Cherono v Wealthsmith Limited & another (Civil Appeal E1222 of 2023)
[2024] KEHC 15328 (KLR) (Civ) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1222 OF 2023

RC RUTTO, J

NOVEMBER 29, 2024

BETWEEN

LUCY CHERONO ..... APPELLANT

AND

WEALTHSMITH LIMITED ..... 1ST RESPONDENT

BARLETTA HOLDINGS LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrates Court case CMCC No. E12368 OF 2021 at Nairobi delivered by the Hon. Stephen K. Onjoro (PM), on the 12{{^th}} October, 2023)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi CMCC No. E12368 of 2021 wherein, the Appellant sued the Respondents for breach of contract relating to payments of return of investments pursuant to a Tripartite Farm Management Agreement.

2. The genesis of this dispute, as stated in the plaint, is that the Appellant purchased a piece of land at Kitengela Greens for Kshs.600,000/= and two greenhouses for a total of Kshs.600,000/=. Later, after the Kitengela farming project became untenable, the green houses were moved to Nanyuki where the Respondents had established farming activities.

3. The Appellant claims that the 1st Respondent committed, through the 2nd Respondent, to carry on farming in the greenhouses and to pay a return on investment of Kshs.400,000/= per season, totalling to Kshs.800,000/= per year, from the date of the tripartite agreement dated 31st January 2017 to 31st January 2020.

4. The Appellant's case was that the Respondent initially remitted Kshs.400,000/= as the first payment on the return on investment for the first season in 2017. However, after this payment, no subsequent amounts were paid, thus breaching the terms of the agreement.

5. The Appellant further claims that, after the expiry of the contract, the Respondents failed to return the greenhouses as agreed, even after committing to do so in an email dated 4th August 2020. Consequently, the Appellant sought a declaration that the Respondents breached the contract and their obligations, as well as special damages amounting to Kshs.1,689,000/= for the return on investment for five seasons at Kshs.400,000/= per season, less Kshs.74,000/= per season in management fees; and Kshs.50,000/= expenses incurred in unsuccessfully attempting to retrieve the greenhouse. Additionally, the Appellant sought Kshs.300,000/= as the value of the greenhouse, general damages for losses suffered, and costs and interest for the suit.

6. In their Amended Defence dated 9th May 2023, the Respondents acknowledged the stated facts but added that the proceeds due to the Appellant were contingent upon successful farming.

7. Upon hearing the parties, the trial court on 12th October 2023, delivered the judgment, dismissing all the prayers sought in the plaint except for damages equivalent to the value of the greenhouses, as they were now damaged and of no use to the Appellant. The Appellant was also awarded the costs and interest of the suit.

8. The Appellant, aggrieved with the entire judgment, lodged this appeal on 9th November 2023 setting out the following grounds of appeal:

    i. The Learned trial Magistrate erred in law and fact in disregarding the evidence tendered by the Plaintiff's witness and Plaintiff's documents filed.

    ii. The Learned trial Magistrate erred in law and in fact in holding that the Plaintiff is the one who breached the terms of the contract.

    iii. The Learned trial Magistrate erred in law and in fact when he blamed the Plaintiff for failing to pay the service charge.

    iv. The Learned trial Magistrate erred in law and in fact in finding that special damages were not proven.

    v. The Learned trial Magistrate erred in law and in fact when he failed to award the Plaintiff the special damages as pleaded.

    vi. The Learned trial Magistrate erred in disregarding the Appellant's evidence and submissions.

9. The Appellant prayed that the appeal be allowed with costs and, that the judgment delivered on 12th October, 2023 be set aside and the prayers contained in the plaint be allowed. The appeal was canvassed by way of written submissions.

Appellant's submissions

10. The Appellant's submissions, dated 5th May 2024, identified two key issues for determination: (1) which party breached the contract, and (2) whether special damages were proven.

11. On the first issue, the Appellant contends that the trial court erred in finding her in breach of the contract, due to her failure to pay Kshs 74,000/= for the commencement of another farming term. She argues that she was entitled to her returns for the entire first year without being obligated to pay the management fee for the second season of that year. Consequently, she claims entitlement to Kshs

400,000/= as returns for the second season of the first year. Regarding subsequent years, she asserts that there was no requirement for her to pay the management fee upfront, as such payment was contingent on the Respondents fulfilling their contractual obligations first.

