



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 3497 OF 1981

PETER NJOROGE PLAINTIFF

VERSUS

ESS BUILDERS & COMPANY DEFENDANT

JUDGMENT

In 1971, the plaintiff acquired a piece of land (LR 209/7941) at Kyuna Estate, Nairobi. He decided to build a house on the plot and obtained a loan from the East African Building Society for that purpose. He approached a firm of Architects called Harbans Singh Associates who apparently were his friends and agreed to act as Architects for no fee. The first contractor engaged was a firm called Sancreet. They commenced work on February 20, 1975 and built up to the first floor. The plaintiff did not pay them so they abandoned their effort on July 26, 1975. They had done about 25% of the work on the house. The plaintiff then signed a contract for the completion of the house with a firm called Interior Decorators, Harbans Singh Associates continuing to be the Architects. They commenced on October 1, 1977 and worked till about March, 1978 adding some 12% of the work to the house to what Sancreet had done ie a total of some 37%.

They were paid by the plaintiff but unfortunately then went into liquidation and discontinued. The plaintiff says that when they discontinued they had left a shed with some materials in it on the site. The defendant agrees that the shed was there but says there were no materials of any kind in it.

It fell upon the defendant to take over the completion of the house from interior decorators. The defendant firm signed a contract with the plaintiff on May 26, 1978 to complete the house at a price of Kshs 350,000 again with Harbans Singh Associates as Architects. The effective partner in the firm for that job was Mr Gurdan Singh Flora who took over from his partner Mr Harbans Singh. The contract is a standard form building contract with an appendix for the application of disapplication of certain clauses. The date for practical completion is stated to be "October 30, 1978."

The defendant commenced work in June 1978. The architect Mr Flora, issued his first certificate for payment on July 18, 1978. It was for Kshs 100,000. It was not paid promptly. However the plaintiff did pay installments as follows –

August 4, 1978 - Kshs 21,000

September 9, 1978 - Kshs 30,000

December 6, 1978 - Kshs 46,000

Kshs 97,000

On May 16, 1979, the Architect issued a second certificate for payment of Kshs 180,000. Again the plaintiff did not pay promptly, but did pay two installments as follows –

May 23, 1979 - Kshs 8,000

July 5, 1979 - Kshs 30,000

Kshs 38,000

So that by July 5, 1979, the plaintiff had paid Kshs 97,000 plus Kshs 38,000 a total of Kshs 135,000.

On July 12, 1979 the defendant wrote to the architect with copy to the plaintiff as follows:

“Ref. Construction of the House of Mr Peter Njoroge at Kyuna Estate

I would like to draw your kind attention on the above mentioned job which is suffering due to lack of payment. You have issued 1st certificate of payment of Kshs 100,000 on July 18, 1978, he has paid us out of it only Kshs 97,000 up to December 1978, even this amount he has paid in three installments.

You have issued us 2nd certificate of payment of Kshs 180,000 out of this amount he paid only Kshs 30,000. He gave us a cheque of Kshs 25,000 which failed to clear the bank.

Under the above mentioned circumstances we can no longer go on investing in the construction of the above mentioned house.

Moreover prices of all building materials have gone up and any delay in construction was because of payment not paid in time. We are left with no alternative but to stop the work till such time he can arrange for finance and a guarantee for the balance left.

Your advice is always welcome. We allow him seven days notice failing which we may take recourse to legal action and also send him an extra bill for difference in cost of materials and labour charges to higher prices.”

Mr Flora testified that as a result of this letter a meeting was held on July 13, 1979 at his office with the plaintiff and Mr Channa Senior of the defendant firm. The plaintiff explained that he had difficulty with finances and urged the defendant to complete the house so that he could rent it and pay the contractor. The contractor agreed and in fact completed the house in October 1979.

Mr Channa Senior of the defendant firm informed Mr Flora in November 1979 that the house was complete. Naturally he was anxious not to hand over the keys until he was paid or at least had security for payment. There was another meeting in Mr Flora's office at which accounts were taken. Mr Flora recalls that some Kshs 211,000 or thereabouts were due to the contractor. He thought that a formal agreement for handing over the house and making the final payment should be drawn up by a lawyer.

