



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.531 OF 2014

MABEL LIMITED.....PLAINTIFF

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....DEFENDANT

JUDGEMENT

1. The plaintiff **M/s MABEL LIMITED** through a plaint do 29th October 2014 sued the defendant M/s Agricultural Development Corporation praying for judgment against the defendant for:-

- a) The sum of Kshs.147, 941,570.00 together with interest at Court rates from the date of filing this suit until payment in full for general and special damages.
- b) Rescission of the lease agreement/contract.
- c) Release of all the Plaintiff's farm machinery and equipment detained by the Defendant's officers, servants and/or agents.
- d) Monetary compensation at the market value of the Plaintiff's farm machinery and equipment detained by the Defendant's officers, servants and/or agents.
- e) Costs of this suit together with interest thereon at Court rates from the date of filing this suit until payment in full.
- f) Such other or further relief that this Honourable Court may deem fit to grant.

2. The defendant filed defence and counter-claim dated 9th February 2015; seeking that the plaintiff's suit be dismissed and judgment be entered in favour of the defendant for:-

- a) **Kshs.517, 000/- being the outstanding rent payable for the period ending 31st July, 2014 and interest thereof.**
- b) **Kshs.470, 000/- being outstanding rent payable for the period commencing 1st August, 2014 to date.**
- c) **Kshs.1, 204,000/- being the unpaid costs of the pipes supplied to the Plaintiff by the Defendant.**
- d) **Costs of the suit.**
- e) **Interest on (a), (b) and (c) above at court rates.**
- f) **Any other relief deemed fit by this Honourable Court.**

3. The plaintiff filed Reply to defence and defence to counter-claim dated 20th February 2015 praying for:-

- a) **That judgement be entered for the Plaintiff as prayed in the plaint.**
- b) **That the Defendant's counterclaim be dismissed with costs.**

c) Any other relief this court deems fit to grant.

4. The plaintiff called three witnesses in support of its claim against the defendant. **PW1** John Njega Kimingi, the Managing Director of the plaintiff company testified that he entered into a lease agreement with the defendant to lease a portion of land from the defendant on 1/8/2011, which portion he took possession thereby and tilled the land. That the portion of land he took was empty, he cleared it and the portion comprised of 4 portions totaling 235 acres. That after tilling the vacant land people started entering into the plots and planting on the same. **PW1** asked the people to vacate his land but instead claimed the land to be theirs, where the plaintiff was putting up a dam. **PW1** had a meeting with the people who told him the defendant had no right to lease the land. The portion of lands leased to the plaintiff were plots No.485, 486, part of 488 and 513 known as ADC Kiswani situated at Kilifi County measuring a total of 235 acres.

5. As per the lease Agreement the plaintiff was to pay Kshs.423,000 at a rate of Kshs. 1800 per acre during the first 3 years and thereafter a consideration of Kshs.470,000 at a rate of Kshs.2000 per acre for 4th, 5th and 6th years of the lease running from 1st August 2013 to 31st July 2017.

6. **PW1** testified that the plaintiff took possession of the parcels of land on 18th September 2011 cleared the land for the preparation of planting various crops, however it noted there were squatters working on small portions on the leased land. The plaintiff requested the squatters to vacate its leased portion of land and did withdraw from its portion, save for one person who had some crops, who the plaintiff gave sometime to harvest his crops and vacate from the land.

7. The plaintiff continued to occupy and use the land, however the squatters continued to trespass into the land and hiving off sections of the leased land and interfering with plaintiff's possession of the land. **PW1** relied on his witness statement (*P-Exhibit 1*), bundle of documents (*P-Exhibit 2(a)*) and supplementary documents (*P-Exhibit 2(b)*).

8. The plaintiff called **PW2** Kahindi Kahigu Kadege, an employee of the plaintiff, who had been employed by **PW1** as a shamba boy at the leased land. He testified the leased land bordered his land and that there were problems with squatters, who would plant whenever **PW1** would plant on the leased land. That he would be reporting of the incidents to the defendant at Malindi, who would promise to come to the site but would not. He testified the squatters would be occupying between 100 – 200 acres claiming the land as theirs in 2013. He testified the plaintiff used the land for 2 years without problems. **PW2** testified the plaintiff left the land due to its being in occupation of the squatters. **PW1** produced his witness statement (*-Exhibit 3*) as his evidence in chief.