12. The Appellant submitted that she made consistent efforts to follow up on the payments, sending nearly 60 emails. Through these email correspondences, the Respondents attempted to vary the terms of the agreement by extending its duration to four years and reducing the payable amount from Kshs 200,000/= to Kshs 150,000/= per term, a proposal with which the Appellant did not agree. The Appellant further stated that she was informed her payment would be made in October 2018.

13. The Appellant further argued that she lost the opportunity to terminate the contract due to the Respondents repeated assurances throughout the term of the agreement that payments would be made. The Appellant argued that if calamities were the cause of the Respondents' failure to meet their obligations, they should have informed her, especially in response to her repeated inquiries. She contended that by continuing to promise payment even after the contract's expiration, the Respondents effectively acknowledged that the fault was theirs and not hers.

14. The Appellant urged the court to find that the Respondent should have terminated the agreement so that the legitimate expectation to the Appellant could be extinguished. To buttress this, the Appellant relied on the cases of Keen Kleeners v Kenya Plantation and Agricultural Workers Union Mombasa COAC No. 101 of 2019 [2021] eKLR and Kenya Revenue Authority v Export Trading Co. Ltd Supreme Court of Kenya Civil Petition No. 20 of 2020 [2022] eKLR among others.

15. The Appellant further submitted that the Respondents did not plead the failure to pay the management fee as a defense for their non-payment. While relying on the case of Independent Electoral and boundaries v Stephen Mutinda Mule & 3 Others [2014]eKLR she urged this court to find that parties should be bound by their own pleadings. She further urged the Court to find that she did not do anything to frustrate or hamper the Respondent's farming business.

16. On the second issue of whether the special damages were proved, the Appellant contends that the court erred in concluding that the special damages were not substantiated. The Appellant asserts that she hired a car to assist in the collection of the greenhouses, but her efforts were frustrated by the Respondents, despite their responsibility to surrender the greenhouses. The Appellant provided a receipt for the car hire, which she argues should be considered as an expense incurred due to the Respondents' failure to meet their obligations.

17. In conclusion, the Appellant urges the court to allow the appeal, set aside the trial court's decision, and award the Appellant the amount pleaded in the Plaint.

Respondents' submissions

18. By their submissions dated 3rd July 2024, the Respondents reiterated the contents of their defence and stated that after the Appellant confirmed her unwillingness to transfer her ownership rights from Kitengela to Nanyuki, she was refunded the cost of the greenhouses in two equal installments of Kshs 200,000/= each, paid on 25th November 2017 and 2nd December 2017.

19. The Respondent further submits that there was no evidence presented by the Appellant that was disregarded by the trial court. That the parties had agreed to a one-year contract, which could be renewed for two additional years. However, the renewal and continuation of farming were conditional upon the Appellant paying the 2nd Respondent an agreed management fee of Kshs 74,000/=. No evidence was provided to prove that this amount was paid. The Respondents confirmed they were

still engaged in farming but attributed their failures to factors unrelated to the Appellant, as well as a backlog in payments due to the Appellant's alleged failure to pay the management fee.

20. The Respondent submits that the agreement did not provide for the refund of any expenses incurred by the Appellant while visiting the land at Nanyuki or Kitengela. Additionally, the trial court considered the evidence presented by the Appellant on this matter and found it unconvincing.

21. The Respondent further contends that given the trial court's discretion and the decision it made, there is no reason for this court to interfere with the judgment. As such, the appeal should be dismissed with costs.

22. The Respondent also argues that the Appellant's case was filed in the wrong court, as disputes concerning environmental matters, such as this one, should have been filed in the Environment and Land Court. To support this assertion, reference was made to Article 162(2)b of *the Constitution*. The Respondent urged that the suit should be dismissed for lack of jurisdiction.

Analysis and Determination

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123.

24. This court therefore has a duty to delve into factual details and revisit the evidence as presented before the trial court, analyze and evaluate it and arrive at an independent conclusion while bearing in mind that it is the trial court that had the advantage of hearing the parties.

25. Having considered the grounds of appeal, the proceedings of the lower court and the submissions by the parties, the issues arising for determination are first, whether this court has the requisite jurisdiction to determine this appeal secondly, whether there was a breach of contract and lastly, whether the Appellant proved her case on a balance of probability hence deserving of the orders on damages. I now proceed to determine each of the issues.

i.whether this court has the requisite jurisdiction to determine this cause

26. It is noted that the Respondents in their submissions raised a jurisdictional issue namely, that this honourable court does not have the requisite jurisdiction to hear and determine this case pursuant to Article 162(2) of *the Constitution*.

