



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 70 OF 2008

GABRIEL NJUGUNA NJOROGE.....PLAINTIFF

VERSUS

DAVID LOBONGON TIOKO.....DEFENDANT

JUDGMENT

1. The plaintiff commenced the suit herein vide a plaint dated 2/9/2008 which was filed on 3/9/2008. In that plaint he claimed for the following orders:-

- a. A declaration that the plaintiff is a sole proprietor of the suit property and that the defendant is a trespasser and an eviction order be issued and payment of rent from May, 2004 till judgment date and refund of rent paid by the 2 tenants till date of judgment.**
- b. An injunction order restraining the defendant, his agents and or his servants or any other person claiming through the defendant from interfering with the plaintiff's, his tenants, agents or servants peaceful occupation or dealing in any manner with the suitland.**
- c. Costs and interest of the suit and interest in (a) and (b) above.**

PLAINTIFF'S CASE

2. It is the plaintiff's case that he is the proprietor of **Plot No. 331 – Lodwar Municipality**, which was initially **Plot No. 357 – Turkana County Council** (herein referred to as the "suitland"); that on or about **20/11/2000** the plaintiff and the defendant entered into a sale agreement whereby the plaintiff was to sell the suitland to the defendant but the agreement was revoked by the plaintiff in **November, 2003** after the defendant substantially defaulted in paying the purchase price as agreed.

3. It is the further averment of the plaintiff that the parties subsequently agreed verbally that the defendant would be a tenant and the deposit of **Kshs. 80,000/=** would be converted into rent with effect from **November, 2000**. It is alleged that on or about **20/11/2000** the defendant and his agents unlawfully and without the consent of the plaintiff invaded the plaintiff's suit premises and locked doors thereby occasioning the plaintiff and his tenants inconvenience, loss and damage and the defendant has by means of force stayed in the suit premises and not paid any rent since **May (inclusive) 2004** at **Kshs.2500/=** per month.

4. It is also alleged that the defendant is also collecting rent from 3 other tenants at **Kshs.8,000/=**. The plaintiff avers that he is the sole proprietor of the suitland and the defendant has no colour of right, title, or interest to the suitland.

DEFENDANT’S DEFENCE

5. The defendant filed a defence dated **29/9/2008** which was later amended pursuant to leave of this court granted on **18/3/2014** which leave period was extended on **4/8/2015**. The amended defence and counterclaim was filed on **23/7/2014**. In that defence and counterclaim, the defendant denied the plaintiff’s claim and insisted that he is the “legal and lawful” owner of **Plot No. 331 – Lodwar Municipality** having legally purchased the plot from the plaintiff on **20/11/2000**. The defendant avers that the agreement for sale of the plot to him has never been revoked and that the parties never entered into or verbal lease agreement with the plaintiff. As he is the legal owner of the premises, the defendant claims, he is entitled to collect rent from tenants on the premises.

6. In addition the defendant claims that he has substantially developed the suitland by putting up permanent commercial premises which are occupied by the defendant’s tenants have the plaintiff cannot be heard to say that he developed the premises. The defendant further pleads that the suit is grossly incompetent as the plaintiff has filed the same without having paid costs in **Kitale CMCC No. 507 of 2004**.

7. In the counterclaim, the defendant reiterates the contents of the defence and prays for specific performance of the agreement dated 20/11/2000 over plot No. 357 – Lodwar Municipality and that the defendant be declared the legal owner of Plot No. 331 – Turkana County.

ANALYSIS OF PLEADINGS AND EVIDENCE

8. The plaintiff filed his own statement on **5/7/2017** and followed it up with a further statement filed on **10/7/2017**. The plaintiff filed two lists of documents, one dated 27/5/2009 and filed on 15/7/2011 and another dated 10/7/2017 and filed on the same date. The defendant filed his statement on 13/6/2017 and the same was accompanied by the defendant’s list of documents dated 8/6/2017. Both parties testified at the hearing which took place on 11/7/2017 and none called any witness. They adopted their written and filed statements and produced documents in evidence.