It is not in dispute that Mr Channa and the plaintiff then went to Mr Channa's Advocate, Mr S Sharma who prepared the following document which was duly signed by the plaintiff –

“IRREVOCABLE LETTER OF AUTHORITY

I Peter Njoroge of post office box number 73445, Nairobi in the Republic of Kenya being the registered owner of plot LR 209/7941 Kyuna Estate Nairobi together with the buildings and improvement being thereon undertake to pay Kshs 211,300 (two hundred eleven thousand three hundred Kenya shillings only) to M/S Ess Builders & Company in respect of balance of payment for work done and materials supplied at the aforesaid property during 1978/1979.

In consideration of the above agreement and in further consideration of the giving of occupation of the said premises to Mr Peter Njoroge. Mr Peter Njoroge shall pay the said sum of Kshs 211,300 as follows:

MODE OF PAYMENT:-

As to Kshs 164,900 to be paid to M/s Ess Builders & Company on or before December 21, 1979. The said Mr Peter Njoroge herewith deposits a bill for Kshs 164,900 as a collateral security. As to balance of Kshs 46,400 on or before April 30, 1980. In pursuance of the aforesaid agreement a bill for Kshs 164,900 and other cheques for Kshs 46,400 are being herewith deposited with S Sharma, Advocate. I further undertake and confirm that the above bills and cheques will be met on their respective due dates.

Dated at Nairobi this 8th day of December, 1979.”

Before Mr Channa handed over the keys to the plaintiff, the plaintiff signed another document which reads as follows –

“Re: Occupation Certificate LR No 209/7941 Kyuna Estate, Nairobi

I Peter Njoroge hereby confirm that I have today received the possession of the above house and write to confirm that good material has been used and the house has been constructed to the best of my satisfaction.

I further confirm that no work of whatsoever is to be carried out on the said premises. I admit that as at today I owe yourselves Kshs 211,300 (two hundred eleven thousand and three hundred Kenya shillings only) and shall clear it in two major installments, one due on December 21, 1979 for Kshs 164,900 (one hundred sixty four thousand and nine hundred Kenya shillings only) and the balance to be paid on or before April 30, 1980.”

To secure payment of the above amounts the plaintiff gave the defendant four postdated cheques –

1. **165,000 dated December 21, 1979**
2. **15,000 dated January 20, 1980**
3. **15,000 dated February 20, 1980**
4. **16,300 dated April 25, 1980**

They were all dishonoured on presentation. In respect of (2), (3) and (4) separate cases were filed in the Magistrates court by the defendant and judgment obtained in respect of all of them.

In respect of the cheque for Kshs 165,000 the defendant filed suit No 22 of 1980 in the High Court. His plaint dated January 4, 1980 stated:

“The plaintiff’s claim against the defendant is for the sum of Kshs 165,000 payable by the defendant as the drawer of one cheque number CD 089755 dated December 21, 1979 for Kshs 165,000 drawn on Bank of Credit and Commerce International Nairobi Branch payable to the order of the plaintiff. The said cheque when duly presented on its due date at the bank concerned was dishonoured and returned unpaid with the remarks “Refer to Drawer” R/D whereof the defendant had due notice of dishonour. Alternatively notice of dishonour was dispensed with as the said bank had no funds of dishonour to meet. The particulars of the said sum are within the knowledge of the defendant.”

A defence was filed on February 29, 1980 by Hayanga & Co, who then acted for Mr Njoroge. The relevant parts of it read as follows:

“2. The defendant denies being indebted to the plaintiff in the manner alleged by the plaintiff. The cheque referred to in the plaint was drawn by the defendant solely and only for the accommodation of the plaintiff and there was no consideration therefore. In the premises the defendant was not and is not liable on the said cheque.

3. Further and in the alternative, the defendant states and will aver at the hearing of this suit that on or about June 2, 1978 it was agreed between the plaintiff and the defendant that the plaintiff would construct and finish an already halfway built house for the defendant LR No 209/7941 Kyuna Estate, Nairobi.

4. It was a term of the said agreement express and or implied and understood by both parties that the plaintiff would be paid periodically on presentation of Certificates of Architect and Valuer from and by the East African Building Society Limited, for a total of Kshs 350,000 balance being paid at completion.

5. It was further agreed between the parties that the building would be constructed in a proper and workmanlike and completed and handed over after the plaintiff has obtained certificate of occupation from the City Council of Nairobi as is required by law and both to be handed over to the defendant on or before October 31, 1978.

6. In partial compliance with the said agreement the plaintiff presented Architects Certificate of payment and the defendant paid as follows:

1. August 4, 1978	Kshs 21,000.00
2. September 9, 1978	Kshs 30,000.00
3. December 6, 1978	Kshs 46,000.00
4. April 23, 1979	Kshs 8,000.00
5. July 5, 1979	Kshs 30,000.00
6. December 6, 1979	<u>Kshs 10,000.00</u>

Kshs 145,000.00

7. In breach of the said agreement the plaintiff failed refused and or neglected to finish the construction of the building until December 7, 1979 instead of October 31, 1978 and in further breach the plaintiff after completing the building has failed refused and or neglected to obtain Certificate of Occupation from the City Council of Nairobi to enable the defendant to lawfully occupy the same. The building has also not been completed in a good workmanlike manner.

8. As a result of the said breach the EA Building Society Limited has refused to pay the balance for the alleged work done until and unless the plaintiff produces Certificate of Occupancy.

9. By way of payment of the said balance the defendant drew the cheque mentioned in the plaint but in the premises, the consideration for the said cheque has totally failed and the as he was entitled to do countermanded payment thereof.

Reasons whereof the defendant prays that the plaintiff's claim be dismissed with costs."

There was no set-off or counterclaim. An application for summary judgment was then made and a replying affidavit opposing it was filed by Mr Njoroge on March 26, 1980.

The motion for summary judgment came up for hearing before me on July 24, 1980. I gave judgment as follows:

"I am definitely of the view that the defendant has no defence to this suit and that there is no triable issue in this case. The defendant has given the plaintiffs a cheque which was returned R/D. Furthermore, in two documents dated December 8, 1979 the defendant acknowledges that he owes this sum to the plaintiffs.

Although the defendant's alleged defence is that the building was not properly done, he says in a letter dated December 8, 1979 that "good material has been used and the house has been constructed to the best of my satisfaction. I give the plaintiff summary judgment in the sum of Kshs 165,000 with interest and costs as prayed, together with the costs of this application."

There followed applications for a stay pending appeal. Limited stays were granted on condition that Mr Njoroge gives adequate security or deposits money in court. These were not forthcoming. It seems thereafter the appeal was abandoned and instead a fresh suit ie this suit was filed by Mr Njoroge on December 2, 1981 of which the relevant paragraphs of the plaint read as follows:

"3. By an Agreement in writing made on May 26, 1978 the defendant agreed to carry out certain works as contractor for the plaintiff upon the plaintiff's land known as plot No 209/7941 Kyuna Estate, Nairobi for an agreed sum.

4. It was a term of the contract that the said works would be completed by October 30, 1978 and available for use by the plaintiff by the said date.

5. In default thereof the defendant did not complete the said works and hand over the premises until December 8, 1979.

6. By reason thereof the plaintiff has suffered loss damage and injury.

PARTICULARS

(a) Loss of rent at the rate of Kshs 10,000 per month for fourteen months Kshs 140,000

And the plaintiff claims damages.

7. The defendant was further in breach of the contract in that it did not complete the said works as agreed and required and/or the work done was not fit for the intended purposes. By reason thereof the plaintiff suffered further loss and damage in the sum of Kshs 45,000 and claims the same from the defendant.

8. The defendant upon assuming the contract received and/or took into its possession goods materials and items belonging to the plaintiff to the value of Kshs 48,000 which goods materials and items it has

not returned to the plaintiff or given credit for. The plaintiff therefore claims from the defendant the return of the said goods or the sum of Kshs 48,000 in lieu thereof.”

In his defence to this suit the defendant says that he is not liable in damages for any delay which in any event was waived that the plaintiff is stopped from claiming for defects in materials or construction and denies that he took any materials belonging to the plaintiff on assumption of the contract on May 26, 1978. Finally he pleads res judicata by virtue of the previous suit No 22 of 1980.

(1) Res Judicata

I will deal first with the plea of res judicata. Mr Mitra relies on section 7 of the Civil Procedure Act and in particular explanation (4) Which reads as follows:

“Explanation. (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The answer to Mr Mitra’s submission on this point is to be found in the judgment of Sir Udo Udama in *Karshe v Uganda Transport Co Ltd* [1967] EA 774. The headnote of the report reads:

“In a previous suit (No 672 of 1964) the present plaintiff had been sued by the present defendant for damages for negligence arising out of a road accident which occurred on March 28, 1964. In that suit the present plaintiff filed on counterclaim. The judge in that suit found both parties fifty percent to blame and gave the present defendant judgment for half its claim. After that judgment was delivered the present plaintiff filed this suit claiming fifty percent of the damages suffered by him as a result of the accident. At the hearing the present defendant took the preliminary objection that the present plaintiff was estopped by the judgment in the previous suit from bringing this suit, having failed to file a counterclaim in the previous suit.

Held: The present plaintiff was not precluded from bringing this action by estoppel or by res judicata because the issue of the loss or damage suffered by the present plaintiff was never enquired into by the court in the previous suit.”

Sir Udo Udoma extensively reviewed the English, Indian case law and the Uganda provisions (which are identical to the Kenya ones) and I fully agree with his reasoning.

In this case it is true there was no set-off or counterclaim in the previous suit, but the defendant then had a choice either to do so or bring a fresh suit. The matters he urges now were not directly and substantially in issue in the previous suit which was an action on a cheque. When I said in the previous suit that Mr Njoroge had no defence, all I was saying is that he did not have a defence to an action on a cheque. I did not say he had no defence to an action on the building contract which he now seeks to ventilate in this suit nor did I inquire into his loss or damage. I therefore hold that this suit is not res judicata by virtue of the previous suit No 22 of 1980.

(2) Delay

It is true that the appendix to the contract states that the date for practical completion is October 30, 1978. It is however clear that time was not of the essence of this contract. Mr Nowrojee submits however that the question of time being of the essence only goes to the question of repudiation and if the contract is not repudiated, it is still open to the plaintiff to seek damages for the delay. That may be so in a proper case, as where employer pays promptly and keeps pressing the contractor for early completion. But in

this case it was the other way round. The contractor was not being paid promptly. He stopped the work on and off as he was being paid in bits and pieces. Exasperated by all this he then threatened to stop completely (see letter of July 12, 1979). The architect intervened and the contractor was good enough to continue again without payment hoping that the plaintiff would honour his promise and pay him on completion and yet again despite all this, the cheques he gave him were all dishonoured.

It seems quite clear to me that the plaintiff was quite happy to get his house, despite the delay and the documents he signed on December 8, 1979 speak for themselves.

(3) Defects

That there were a few defects in the house at completion, there is no doubt. Most of them were minor and need not concern us. The major defect was a leakage in the roof but Mr Njoroge did not even invite the defendant to come and remedy the roof defect. Instead he employed a man called Maina who appears to have been a previous employee of the defendant. Maina says he repaired the roof, but he seems to have done a bad job since the leaking continued to the distress of Mr Frank Thomas, the tenant.

It is of course not surprising that the plaintiff did not approach the defendant to remedy the roof defect in view of what he says in the first paragraph of December 8, 1979 letter. The simple truth is that the plaintiff was desperate to get the house and let it to Mr Thomas. I do not accept for one moment that he was pressured into signing the December 8 letter. He is an adult, educated and intelligent man. He could easily have amended the letter if he wished to do, or at least insisted that there should be a final architect's inspection or inspection by an independent man. He did not. I hold that he has waived any right to claim for the roof defect by virtue of December 8 letter.

There is also a claim that in two of the bathrooms and in the kitchen PVC tiles were put instead of terrazzo tiles. Mr Flora, the architect, told me that this was specifically agreed with the plaintiff and the contract price reduced accordingly. I believe Mr Flora on this point.

But even if I did not, I hold that the letter of December 8, 1979 constitutes a waiver by the plaintiff for any claim for the use of PVC tiles instead of terrazzo.

(4) Materials

Mr Njoroge and Maina say that the shed which interior decorators left had in its steel window frames, steel door frames and wheel barrows which were taken away by

Mr Channa Junior. Mr Channa Senior and the architect Mr Flora say there was nothing in the shed.

There are letters addressed by Mr Flora to interior decorators warning them not to take any "materials" from the site but Mr Flora says that this refers to actual materials used on the building.

Frankly I do not believe that the defendants would have taken anything from the site which was not theirs. Further it is incredible – if they did – that the plaintiff should do nothing about it or say anything about it or claim it earlier. Upon the evidence I hold that the plaintiff has not established that the defendant has taken away materials which belong to him or to the previous contractors.

At the end of the day I am driven to the irresistible conclusion that the plaintiff is a bad payer who has used every trick under the sun to evade his financial obligations. The simple truth is that the defendant

completed the plaintiff's house as far back as November 1979. The plaintiff almost immediately let it to Mr Frank Thomas at a high rent. It is high time the plaintiff learnt that he cannot get anything for nothing.

I dismiss the suit with costs.

Dated and delivered at Nairobi this 2nd day of July , 1982.

EUGENE COTRAN

JUDGE



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