27. The Respondents argued that the case was filed in the wrong forum, as it involves a dispute concerning a contract related to land, its use, the benefits derived from such use, and the enforcement of the parties' rights. To buttress their argument, they relied on the provisions of Article 162(2)(b), to the effect that Parliament shall establish a court with the status of the High Court to hear and determine disputes related to the environment, as well as the use, occupation, and title to land.

28. While I appreciate that jurisdictional challenge can be raised at any stage and that the Respondents never raised this argument before the trial court, the Court takes note that the issue of jurisdiction is a fundamental legal question that needs to be determined at the outset for without it, the court lacks the authority to determine the dispute. The Supreme Court of Kenya in In the Matter of Interim Independent Electoral Commission [2011] eKLR emphasised that jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, the statute law, and by principles laid out in judicial precedent.

29. In addressing this issue, it is common ground that the jurisdiction of the Environment and Land Court (ELC) is outlined under Article 162(2) of *the Constitution*, in conjunction with Section 13 of the ELC Act, 2011, which pertains to matters related to the use, occupation, and title to land.

30. An analysis of the plaint filed by the Appellant, shows that the dispute relates to an alleged breach of contract by the Respondents and /or their employees, servants, consultants and agents. The particulars of the breach of contract have been set out and includes failure to meet obligations in making payment of the return on investment as contained in a tripartite agreement; and failure to deliver the green houses to the appellant. This court also notes that in the Defence filed before the lower court, the Respondent stated that they had met all their obligations in the contract and refunded the Appellant funds paid for farming. It also made reference to the farm management agreement between parties which guided their engagement and which according to the Respondents, they fulfilled their part of the bargain. All these particulars have been summarized in the introductory paragraphs of this judgment. Notably, the remedies sought are also based on the alleged failure by the Respondents to fulfil specific contractual obligations.

31. From the above, it is clear that there is no dispute regarding the ownership, occupation, or use of the Appellant's land. Instead, the dispute revolves around the implementation of the tripartite farm management agreement between the parties herein. Clearly this is a claim for breach of contract and is not related to the environment or land use or ownership as contemplated under Article 162 (2) of *the Constitution*.

32. Consequently, I find that this claim does not fall under the ambit of the provisions of the Environment and Land Court (ELC) as outlined under Article 162(2) of *the Constitution* as read together with Section 13 of the ELC Act, 2011. Therefore, this court, finds that it has the requisite jurisdiction to hear and determine the matter.

ii.Whether there was a breach of contract and whether the appellant proved her case on a balance of probability hence deserving of the orders on damages.

33. Sections 107 and 109 of the *Evidence Act* place the burden of proof on the Appellant to substantiate her claim. In this case, the Appellant alleged that the Respondents breached the contract by failing to meet their obligations, particularly, payment of the return on investment as stipulated in clause 3.10 of the Tripartite Farm Management Agreement and despite numerous demands, failing to return the greenhouses after the contract period expired.

34. To support her claim, the Appellant presented the Tripartite Farm Management Agreement dated 31st January 2017 as evidence of the agreed terms. I have reviewed the Agreement which was not contested by the parties and will highlight the following key provisions below.: -

> Clause 3.5 provides that, "During the term, Weathsmith shall engage Barletta to undertake a comprehensive agribusiness programme on behalf of the owner which will entail communicate and keep the owner informed on the progress of the agribusiness programme generally including updates on the planning dated, progress of the crop harvesting and payment dates and to permit the owner access to the property after provision of reasonable notice.
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> Clause 3.10 provides that, "During the term, Weathsmith shall engage Barletta to undertake a comprehensive agribusiness programme on behalf of the owner which will entail to pay the owner a return of Kshs 800, 000/= in two instalments for every twelve (12) months of successful farming and marketing of the produce. The payment shall be six months from the

date of planting crop in greenhouse. It is hereby agreed that Barletta may at its sole discretion commence on the agribusiness prior to the owner completing payments. However, the owner shall not qualify to receive any returns from the agribusiness prior to its completing all payments.