9. The plaintiff stated that the defendant was his only tenant on the premises before they entered into the sale agreement. After the defendant failed to pay, he treated him as a tenant to date. There was produced evidence in the form of **D. Exhibit 1**, a letter of allotment dated 15/2/2007 showing that the plaintiff was allocated the plot by the County Council of Turkana. The plaintiff produced original receipts issued by the County Council of Turkana and Lodwar Municipal Council. Receipt No. 16029 was issued by the County Council of Turkana for Kshs.350/= on 7/2/1989 being plan approval fee; Receipt No. 11123 dated 15/12/2003 for Kshs.2000/= was issued by the Lodwar Municipal Council being acknowledgement of payment of Kshs.2000/= plot rent for year 2000 and year 2001. Receipt No. 004137 dated 15/2/2007 was for payment of Kshs.15,000/= being charges for allotment letter and seal; Receipt No. 15078 dated 6/11/2012 is for plot rent for the years 2004 – 2012, Kshs.9000/=. Receipt No. 11014 is for plot rent for year 2002 – 2003, being Kshs.2000/=. A copy of the letter changing the number of the suitland from 357 to 331 was produced as **“P. Exhibit 3.”**

10. There is no doubt then that the suitland was allocated to the plaintiff and that the allocating authority still recognizes the plaintiff as the proprietor of the land to date. The plaintiff also produced a carbon copy of the agreement dated 20/11/2000 as **“P. Exhibit 5”**. It showed that the parties agreed on the purchase price of Kshs.200,000/= out of which the defendant was to pay Kshs.80,000/= as deposit.

11. According to the agreement, the balance of the purchase price was to be paid at intervals of three months at the rate of Kshs.10,000/= until the balance was cleared. Transfer of the plot was to be done immediately the balance was fully cleared. The plaintiff was to meet rent charges to the Municipal Council till the transfer was done. The agreement is signed by the plaintiff and the defendant in the presence of three persons whose details and signatures appear alongside their names.

12. The plaintiff’s letter dated **20/1/2004** demanding payment of rent was produced as **“P. Exhibit 6.”** It attaches receipts for rents “paid up to October, 2003” and an invoice for further rent upto January, 2004.

It also seeks to clarify the amount of rent payable with effect from February, 2004. “**P. Exhibit 7**” - “**P. Exhibit 10**” are copies of receipt Nos. 685, 686, 687, all totalling to **Kshs.54,400/=**. These copies of receipts were still intact in an aged receipt book which was produced by the plaintiff. Photocopies were compared with the original copies in the book and the original book was returned to the plaintiff. There is also a copy of a Cheque dated **15/12/2003** for **Kshs.45,600/=** addressed to the name of the defendant No. 000457. It is a Banker’s Cheque. The plaintiff testified that the defendant had paid **Kshs.100,000/=** for the plot which the plaintiff refunded by way of conversion of the portion of the purchase price paid into monthly rent for the defendant’s stay on the premises since the execution of the contract and by way of the refund cheque “**P. Exhibit 10**” mentioned hereinabove.

13. The certificate of posting No. 1714 dated 8/5/2004 was produced and marked “**P. Exhibit 11.**” It was produced as evidence that the cheque was dispatched to the defendant. A letter dated 6/5/2004 was put in as evidence, “**P. Exhibit 12**”. It reminds the defendant that he had not paid his rent as at its date and gives an account of the defendant’s rent arrears dating back from November, 2003. It demands immediate payment of rent and notes that the defendant is in the process of putting up illegal structures on the suit premises, by reason of which the plaintiff expressly terminates the defendant’s tenancy with effect from 7/5/2004, requiring the defendant to remove any of his possession that may have been in the premises. Soon thereafter, the plaintiff avers, the defendant brought the rent arrears and the plaintiff issued him with a receipt of Kshs.14,200/=.

14. A rent agreement between the Turkana Teachers Burial and Benevolent Scheme and the plaintiff dated 7/5/2004 was produced as “**P. Exhibit 14**”. It is the plaintiff’s case that he leased the one building consisting of two rooms on the premises to the lessee at the cost of Kshs.3000/= per month with effect from May, 2004. Another rent agreement between the plaintiff and Michael Ekai Aremon dated 11/6/2004 was produced and marked “**P. Exhibit 15.**” By that agreement, the plaintiff states. He leased half of his Plot No. 353 to the lessee for three years at the sum of Kshs.5000/= with effect from June, 2004. That in total is the evidence the plaintiff produced in court in proof that the agreement between the parties was revoked and that the defendant remained on the premises as a tenant of the plaintiff.

15. On his part the defendant filed a very brief statement on 13/6/2017 stating that he is the legal owner of the suitland having purchased the same from the plaintiff and that the allegation that he entered into an agreement with the plaintiff to be his tenant is false. In his oral testimony the defendant averred that after the payment of the initial deposit of Kshs.80,000/=, he paid Kshs.10,000/= on 24/7/2001, and another similar sum on 10/9/2001; that when he brought the plaintiff the third sum of Kshs.10,000/= on an unspecified date, the plaintiff refused the money and has never accepted any more money from the defendant ever since; that the plaintiff complained of having sold the plot for a small sum to him; that he has always been ready to pay the plaintiff and that there was never any written agreement between the parties revoking the sale agreement of 20/11/2000 or one making him a tenant again.

16. The defendant’s version of events relating to the alleged refund by the plaintiff is that the plaintiff’s wife brought to him “**P. Exhibit 10,**” the cheque dated 15/12/2003 on an unspecified date; that he told the plaintiff’s wife to return the cheque to the plaintiff but she refused and went away; that thereafter the defendant did not bank the cheque; that he remained with the cheque until the hearing when he produced it as “**D. Exhibit 1.**”; and that he has never paid to the plaintiff any rent since the sale agreement and the plaintiff has never given the defendant any rent receipt.

17. The defendant avers that he has built a permanent structure a bar, on the premises and some other temporary structures hosting a butchery and a pool game room. He produced photographs of the developments on the premises as evidence. He averred that he has been collecting rent from the tenants on the premises including the Turkana Teachers Burial Benevolence Fund and one Lucy Ng’ang’a. He produced a receipt book as “**D. Exhibit 3.**” It showed rent receipt (copies) for the period 10/3/2015 to 31/10/2015 from various tenants. No copies of receipts for previous years were produced in evidence by the defendant.

DETERMINATION

18. It is not in doubt that the plaintiff and the defendant entered into a sale agreement dated 20/11/2000. Though the defendant did not produce the original agreement, the plaintiff stated, which is not denied, that the defendant remained with the original after the execution thereof. The plaintiff produced a carbon copy of the agreement.

19. The issues for determination in this suit are as follows:-

1. Was there effective revocation of the agreement dated 20/11/2000 by the plaintiff by reason of breach on the part of the defendant?

2. Whether the plaintiff is entitled to the remedy sought in the plaint and the defendant in the counterclaim?

3. Who should bear the costs?

1. Was there effective revocation of the agreement dated 20/11/2000 by the plaintiff by reason of breach on the part of the defendant?

20. The plaintiff's stance is that he is still the sole proprietor of the suitland since he revoked the agreement between him and the defendant. To revoke is defined in the **Blacks Online Law Dictionary** as **"to call back; to recall; to annul an act by calling or taking it back."**

21. To "rescind" has been defined in the Blacks Online Law Dictionary as **"to abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party."**

22. "Rescission" is therefore a party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach. Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre-contractual position.

23. Therefore the plaintiff is saying in his own language that he rescinded the sale agreement for breach by the defendant.

24. As at the year **2003**, the defendant had paid only Kshs.100,000/= out of the total purchase price of Kshs.200,000/=. He does not deny that fact. He does not insist that he ever paid any amount beyond Kshs.100,000/=. He is presumed to agree with the plaintiff on this point. The question is whether he was in breach of the agreement. His agreement with the plaintiff stated that the defendant would clear the balance of Kshs.120,000/= by paying Kshs.10,000/= every three months with effect from 20/11/2000.

25. If the defendant had paid Ksh 10,000/= every month, the defendant ought to have paid to the plaintiff the aggregate sum of Kshs.120,000/= by November 2003. That was sufficient to clear the balance of the purchase price.

26. The defendant seems to acknowledge that he had paid only Kshs.20,000/= during the period following his payment of the initial deposit of Kshs.80,000/= to the plaintiff. The plaintiff, upon the expiry of the period of time the defendant needed to clear the balance, converted the deposit of Kshs.80,000/= and the further payment of Kshs.20,000/= (being a total sum of Kshs.100,000/= that the defendant had paid as purchase price) into rent for the period that the defendant had been in occupation of the premises during the pendency of the agreement. The receipts labeled **P. Exhibit 7**, **P. Exhibit 8** and **P. Exhibit 9** are evidence of the plaintiff's action. So is **"P. Exhibit 10"** which the Banker's Cheque for Kshs.45,600/=.

27. There are receipts dating back to the year 2004 showing that rents were received from the defendant totaling to Kshs.54,400/=. A cheque for Kshs.45,600/= was also made out in the name of the defendant. It was dated 15/12/2003. These receipts and the cheque total to the value of **Kshs.100,000/=** which the plaintiff acknowledged as having been paid to him by the defendant.

28. The defendant, upon receiving the cheque sent by the plaintiff, merely kept it. It does not matter which method of conveyance was used; the defendant avers that it was brought to him by the plaintiff's wife; however, he never banked it. He never returned it to the plaintiff. He never paid any more money to the plaintiff, as purchase price after the cheque was received. He never wrote any letter to the plaintiff. He seems not to have ever tried to engage the plaintiff in any form of communication regarding the transaction.

29. This silence seems strange; taken in conjunction with the plaintiff's assertion that the defendant "unlawfully and without the consent of the plaintiff, invaded the plaintiff's suit premises and thereby locked doors", it puts the defendant into the awkward position of explaining why he stayed on the premises without paying rent after the rescission of the agreement.

30. The plaintiff's action of rescinding the agreement and demanding rent occurred after the date on which the last instalment payable by the defendant, if he had kept to the payment schedule, was due; The defendant does not have any evidence that the plaintiff refused to accept money intended to be further payment of consideration. He also does not show in this suit that during the period between November 2000 and January 2004 he in any manner expressed willingness to pay to the plaintiff the balance of the purchase price before the plaintiff rescinded the sale agreement. If the agreement of sale between the Plaintiff and the Defendant was frustrated by the plaintiff as alleged by the Defendant, then the Defendant had the option of filing a suit to enforce the agreement by seeking orders of specific performance, yet he never did so.

31. It has been held before in numerous cases that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.

32. In this case the defendant was bound to pay as per the agreement yet he did not do so. This was a simple agreement in which the plaintiff's obligation was to effect transfer upon full payment and nothing more. The agreement was a simple contract based on pure trust. Though time was not expressed to be of essence in the body of the contract, where numerous instalments fell due and the defendant omitted to pay, the defendant was clearly in breach from the date of the first omission.

33. If the defendant never paid the balance of the purchase price as required by the sale agreement that is by November 2003 which we will call the due date, what was the resultant relationship between him and the plaintiff thereafter?

34. The plaintiff states that since 20/11/2004 the defendant has by use of force stayed in the suit property and has not paid rent since May, 2004 and he has also been collecting rent from two other tenants on the premises. That must be so because after the due date, the plaintiff rescinded the agreement and demanded rent from the defendant. The plaintiff's letter dated 20/1/2004 which demands rent from the defendant was produced as evidence.

35. From the above analysis the only conclusion this court can arrive at is that the defendant stayed on the suit premises by use of force as pleaded by the plaintiff.

36. Though the defendant states that there was no agreement signed between him and the plaintiff revoking the agreement of 20/11/2000 and that there was no oral agreement to revoke the agreement dated 20/11/2000, there was no requirement in the sale agreement for notice, or for a further agreement revoking the agreement. The evidence points to the fact that the defendant breached the agreement by his failure to pay the full purchase price within the period envisaged in the agreement and the plaintiff, upon this breach, revoked the agreement. The defendant gave no evidence to suggest that the plaintiff can be faulted for rescinding the agreement.

37. The plaintiff has produced a copy of the cheque which he sent the defendant as a refund signaling the revocation of their agreement. Surprisingly, the defendant firmed up the plaintiff's evidence by producing

the original banker's cheque the plaintiff sent, unbanked. It is clear that since the cheque was not banked the money was not reclaimed by the plaintiff and neither could it revert automatically back to his account. It was not alleged by the defendant that the money was claimed by the plaintiff or that it reverted to him. It can be safely presumed that the plaintiff was, by this manner of accounting, left with not a single cent of the money that the defendant had paid to him as purchase price.

38. I find that the defendant is not justified in maintaining that the suit premises are his by virtue of the agreement dated 20/11/2000 for the sole reason that he failed observe the sale agreement terms and consequently the plaintiff exercised his discretion and revoked the agreement.

39. After the agreement was effectively revoked by the plaintiff, the defendant ceased to have any interest in the suitland under the agreement. The rescission reverted the parties to their former status as landlord and tenant. I therefore find that on a balance of probability the plaintiff has proved that the agreement dated 20/11/2000 had been effectively revoked by the plaintiff upon breach thereof by the defendant.

2. Whether the plaintiff is entitled to the remedy sought in the plaint and the defendant in the counterclaim?

40. The plaintiff seeks a declaration that he is the sole proprietor of the suit property and that that defendant is a trespasser. He also seeks an eviction order and payment of rent from May, 2004 till judgement date and refund of rent paid by 2 tenants till date of judgment. He also seeks an injunction restraining the defendant or his agents from interfering with the plaintiff's occupation of the suitland.

41. In his counterclaim, the defendant seeks orders of specific performance and that he be declared the legal owner of Plot Number 331 Turkana County. In the case of **Mukika Chai Dzombo vs Coast Development Authority (2014) e KLR**, this court observed as follows:

“Instead, the Defendant is asking for specific performance of the contract. It is trite law that an order of specific performance can only succeed where a party shows that he has complied with all the terms of the contract, which the Defendant has not done. Specific performance is an equitable remedy that compels a party to complete a contract according to the precise terms agreed upon so that under the circumstances, justice will be done between the parties.”

42. The payment of the balance of the purchase price by the Defendant was to be done within a specific period of time. He not only failed to effect payment but he also failed to justify such non-payment during the hearing of the suit.

43. In the case of **Nairobi Civil Suit No. 1512 Of 1998 Thrift Homes Limited Versus Kays Investment Limited** the court quoted the decision of the Court of Appeal in **Civil Appeal No. 165 of 1996** between **Gurdev Singh Birdi and Marinder Singh Gatora and Abubakar Madhbuti**, in which **Tunoi, JA** (as he then was) said:

“However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.

44. In that case of the court went on to observe as follows:

“In this case, the plaintiff indicated that it was ready and willing to complete the transaction but it did not show how it would comply. The plaintiff has not even shown that it attempted to pay the defendant the purchase price and was rejected. It is not enough to state that you were ready to comply and willing to comply in a letter. This statement is echoed in the case of Nabro Properties Limited –vs- Sky Structures Limited & 2 others (2002) 2 KLR 300 where the Court held that, “A party seeking specific performance must show and satisfy court that it can comply and be ready and able a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant”.(Emphasis mine)

45. There was not even a single letter that the defendant sent to the plaintiff in the instant case signaling an intent to complete the agreement. In the case of **Nyeri Civil Appeal NO. 200 OF 2011 Rajan Shah T/A Rajan S. Shah & Partners versus Bipin P. Shah**, it was held as follows:

“The standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions* Lord Denning said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.”

46. In this case if I were to allow the orders of specific performance, I would be giving my assent to occupation of the plaintiff’s premises by the defendant and assist the defendant to perpetuate what he did illegally. In the light of the previous decisions cited above, it would not be just in this case to order specific performance in favour of the defendant for the sole reason that he has not paid the balance. He is therefore not entitled to an order of specific performance.

47. The plaintiff owned the land before leasing it to the defendant; he owned the land before the parties entered into a sale agreement. Since this court has found that the sale agreement was effectively rescinded by the plaintiff over the defendant’s breach, there is no interest that could have passed to the defendant vide the sale agreement. The parties reverted back to their old relationship immediately the agreement was revoked in the year 2004.

48. The demand by the plaintiff vide the letter dated 20/1/2004 that the defendant pays rent in respect of the suit property signalled the end of the sale transaction between the parties. However the defendant failed to pay rent. If the defendant had commenced paying rent he would have been regarded as a tenant. The plaintiff testified that the defendant has never paid any rent since May, 2004. The defendant has confirmed that the only monies that he paid was Kshs.100,000/= and no more. This was converted into rent from the November, 2000 and the plaintiff issued receipts over a portion of this money converting it into rent. The rest was refunded to the defendant vide a banker’s cheque written in the defendant’s name which the defendant failed to bank.

49. Further, the defendant went a step further and, as he has admitted, collected rent from other tenants and also erected permanent and temporary structures over the said land notwithstanding the plaintiff’s warning to him not to erect such structures in a letter dated **6/5/2004**.

50. It is clear that the defendant does not regard himself as the plaintiff’s tenant. Now that his claim for

ownership of the land has failed he cannot be regarded as a tenant. I find that from the time that the defendant ceased to pay rent and purported to be a landlord, his presence on the said land ceased to be that of a tenant but a trespasser since the sale agreement had been rescinded. Subsequently, the termination of his tenancy was communicated to the defendant vide “**P.Exh12**”, the letter dated 6/5/2004 which stated that such termination took effect on 7/5/2004. He has however held on without the plaintiff’s consent to date.

51. The plaintiff is entitled to the rent that the defendant collected from the other tenants as the defendant has admitted doing so over the years. In the plaint the defendant’s rent was said to be Ksh.2500/=. The two other tenants on the premises were said to be paying Ksh.8000/= to the defendant every month. The defendant’s evidence shows that even greater sums were paid to him by tenants. The court will confine itself to sums claimed. The sums claimed by the plaintiff were not controverted by the defendant. They would be otherwise what can be termed as mesne profits. The **Concise Oxford English Dictionary 12th Edition** defines mesne profits as: - “*the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.*”

52. I therefore find that the plaintiff is entitled to the aggregate sum of rent owed by the defendant in respect of his own occupation of the premises for the period of between May, 2004 and September, 2017 a period of 160 months. The plaintiff is therefore entitled to the monthly sums quoted above multiplied by this number of months which totals to:-

1. Kshs.400,000/= in respect of the premises the plaintiff occupied.

2. Kshs.1,280,000/= in respect of the rent that the defendant received from other tenants.

(3) Who should pay costs?

53. The suit was occasioned by the defendant’s refusal to regularize his stay on the premises by paying rent to the plaintiff after the agreement dated 20/11/2000 was revoked; the defendant shall therefore bear the costs of this suit.

There shall be judgement for the plaintiff against the defendant in the following terms:-

1. A declaration that the plaintiff is the sole proprietor of suit premises and that the defendant is a trespasser thereon;

2. An order that the defendant do the plaintiff give vacant possession of the suit land immediately and in default of vacant thereof the defendant be evicted from the premises;

3. A permanent injunction restraining the defendant, his agents or servants or any one claiming under him from interfering with the plaintiffs’ or his tenants’ peaceful occupation of the premises or dealing in any manner with the suitland.

4. The defendant shall pay to the plaintiff:-

a. Kshs.400,000/= being the equivalent of rent that he should have paid to the plaintiff from May, 2004 till date of judgement.

b. Kshs.1,280,000/= being the equivalent of rent that should have been paid by the tenants to the plaintiff but which the defendant collected from the said tenants between November 2003 and September 2017.

5. The defendant shall bear the costs of the suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of September, 2017.

MWANGI NJOROGE

JUDGE

28/09/2017

Before – Mwangi Njoroge Judge

Court Assistant – Picoty

Mr. Bisonga for the Defendant

Ms. Mufutu holding brief for Baronga for Plaintiff

COURT

Judgment read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

28/09/2017