9. **PW3** Samuel Ngugi Kuria prayed his statement (*P-Exhibit P4*) be admitted as his evidence in chief. He testified that he was engaged to work in the leased farm by **PW1**, as a supervisor of other people working on the farm. He urged there were problems caused by people who would come after they had ploughed the farm and plough down what they had planted. He testified he employed **PW2** to assist who he would send to call the defendant to come and assist the plaintiff whenever they had problem with squatters. He stated the plaintiff worked on the leased land without any difficulties planting water melon; rice, onion amongst other crops. That the plaintiff ploughed the leased land for a period of 2 years but had to leave the work due to people who came in large numbers and threatened their lives. **PW3** left the farm in 2013 leaving crops such as pilipili amongst many others and also the machinery. That he was later send by the plaintiff to go and collect the machinery but the defendant denied him access to the same and left without the machinery.

10. The Defendant witness Francis Bor, a technical officer of **ADC**, Coastal Region, basically the manager of the farms in the Region, relied on his statement (*Exhibit D-1*) as his evidence in chief. He testified that in or about May 2011 the plaintiff made a proposal of intended use of their farm which proposal the defendant accepted on 30/5/2011. That on 6/6/2011 **DW1** showed the plaintiff the land they wanted to lease being an area of 325 acres but the plaintiff accepted 235 acres; being 4 blocks numbers 485, of 92.25 acres; 486 of 71.1 acres; 488 of 30.8 acres and 513 of 105.2 acres out of 955 acres. **DW1** testified that there were some tenants of the defendant on the land; but there were no squatters. The plaintiff looked at the blocks and pointed out what they wanted. That the lease Agreement was subsequently drawn by defendant's legal department.

11. **DW1** further testified the plaintiff took 275 pipes to enable it deliver water whenever it wanted but **DW1** did not raise any invoice urging Finance Department did. That there was amount which the plaintiff was to use as capital. He urged the leased land was not fenced. **DW1** testified he did not receive any report from the plaintiff's agent nor did he fail to take any action against the squatters. He urged the leased land is still open though the lease expired in July 2017.

12. **DW2** Anthony Adembo, company secretary, with the defendant, in charge of legal matters and in charge of handling land matters, testified that he was aware of the lease agreement executed by the plaintiff and the defendant herein in 2011 and which lease was due to expire on 31/7/2017. The particulars of the lease are set out in the lease agreement for the first 3 years and secondly for the last 2 years in respect of 4 portions nos.485, 486, 488 and 513 for 235 acres; urging **ADC** farm covers 3000 acres in Malindi. **DW2** stated the lease was specific for growing crops specified in the lease agreement. He testified the hearing at Malindi in HC ELC 16/2011 did not touch on any of the leased lands. He testified the lease agreement had termination clause.

13. **DW3** Mohamed Bulle, Regional Manager of the defendant corporation in Coast, testified that there are 2 different farms with two different managers. He testified that he recorded his statement on 20/05/2015 and prayed the same be admitted as his evidence in chief (*Exhibit D-3*). **DW3** testified his work was to supervise the two companies, urging the farm in question was under his supervision. **DW3** denied that there were squatters on the leased land but those who were going there were threatening to create disturbances. He testified he was aware of the **PVC** pipes which belonged to Galani but did not know the exact number of piles nor did he know the year of lease but it was supposed to end in July 2017 urging the plaintiff is still on the ground.

14. **DW4** Morrison Andwati; Chief Accountant with **ADC** farm, testified that he recorded a statement on 20/5/2015 and signed the same. He identified the statement as (*Exhibit D-4*) and relied on the same as his evidence in chief. He urged he is aware of the plaintiff's claim and pointed out the documents supplied by the plaintiff are not sufficient to justify settlement of its claim. He further urged the **ADC** did not receive any financial documents from the plaintiff nor had he seen audited report of the plaintiff's company.

15. I have very carefully perused the pleadings; the parties witnesses statements, parties evidence, list of documents, and written submissions and the issues arising thereto for consideration can be summed up as follows:-

- a) **Whether the plaintiff was given vacant possession of the land lease to it?**
- b) **Whether there was non-disclosure of squatter problem by the defendant to the plaintiff at the time of entering into the lease Agreement?**
- c) **Whether any of the parties to the agreement was in breach of the contract?**
- d) **Whether the plaintiff has suffered loss and damage as a result of the defendant's alleged breach of the contract?**
- e) **Whether the defendant's counter-claim against the plaintiff was proved?**
- f) **Who should bear the costs of the suit?**

A) Whether the plaintiff was given vacant possession of the land lease to it?

16. The lease agreement dated 18th September 2011 between the plaintiff and the defendant is silent on whether the land was handed over to the plaintiff being vacant or not, however **DW1** Francis Bor, testified that on 6th June 2011 he took the plaintiff's round the land they wanted to use measuring 325 acres in the four blocks; where he stated they had some tenants of theirs but stated there were no squatters in the 955 acres of Block 513 including the 105.2 acres being leased. He stated the land leased was not fenced and that it was not their duty to fence the same.

17. The plaintiff through **PW1**, testified the land he took possession of was empty and it cleared it, after taking possession of the 4 portions totalling 235 acres. **PW1** testified that there were no people on the land. According to **PW1**, it is after the plaintiff tilled the land, that people started entering the leased land and started ploughing the land. **PW1**, **PW2** and **PW3** talked to the people and asked them to leave the land and when the plaintiff started building a dam one person claimed the land was theirs. A meeting was held with him and the plaintiff explained that he had leased the land to which he claimed the person, stated the defendant has no right to lease the land as the said person claimed other people owned the land. The person was not satisfied with plaintiff's explanation and promised to bring people to occupy the land. The plaintiff negotiated with the people and employed some of them. In view of the above I find that the defendant demonstrated that when it leased the land it was vacant, however as per the plaintiff after it entered and started using the land other people started claiming interest over the land and entered into possession; these are people who the plaintiff refer to as squatters.

B) Whether there was non-disclosure of squatter problem by the defendant to the plaintiff at the time of entering into the lease Agreement?

18. In determining this issue, I find it proper to state the definition of a "squatter". In the Black's law Dictionary 10th Edition page 1622 squatter is defined as "**someone who settles on property without any legal claim or title**". Similarly the definition of "non-disclosure" as per Black's Law Dictionary, 10th Edition page 1215 is defined as "**the failure or refusal to reveal something that either might be or is required to be revealed.**"

19. From the evidence addressed by both the plaintiff and the defendant there no dispute that both parties entered into a lease Agreement on 1st August 2011 for a period of 6 years. The leased parcels of land were numbers 485, 486, part of 488 and part of 513 known otherwise as **ADC** Kiswani within Kilifi County all in all measuring 235 acres. There is no dispute that according to **PW1**, **PW2** and **PW3**, the plaintiff took possession of the leased land and started cultivation, when it found that there were some squatters hiving off part of the ploughed land and planting their crops in the land ploughed by **PW1**, and claiming the land to be theirs; the squatters issue as per **PW1**, **PW2** and **PW3** became problematic as they would interfere with the plaintiff's peaceful use and occupation of the leased land from time to time as they would make demarcations on the leased land. **PW1** got into negotiations with **PW2** Kahindi Kahingu a village elder to reach settlement with the settling squatters. **PW1** testified that he had to employ **PW2** on permanent basis, assigning him duties of handling squatters' issues whenever they would arise.

20. **PW2** testified that the squatters became a problem that they even killed an Administrative police officer. **PW1** and **PW2** testified that they reported the squatters issue to the defendant provoking the defendant officials from **ADC** Headquarters from Nairobi to come to the site accompanied by Mr. Buke (**DW3**), a Coastal Regional Manager, who promised to solve the squatters issue by chasing them away.

21. The defendant through **DW1**, **DW2**, **DW3** and **DW4** denied that there were squatters on the leased land as at the commencement of the plaintiff's tenancy on the leased land. From a letter dated 23/9/2011 the defendant's **CEO** Malindi Location, Gabriel Karisa, wrote to **OCS** Malindi Location stating one acre of farm produce at Defendant's farm had been harvested and stolen. Further on 20th September 2014, the Managing Director of the defendant, A.K Tuimun, wrote to Inspector General of Police; David Kimaiyo, then; complaining of the security at the Defendant's Kiswani Farm due to the periodic invasion into the farm by squatters who were destroying the crops as well as killing and causing injuries to animals. Later in September 2014, Technical Officer, **ADC** Kiswani Complex; Francis Bor, wrote to Managing Director; reference of the letter reading "invasion by squatters" and detailed the cases as:-

i) **OB No.45/20/9/14;**

ii) **CR. 313/416/2014;**

iii) CF 532/2014;

In view of the above and noting that **DW3** Mohamed Bulle, confirmed before the court that there were invasion to the leased land and considering the above-mentioned correspondences, and the evidence by **PW1**, **PW2** and **PW3** I am satisfied that there were squatters problem at the leased land.

22. In the instant case, both the plaintiff and the defendant do not dispute of the existence of case No. Hccc 16 OF 2010 Raphael Mlewa Mkara & 515 others vs Agricultural Development Corporation and the court order issued on 20th May 2011. Upon perusal of the pleadings attached to the list of plaintiff's documents the following becomes very clear:-

a) That as far as 2010 there was a suit filed against the defendants by the parties in Hccc No. 16 of 2010 involving the leased parcel of land to the plaintiff by the defendant.

b) On 20/5/2011 an adverse temporary order was made against the defendant involving the same parcels of leased land to the plaintiff by the defendant.

c) On 8/6/2012 an order by Hon. Meoli J was made in favour of the defendant restraining the plaintiffs in the above suit from encroaching or occupying the defendant's land pending the hearing and determination of the suit.

d) In Elc 16 of 2010 the plaintiffs alleged by the defendant to be squatters/invaders of Kiswani Farm numbering in hundred and occupied 1282.29 acres of the 3000 acres also affected L.R No. 513, 467, 470, 480, 485, 482, 488, 456, 5061 and 1949 four of what were the parcels leased to the plaintiff herein.

23. From the evidence adduced by both parties and the case that was before court as from 2010 being Hccc No. 16 of 2010 (*Malindi High Court*) I have no doubt in finding and holding that at all material time since 2010 to the time of signing the lease between the plaintiff and the defendant in or about 1st August 2011 the defendant was aware of the periodic existence of squatter problems affecting the parcels of the land that it intended and eventually leased the same to the plaintiff and though being aware of the existence of the squatter problems the defendant deliberately failed and/or refused to reveal that crucial and material information to the plaintiff. The defendant declined to disclose the relevant material information to the plaintiff and sought to benefit from the plaintiff's interest in leasing the property to which had the information been disclosed, the situation would have been different.

24. The defendant contend, that it would have been improper to stop its business activities on the whole of Kiswani farm simply because a case has been filed against it challenging ownership of the property, yet it had a good title and that is why the defendant went on to lease the land to the plaintiff since it was well aware the land belonged to the defendant and the case was baseless. I find the issue herein is not the issue of title to the land but whether the defendant had the obligation to disclose squatter problem and I find it did not bother to inform the plaintiff and the issue of ownership of the land is no defence for failure to disclose a crucial information which the plaintiff would have considered before entry into the lease. The defendant is guilty of non-disclosure of material facts.

25. The defendant further contend, the plaintiff failed to take action to report the matter to police and that the plaintiff did not consider opting out of the contract. I have considered the evidence of **PW1**, **PW2** and **PW3** and I am satisfied that they reported the matter to the administration and the defendant were duly informed even letters made to them and also they dealt with higher police officers.

26. On clause (l) of the Lease Agreement it is provided:-

"The Lessee may from time to time be exempted from liability under this lease arising out of its failure to prevent the encroachment or systematic trespass upon the said land as provided in (I) above by the Lessor in writing where such encroachment or systematic trespass results from illegal eviction the Lessee cannot achieve even after exercising due diligence and employing reasonable effort and where such eviction may require the intervention of the government of the aforesaid Republic. The Lessee shall otherwise be expected to observe the covenants hereby provided."

27. The above clause was freely entered into by both parties herein and are bound by the same. From the said clause it is an indication that the defendant was well aware that the squatter issue was likely to arise during the pendency of the lease and the defendant though it did not disclose of the existence of squatter problems, it opted to have lessee exempted from liability under the aforesaid lease arising of its failure to prevent the encroachment or systematic trespass upon the leased land by the defendant. Such clause was not accidentally put in the agreement for the sake of it. It was put as the defendant was aware of existence of the squatters problems but did not come out forthright.

28. Under clause 4 of the lease agreement it is provided:-

"The Lessor hereby covenants and agrees with the Lessee to permit the Lessee on its paying the rent hereby reserved and performing and observing the covenants agreements conditions stipulations and provisions on its part herein more particularly set out peacefully to hold and enjoy the said Land during the term hereby granted without any interruption by the Lessor or any person rightfully claiming under or in trust for it."

In view of the above mentioned clause, I find that it was a duty of the defendant to ensure that the plaintiff's leased land were free from any interference from squatters and was utilized peacefully during the term of the lease. The defendant failed in ensuring that the plaintiff occupied and utilized the land free from any encroachment. I do not agree with the defendant assertion that the clause was limited to lessor and lessee and that it only protected the lessee from the interference only by the lessor.

29. In the case of **Stephen Wasike Wakhu & Another vs Security Express limited (2006) eKLR** Hon. Lady Justice M. Mugo stated:-

"A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that "he who alleges must prove."

30. I therefore find that the plaintiff has demonstrated that there was non-disclosure of squatter problem by the defendant to the plaintiff at the time of the entry into the lease agreement and I also find and hold a guilty party should not be allowed to benefit from its failure of non-disclosure of crucial material information and very relevant to the execution of the agreement.

C) Whether any of the parties to the agreement was in breach of the contract?

31. The lease agreement entered into by the parties provides for conditions under which the contract should be terminated. Under clause 5(b) it is provided:-

"Either party may at any time for any reason terminate this Lease by giving to the other not less than six (6) months notice in writing of its intention so to do and upon the expiry of such period the Lease shall forthwith determine."

32. In view of the above it appears the lease agreement provided for a party at any time to terminate lease for any reason by giving the other 6 months' notice or for breach of terms of the lease.

33. The plaintiff position is that it is the defendant who breached the contract by its breach of clause 4 of the lease agreement by failing to inform the plaintiff that the leased parcels of land were subject of an ongoing court case at the time the lease agreement was being entered into being Malindi High Court Civil case No. 16 of 2011 Raphael Mlewa Mkare & 515 others vs Agricultural Development Corporation. In addition to that, it is contended by the plaintiff, that the defendant did not take any action upon being informed that the leased property were being encroached on by the squatters; to ensure that the plaintiff enjoyed quiet enjoyment during the term of the lease.

34. **DW1, DW2 and DW3** in their witness statements and in their evidence before court admitted they knew of the ongoing cases. In the evidence of **DW1, DW2, DW3 and DW4**, the defendant failed to demonstrate the steps they undertook to prove that they discharged their obligations as spelled out under clause 4 of the lease agreement save they promised to chase the squatters but failed so to do. The evidence of existence of periodical problems with squatters strengthens the plaintiff's evidence that the leased properties were perennially invaded by squatters. **DW4** confirmed the leased properties were always being invaded by invaders.

35. The defendant contends the plaintiff was the one in breach of the contract as under paragraph 13 of its statement it decided to withhold rent. It is stated under the said paragraph as follows:-

"We wrote to the Defendant (copy of letter from Mabel Ltd to ADC annexed on page 22 of the Plaintiff's bundle of documents) on the situation and asked them to find a solution to the matter. They did not respond to our letter and I decided to withhold rent for the period August, 2013 of Kenya Shillings Four Hundred and Seventy Thousand Only (Kshs.470,000/-) to create a situation where it would have to address the matter as the Plaintiff no longer had hope of getting its value for money due to the aggravated squatter situation."

