



**M'rukiri v M'erimba (Civil Appeal 12B of 2019)
[2023] KEHC 18016 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 12B OF 2019
EM MURIITHI, J
MAY 31, 2023**

BETWEEN

JOSEPH M'RUKIRI APPELLANT

AND

THANGICIA M'IMUNYA M'ERIMBA RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. G.N Wakabiu
(CM) delivered on 31/12/2018 in Maua CMCC No. 157 of 2005)*

JUDGMENT

1. By an amended plaint dated 10/2/2009, the Respondent sued the Appellant seeking {{abbr{title Kenya shillings} Kshs } 58,000 as per paragraph 9a of the amended plaint, costs of the suit plus interest. The Respondent pleaded that by written agreements dated 7/7/2003 and 6/9/2004, the Appellant released to him miraa plants for a total of 20 plucking periods. In pursuance of the agreements, he paid the Appellant a total sum of Kshs 47,000 receipt of which the Appellant duly acknowledged. By a further oral agreement, the Appellant added a further 4 plucking periods and he paid Kshs 12,000 to the Appellant. On 29/8/2005, while the Respondent still had a total of 7 plucking periods in accordance with the lease agreements, the Appellant unlawfully invaded the land and plucked the Respondent's miraa shoots valued at Kshs 37,000, as a result of which he has suffered great loss and damage. It was a term of the agreement dated 7/7/2003 that any party in breach of the agreement would pay the non-defaulting party Kshs 52,000 as liquidated damages.
2. The Appellant denied the claim vide his statement of defence dated October 26, 2005 and prayed for its dismissal.
3. After the conclusion of the trial, the trial court found that the Respondent had proved his case against the Appellant and awarded Kshs 58,000 plus costs and interest.



The Appeal

4. The Appellant filed his memorandum of appeal on 30/1/2019 raising 4 grounds as follows:
 1. The learned Chief Magistrate erred in law and fact in awaiting judgment to the respondent against the weight of evidence.
 2. The learned Chief Magistrate erred in law and fact in failing appreciation that the subject matter of the primary suit was governed by the provisions of the [Land Control Act](#) and that no consent of the land board was obtained.
 3. The learned Chief Magistrate erred in law and fact in failing to review the evidence of the appellant and satisfy himself that the defendant's evidence was credible.
 4. The learned Chief Magistrate erred in law and fact in failing to observe that the agreement must have a commencement and determination clauses.

Duty of the Court

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

Evidence

6. PW1 Thangecia M'Imunya M'Irimba, the Respondent herein adopted his statement filed in court on 8/2/2012 as part of his evidence in chief together with the list of documents filed on the same date. He testified that,

"I know the defendant. I had hired miraa in his farm. I am claiming Kshs 58,000/=. The amount of value he harvested and sold my miraa. It was before expiring of my contract. One area remained with 5 harvesting periods and the other side 2 harvesting periods amounting to same amounting to Kshs 58,000/=. I filed our agreement dated 6/9/2004 p-exb-3 (a). Another dated 7/7/2003 pexb-3b. They were two agreements. I gave him money according to the agreement. The 3rd agreement handwritten dated 6/9/2004 and filed in court on 8/12/2012 pexb-3 (c). The defendant wrote me a letter from the chief calling me to go and get money I gave him. The letter is dated 5/9/2005 (pexb-4). He has not paid me any money all this time. I also gave him Kshs 12,000/= without an agreement. My witness was Gachiaro (meaning: A special relationship that if that person fails to deliver the promise a curse befalls that person). The witness was Kubania. I claim the same. It was additional for miraa. He lies in his defence. I did not harvest all periods. I am claiming my money."

7. On cross examination, he stated that,

"You gave the shamba because your children were in school. When you came I gave you Kshs 12,000/= for school fees of your children agreement to follow. One side was for 13 harvest and the other side 7 harvests. I did not refuse to give you money thereby you going to the chief. The chiefs letter was not for money. It was when he harvested my miraa so that he could refund me the value. I did not refuse to go. You did not refuse that we go to the chief so that you pay me. You did not tell me so. You are lying that I brought the case when you



wanted to hire out the miraa because I refused to give you money. I had not exceeded the harvesting period. When chief was calling me I had already filed in court. Kshs 12,000/= you promised to write agreement later and that is why I call Gicharo (witness) in order you don't refuse.”

8. On re-examination, he stated that,

“I filed my 1st plaint on 28/8/2005. The chief letter (pexh4) was for 5/9/2005. I was later than my plaint. In the letter he admitted owing me. He owes me. I called a witness for (Kshs 12,000/=) as he witnessed the harvest and giving him money.”

9. PW2 Ubania Laikanya adopted his statement filed on 8/2/2012 as part of his evidence in chief. He went on to testify that,

“I know both plaintiff and defendant. I know plaintiff as Gicharo (a special relationship in Kimeru, a relationship if he wrongs the other, he receives a curse). The defendant is my in-law. He has married from Athimba clan, which is my clan. I have a Gicharo through my wife. I did not see Thangecia (plaintiff) giving defendant money but miraa. He had hired defendants miraa. When it was harvested by defendant plaintiff called me to go and ask money on his behalf as an in-law to the defendant. Defendant told me he had paid school and gave me one harvest. I do not know whether plaintiff was paid his money.”

10. On cross examination, he stated that,

“Plaintiff told me to go for miraa not money. I did not know plaintiff before incident. He was shown to me. We did not fabricate the story. Plaintiff gave me transport to come to you. I came to your home and found you with your wife a lady from our clan.”

11. DW1 Joseph M'Rukiri, the Appellant herein adopted his statement recorded on 21/3/2012 as his evidence in chief together with the list of documents dated 21/3/2012 and the supplementary list of documents. He prayed for the Respondent's case to be dismissed.

12. On cross examination, he stated that, “There was a miraa lease agreement. I agree.”

Submissions

13. The Appellant urges that the Respondent's prayer for Kshs 58,000 has no legal basis at all because its foundation, paragraph 9a has been cancelled out in red during the amendments. He faults the Respondent for failing to offer documentary proof for the value of the miraa claimed to have been plucked on 28th or 29th of August 2005. He further faults the Respondent for failing to offer documentary evidence of the hire of a watchman or at least call any/or corroborative evidence thereto. The Respondent is faulted for failing to support the claim for the value of the alleged unplucked periods. He urges that the *Land Control Act* is specific that any agreement, including leases on land that is registered requires the consent of the Land Control Board. He urges that the agreements on record were not legally valid having been drafted and witnessed by Arithi & Associates, a body not authorized to do so. He urges the court to find that the trial court's decision was erroneous and allow the appeal in its entirety.

14. The Respondent submits that the Appellant did not tender any evidence to controvert his evidence hence the trial court was right in its finding that he had proved his case on a balance of probabilities. He urges that the provisions of the *Land Control Act* are not applicable in this case, because the lease agreements were limited to the plucking of the miraa shoots only, and they did not give any other rights



or interests over the land to him. He urges the court to apply equity to prevent the Appellant from running away from “a bad bargain which he himself had created” and cites the Court of Appeal case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR. He faults the Appellant for failing to tender any evidence to support his contention that he had exhausted the plucking periods agreed between him and the Appellant, and prays for the dismissal of the appeal with costs.

Analysis And Determination

15. The issue for determination is whether the Respondent proved his case against the Appellant on a balance of probabilities.
16. The law places the burden of proof on the plaintiff to prove his case on a balance of probability. Section 107 of the *Evidence Act* provides that whoever desires the court to give judgment on the basis of existence of certain facts, must prove that such facts exist. Further, section 108 of that Act provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party. In this regard, the Respondent bore the burden to prove his case against the Appellant on a balance of probabilities.
17. The Appellant does not deny leasing the miraa to the Respondent but he maintains that the plucking periods ended in June 2005. On his part, the Respondent contends that he still had 7 unplucked periods when the Appellant unlawfully invaded the miraa.
18. There is no dispute that the parties herein entered into an agreement for the lease of miraa. The parties first entered into the agreement dated 7/7/2003 which was followed by that of 6/9/2004. According to the agreement dated 6/9/2004, the duration of the lease was 7 plucking periods and each period was for 40 days only. It was agreed that the lessee would step on the land on the date of the signing of the agreement. The commencement date therefore as per the terms of the agreement was 6/9/2004.
19. The court has taken the liberty to do the math herein in order to determine when the plucking periods ended. If the commencement date was 6/9/2004, then the 1st plucking period would run from 6/9/2004 – 16/10/2004, the 2nd plucking period from 16/10/2004 – 26/11/2004, the 3rd plucking period from 26/11/2004 – 6/1/2005, the 4th plucking period from 6/1/2005 – 16/2/2005, the 5th plucking period from 16/2/2005 – 26/3/2005, the 6th plucking period from 26/3/2005 – 6/5/2005 and the 7th plucking period from 6/5/2005 – 16/6/2005.
20. This court therefore concurs with the Appellant that indeed the Respondent exhausted all the 7 plucking periods in line with the lease agreement of 6/9/2004, and the trial court fell into error when it held that the Appellant had breached his part of the contract.
21. Even if the court was to adopt the tabulation of the plucking periods as done by the Respondent in the document dubbed “agreement of 40 days” which the Respondent has signed, the same would terminate on 22/7/2005, while the cause of action arose on 29/8/2005.
22. The Respondent recorded in his statement filed on 8/2/2012 that, “By a further oral agreement the Defendant leased to me further 4 plucking periods at agreed consideration price of Kshs 12,000/= which he also acknowledged receipt thereof.” There was no evidence led in support of that claim and therefore the same must fail.
23. It appears from the testimony of the Appellant that the Respondent continued plucking miraa way after the lease had expired. The Appellant recorded in his statement filed on 21/2/2012 that, “The plucking periods ended in June, 2005 after which the plaintiff expressed an interest to lease the miraa for a further period but I told him that we would make a fresh agreement in late August, 2005 so that I



could get cash to pay fees for my two daughters who were in secondary school. The Month of August ended without the plaintiff coming for a lease agreement. I waited until Saturday September 3, 2005 but he was still not ready for an agreement. On Sunday 4th/9/2005 I approached one Julius Gitonga, to find out if he could lease the miraa to enable me raise school fees as schools were opening the following Tuesday, 6th/9/2005.” That evidence was not broached on cross examination.

24. This court finds that the Respondent failed to prove that the Appellant breached the terms of the lease agreement by denying him entry into the land, as the Respondent had already exhausted all the plucking periods in accordance with the terms of the lease agreement. There was no evidence led to show that the value of the miraa plucked on 28/8/2015 was Kshs 37,000 or whether the Respondent had hired a watchman to guard the miraa at a cost of Kshs 8,000 to justify the award of Kshs 58,000 by the trial court.
25. Besides, PW2 who testified in support of PW1’s case was categorical that he did not see the Respondent giving money to the Appellant.
26. On the issue of failure to procure a Land Control Board Consent, this court finds that the lease herein was only limited to the plucking of the miraa shoots, and did not give exclusive possession of the land to the Respondent.

Orders

27. Accordingly, for the reasons set out above, this court allows the appeal and sets aside the trial court’s judgment in its entirety.
28. The Appellant shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