Clause 6 of the Agreement provides that, "On or before the first day of the second term of one (1) year of the agreement and any other term thereafter the owner shall pay to Barletta a basic management fee of Kshs 74,000/= per season to cater for the new term farming activities and service charge.

35. From the above provisions of the contract, this court discerns that each of the parties had some responsibilities bestowed upon it. The 1st Respondent's obligation was to provide updates on payments, while the 2nd Respondent had the discretion to commence the agribusiness before the payments were made, and the appellant obligation was to make and complete payment of the basic management fees per season.

36. Based on the evidence presented, at the trial court and which has been reviewed by this Court, I note that the trial court observed that there is no proof that the management fees were paid before the second term of the one-year contract and hence the appellant breached the contract by not paying the service charge as was agreed in the contract.

37. Indeed clause 6 of the contract clearly stipulated that the appellant was required to pay Kshs.74,000/= per season. It is undisputed that the appellant paid this service charge for the first season of the first year but failed to make the service charge payments for the second season. Despite the non-payment, the appellant still claims Kshs 400,000/= which was the expected farming returns for each season.

38. As the trial court correctly observed, by failing to pay the service charge for the second season, the appellant did not fulfill her part of the contract, hence, equally she could not ordinarily expect to benefit from the farming which was supposed to take place in the second season. Essentially therefore, the appellant cannot justifiably claim a return on investment when she had not met the contractual obligation to pay the service charge for the second season. I reiterate that under the said clause 6 of the contract and by the appellant's own acknowledgement in her submissions before the trial court, a year had two seasons. It therefore follows that service charge was due for the second season as well.

39. Despite the 2nd respondent's discretion to commence agribusiness prior to the appellant completing payments, it is not evident that this discretion was exercised as to entitle the appellant for such payment. The appellant merely sought the payment in full while offsetting the service charge without demonstrating the basis. Her argument that the payment for the service charge was to be made after the successful farming has not found a basis in the agreement.

40. Consequently, I agree with the trial court's finding that the appellant's failure to pay the service charge for the second season amounted to a breach of contract effectively precluding her from claiming Kshs.400,000 which was due for the second season, subject to successive farming.

41. On the claim for special damages, the Appellant asserts that she hired a car to be used to collect the greenhouses, but her efforts were frustrated by the Respondents. She has provided a receipt for the car hire amounting to Kshs 50,000/= to support this claim. This court takes note that the farming activity was to take place in Kitengela at the Appellant's land. However, the parties accepted to have the agribusiness carried out in Nanyuki/Marura/Block 5/245 (Ereri). While the contract stipulated that the greenhouses would be returned to the Appellant, it did not stipulate how this would have been done. The Respondents, on their part, have stated that this request is absurd since the contract did not provide for refund of expenses incurred. The Respondents have also fallen short of demonstrating how

the appellant was to collect the green house. I am satisfied that the transportation of the green house from Kitengela to Nanyuki was at the instance of the Respondents. At the very least, the Respondent should have returned the greenhouse to Kitengela where the appellant's property was located.

42. Based on the parties' submissions, it is evident that the farming relationship, originally intended to last three years, deteriorated almost immediately after the first season. What followed was a series of disputes, with both parties avoiding resolution, culminating in the filing of a suit. I have already determined that the Appellant's failure to pay the service charge for the second season, and consequently for the remaining seasons, barred her from expecting any returns on investment that would have accrued each season.

43. However, the non-payment of service charge did not absolve the Respondents of their obligation to return the greenhouses in good order with reasonable wear and tear or refund the money spent by the Appellants on the greenhouses. I concur with the trial court's findings on this matter.

44. As for the special damages claim, the Appellant submitted that she hired a car to collect the greenhouses, remains uncontested. As already noted, it remains that she was entitled to the greenhouses and she made an effort to claim her property. Since she has provided a receipt evidencing the expense incurred, the court will not penalize her for attempting to enforce her rights. Accordingly, I award her the special damages of Kshs 50,000/-.

45. Noting the above analysis, the court allows the appeal and makes the following orders:

    a. The decision of the trial court awarding the value of the green houses totaling to Kshs. 600,000/- together with costs and interest of the suit at the lower court is upheld

    b. Special damages of Kshs 50,000/- is awarded

    c. Each party shall bear its costs of this appeal.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER 2024

For Appellant:

For Respondent:

Court Assistant: