



REPUBLIC OF KENYA



KENYA LAW
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**Kirugi v Mbogo & 3 others (Civil Appeal 7 of 2021)
[2022] KEHC 12351 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 7 OF 2021
LM NJUGUNA, J
JULY 27, 2022**

BETWEEN

AUGUSTINE NYAGA KIRUGI APPELLANT

AND

ANDERSON GICOVI MBOGO 1ST RESPONDENT

KITHINJI GICOVI MBOGO 2ND RESPONDENT

WAWIRA GICOVI MBOGO 3RD RESPONDENT

NJUE GICOVI MBOGO 4TH RESPONDENT

JUDGMENT

1. The appellant lodged an appeal before this court wherein he has challenged the judgment of the trial court Hon Gicheru delivered on January 25, 2021 and preferred the following grounds:
 - i. That the learned magistrate erred in law and fact by delivering a judgment based on extraneous issues.
 - ii. That the learned magistrate erred in law and fact by finding that the 1st respondent could not lease out his tea bushes since he was not the registered proprietor of the suit land.
 - iii. The learned magistrate erred in law and fact by purporting to determine succession issues in a civil case.
 - iv. The learned magistrate erred in law and fact by openly showing biasness against the plaintiff and ordering the plaintiff to pay a punitive cost of kshs 10,000/= while the case was still on going.
 - v. The learned magistrate erred by openly threatening the appellant in open court in absence of his counsel that he was to dismiss the case which he ultimately did.



- vi. The learned magistrate erred in law and fact by delivering a judgment against the weight of evidence adduced before him.
 - vii. The learned magistrate erred in law and fact by making a finding that the lease agreement/s were not valid without any justification.
 - viii. The learned magistrate erred in law and fact by introducing issues of land control board in a simple tea bush/es lease agreement which is not a controlled transaction under the Act.
2. Wherefore, the appellant has urged this court :
- i. To allow the appeal herein.
 - ii. Enter judgment in favour of the appellant as prayed in the plaint.
 - iii. Costs of this appeal and lower court be granted to the appellant.
3. The crux of the case herein revolves around the lease agreements entered into between the appellant and the 1st respondent sometime in the year 2013 in regards to 2200 stems of tea bushes for a period of six years which was to run upto December, 2019. That on or about January, 2017, the said lease was extended for a period of three years to end on or about the year 2022. It was averred that on or about the month of April 2018, the respondents either jointly or otherwise entered into the leased tea bushes and prevented the appellant, his workers or agents from harvesting and working on the said tea bushes. It was averred that the respondents were in breach of the said two lease agreements and as such, he sought for orders to wit; permanent injunction barring the respondents from entering on, working on or remaining on or interfering in any manner whatsoever with the appellant's 2200 stems of leased tea bushes on LR Ngandori/Ngovio/57.
4. The first respondent filed a statement of defence on July 30, 2018 in which he admitted having entered into a lease agreement with the appellant as pleaded in the plaint but denied that either jointly or otherwise he entered into the leased tea bushes and preventing the appellant, his workers or agents from harvesting and/or working on the said tea bushes.
5. Further, he denied having breached the two lease agreements as alleged by the appellant. He averred that the appellant had not paid the full lease price to him. He denied that he had failed and/or refused to let the appellant use the leased tea bushes as alleged by the appellant and/or depriving the appellant his rights as a lessee.
6. He stated that he is the biological father to the 2nd, 3rd and 4th respondents who are harassing, preventing the appellant from harvesting and working on the leased tea bushes and that his efforts to stop them from doing so, have borne no fruits. He prayed that a temporary injunction be issued against the 2nd - 4th respondents from harassing the appellant and working on the leased tea bushes and costs of the suit.
7. The 2nd – 4th respondents filed a joint statement of defence on June 19, 2018 in which they denied the appellant's claim and the particulars of breach itemized in paragraph 10 of the plaint. They averred that the 1st respondent is their father and that LR Ngandori/Ngovio/57 belongs to their grandfather, the late Mbogo Gerishon and the tea bushes on that portion of land were planted by their mother Nancy Marigu Njiru and their grandmother Rael Muthanje Mbogo. They stated that their father, the 1st respondent, refused to take any responsibility as a father despite there being two school going children who depended on them for their livelihood.



8. That their father refused to educate them and so they only rely on tea on their grandfather's LR Ngandori/Ngovio/57 for livelihood as their father even leased their coffee to 3rd parties. They contended that the lease agreement that the appellant had with their father expired in January, 2018.
9. In his witness statement which he adopted as his evidence before the trial court, the appellant stated that he entered into a lease agreement with the 1st respondent for 2000 stems of tea bushes from the year 2013 to December 2021 but the 2nd to 4th respondents prevented him from plucking the tea bushes and that they have been threatening violence on him and his workers. That he has not been able to enjoy the lease period as his workers have been chased away from the land, yet, he has already paid full consideration for the lease period. He thus prayed for permanent injunction barring the respondents from entering, working on or remaining on or interfering in any manner whatsoever with the 2200 stems of leased tea bushes on LR Ngandori/Ngovio/57, and in the alternative, a refund of the lease price. On his part, the first respondent agreed with the appellant.
10. The 2nd respondent testified on his own behalf and that of the 3rd and 4th respondents. He stated that the 3rd and 4th respondents, himself are children of the 1st respondent whom they accused of having been irresponsible, misusing family property and a drunkard. He averred that the tea was planted by their mother Nancy Marigu and their grandmother Rael Muthanje. According to him, their father, the 1st respondent has no land in his name and hence there was no valid lease between the appellant and their father as the same is not backed by transactions showing transfer of money.
11. The court after considering the matter before it, and by a judgment delivered on January 25, 2021, dismissed the appellant's claim with costs to the respondents; it is this judgement that has necessitated the appeal herein.
12. Directions were issued that the appeal be canvassed by way of written submissions and wherein only the appellant complied with those directions.
13. The appellant submitted that the magistrate erred by invoking extraneous issues in his judgment in that the cause of action arose from a simple lease agreement. That the magistrate invoked the provisions of the LSA whilst the agreement was only in reference to the utilization of the said land; and that the 1st respondent being the only son to the deceased, had rights to deal with the land as he wished as long as the same did not affect the title of the land.
14. That from the proceedings, the trial magistrate was openly biased against the appellant and even at one time slapped the appellant herein with costs of kshs 10,000/= without justifying the same; that he proceeded to threaten to dismiss his case and as such, this was an outright act of bias against the appellant. In regards to grounds 6 and 7, the appellant submitted that the trial court found that there was no valid lease agreement while the 1st respondent had openly conceded that he had leased the tea bushes to the appellant for the period indicated. That the lease agreement was valid and the court thus had no basis in rejecting the same. In the end, it was his case that the trial magistrate erred in finding the agreement between the parties was a lease while in real sense, the same was just a simple letting out of the tea bushes and not a sale agreement. He urged the court to find in his favour and allow the appeal.
15. I have considered the grounds of appeal, the submissions of the appellant and the evidence that was adduced before the trial court and I find that the main issue for determination is whether the appeal herein is merited.
16. This being the first appeal, the court is obligated to re-evaluate, re-analyze and reconsider the evidence before it and come up with an independent finding. [See *Selle & Another v Associated Motor Boat & Others*, [1968] EA 123].



17. This court has analyzed the evidence that was tendered before the trial court together with the lease agreements that were produced in evidence. The first one is dated January 26, 2012 for a period of six (6) years. The consideration for the lease period is indicated as kshs 62,400/=. It is signed by both the appellant and the 1st respondent and witnessed by three other people. If my calculation is right, the lease period was to end in January 2018. The other lease agreement is dated September 23, 2013. The lease period was to run from August 27, 2013 to December 31, 2018 on condition that any party that may breach the same shall meet 50% interest refund of the remaining lease balance. Lastly, there is the one dated January 26, 2017 which is indicated to be a renewal of the previous agreement dated September 23, 2013. It states that the parties had entered into a new lease term of three(3) more years from January 2017 to December 31, 2020.
18. From the three lease agreements, the court makes the following observations.
- i. The first agreement was for a period of six years; meaning; it was going to expire in January, 2018.
 - ii. The 2nd agreement was entered into before the expiry of the 1st one. It does not make any reference to the 1st one and it indicates that it was to commence on 27.08.2013, yet, the first one was still in force.
 - iii. The third one indicates that it was for a term of 3 years and was a renewal of the previous one dated September 23, 2013. It was to commence on January 26, 2017 to December 31, 2020, yet, the 2nd one was still in force as it was meant to expire on December 31, 2018.
19. In all the lease agreements, different amounts were paid to the 1st respondent being kshs 62,400/=:, kshs 85,500/=: and kshs 78,000/=: . The agreements do not indicate for what period the amounts were paid. Further, the court notes that the lease period in the three agreements overlaps and this court is not in a position to tell how much was paid for what lease period and how much is the balance of the remaining lease period.
20. In regards to grounds 1, 2 and 3, the appellant faulted the trial magistrate and argued that the court erred by invoking extraneous issues in its judgment, in that, he invoked laws which were not in issue in the simple lease agreement entered into by the appellant and the 1st respondent. I am in agreement with the appellant that indeed the lease herein was a simple lease and the fact that the same was not registered, the same did not take away the interest of the appellant. I rely on the decision of Court of Appeal in the case of *Mega Garment Limited v Mistry Jadva Parbat & Co (Epz) limited* [2016] eKLR Malindi Court of Appeal no 68 of 2015 when looking at an issue on unregistered lease quoted the case of Bachelor's *Bakery Ltd v Westlands Securities Ltd* (1982) KLR 366 where the court stated as follows:
- “First, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter parties even in the absence of registration, but gives no protection against the rights of third parties.
21. It is also important to note that the appellant had utilized part of the lease period going by the plaint in which he states that the respondents herein entered into the leased tea bushes and prevented him from harvesting the same in April 2018. If the 3rd agreement is anything to go by, his lease term was set to expire on December 31, 2020 and not 2022 as pleaded and he would only be entitled to balance of his lease term if at all.



22. The appellant claimed a refund of the lease price as per the agreement. As noted above, the parties entered into three agreements for lease periods that overlapped and it is not clear which agreement the appellant is seeking to enforce and at what lease price; and in this regard, I find guidance in the case of *Francis Munyoki Kilonzo & Another v Vincent Mutua Mutiso* (2013) eKLR where the court in regards to the maxim of equity on the principle of equity is expressed as follows;

“No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault...a court of equity shall not assist a person in extricating himself or herself from the circumstances that he or she has created...”

23. The other prayer that he sought is for a permanent injunction barring the respondents from entering and/or interfering with the stems of leased tea bushes as pleaded in the plaint. In my considered view, that prayer has been overtaken by events as any lease agreement that may have been entered into has already expired. [See *Moses M Wairimu & 24 Others v Kenya Power & Lighting Co. Ltd & Another* [2020] eKLR; also *Joseph Kipkorir Biwott v Kenya Railways Corporation* [2021] eKLR].

24. Finally, I wish to point out that even if the appellant had proved his case against the respondents herein, the cause of action was based on the lease agreements that were entered into between himself and the 1st respondent. The 2nd – 4th respondents were not parties to the said agreements and no remedy can be sought and/or granted against them based on those agreements as they were not parties to them. The Court of Appeal in the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR, quoting the *Halsbury’s Laws of England*, 3rd Edition, Volume 8 at paragraph 110 with approval, had this to say;

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

[Also see *Rael Moraa Ondika v Swanya Ltd & another* [2022] eKLR].

25. In the end, I find that though the learned magistrate dismissed the appellant’s suit for different reasons, upon re-evaluation of the evidence that was adduced before him, this court arrives at the same conclusion that the appellant did not prove his case on a balance of probability.

26. I hereby dismiss the appeal with no order as to costs.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2022.

L NJUGUNA

JUDGE

.....for the appellant

.....for the respondent

