as being a dilapidated mass of iron. The extent of their wear and their value as at March 31, 1983 was seriously contested. Endesha argued that they had insured the two motor vehicles in the sums of Kshs 140,000 and Kshs 20,000 respectively. Njenga argued that there was no valuation done on the two motor vehicles in March 1983. Considering the evidence on record on a balance of probabilities I am inclined to accept that the motor vehicles were insured for Kshs 140,000 and Kshs 20,000 respectively. That fact was not challenged. I accept it to be the value of the two motor vehicles as at March 31, 1983. The figures not having been given to the insurance company in anticipation of these suits I consider them to be reasonable. By an order of this court the Automobile Association of Kenya valued the two motor vehicles soon after the hearing of this case started. The two motor vehicles were assessed at Kshs 70,000 and Kshs 4,000 respectively. The difference is the depreciation which totals Kshs 86,000. This Njenga has to pay Endesha. He will then retain the two motor vehicles. Endesha to transfer the log book and sign the necessary transfer documents to effect the transfer of them to Njenga.

The upshot of the foregoing is that there will be judgment:

- (1) (a) For Njenga as prayed in prayers (a) (b) (c) and (d) of the amended plaint in suit No 1150 of 1983 general damages under prayer (c) assessed at Kshs 245,000 to be paid by Endesha. Costs will be on that figure with interest on the aggregate figure at court rates to accrue from today's date.
- (b) Kshs 86,851.80 in the counterclaim in suit No 2167 of 1985, costs on that figure with interest on the aggregate figure from the date of filing the counterclaim until payment in full.

(2) For Endesha in the sum of Kshs 160,000 plus costs and interest on the aggregate figure from the date of filing suit No 2167 of 1983 until payment in full.

The effect of the foregoing is that Njenga will pay to Endesha a sum of Kshs 72,148.20. Endesha will in turn effect the transfer of motor vehicles KRP 783 and KQL 153 to Njenga. Finlay will pay to Njenga Kshs 245,000 costs and interest on the figure.

Orders accordingly.

Dated and delivered on 24th September, 1986.

S F O BOSIRE

JUDGE