36. The plaintiff's act to withhold rent is according to the defendant an act of termination of the contract without notice. It is further urged the plaintiff in this matter should have written to the defendant before rushing to court. It is therefore urged the plaintiff breached the contract by failing to pay rent from 1st August 2013 and never giving notice in writing terminating the contract.

37. In the case of **Hassan Zubeidi vs Patrick Mwangangi Kibaiya & another [2014] eKLR** the Court held that: - **"In contract, a breach occurs when one or both parties fail to fulfil the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts."** The Learned Judge further quoted **"Law of Contract in East Africa"** by R.W. Hodgin, Kenya Literature Bureau, and the learned author deals with **"FUNDAMENTAL BREACH"** in this way: - **"If the breach goes to the root of the contract and affects its commercial inability, it is said to discharge the contract."**

38. Further in **Precast Portal Structure Limited vs Riccardo Lizier & 3 others [2015] eKLR** the Court stated that:-

"The applicable principles in this regard are that a contract breaker is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was being made as being not unlikely, or liable to result or flow naturally from his breach. This is commonly referred to as the rule in Hadley vs Baxendale. See also Halsbury's Law England, Fourth Edition, Volume 12 paragraphs 1174-1176 at pages 462-464 in this respect."

39. On the issue of non-payment of rent clauses 1 and 3 of the agreement provides; that the lessor may re-enter upon the premises or any part in the name of the whole and repossess and enjoy possession thereto. The defendant though complains of unpaid rent, it did not take advantage of clause 3 to possess the leased premises but left the plaintiff to continue to be in possession. In actual fact defendant's witness maintained the lease had not been terminated and the same continued to be in force till July 2017. That notwithstanding, I find failure to pay rent for the reason given by the plaintiff justifiable. I also find the defendant's failure to secure peaceful possession of the leased premises also a breach of the contract which goes to the root of the contract resulting to failure of the discharge of the contract. The plaintiffs reason for withholding the rent as per paragraph 13 of his statement was intended to force the defendant to address the issue of the problems caused by the squatters. All in all I find that the defendant was solely responsible for the breach of the contract for failing to discharge its contractual obligations to ensure the plaintiff enjoyed quiet and peaceful possession of the leased property which led to the plaintiff's refusal to pay the rent and the defendant should be solely be held liable for the breach of the contract.

D) Whether the plaintiff has suffered loss and damage as a result of the defendant's alleged breach of the contract?

40. In the instant suit, it should be noted that in the plaintiff's Bundle of documents dated 29/10/2014 and supplementary list of documents dated 16th March 2015 were adduced in evidence by consent of the parties. In this regard the court is guided by the case of **Martin Kidake vs Wilson Simiyu Siambi [2014] eKLR**, wherein Justice G.V. Odunga quoted with authority the case of **David Ndung'u Macharia vs Samuel K. Muturi & another, Nairobi HCCC No.125 of 1989** where Ringera J. (as then was) held:-

"The second issue is that it is only an agreed report that can properly be admitted without calling the maker. The mere exchange of medical reports does not render such report admissible without calling the maker(s) unless one or both of them have been agreed."

41. **PW1** in his evidence averred that the plaintiff had heavily invested in the leased land, that he had 50 acres under irrigation and had planted various crops. He had invested in research on planting of hybrid rice, sorghum, onion, chilies, and cabbages. **PW3** testified the plaintiff had planted water melon, rice, onion and other crops. **PW1** in his evidence testified that he had travelled to Philippines in 2012; visited the Philippines Research Institute, the Phillipines Rice Farms and met the Directors of SL Agritech. He averred that he had engaged Jamleck Mwathi, a leading rice breeder in the country with whom they collaborated together with the authority of **KEPHIS** through the University of Nairobi, Faculty of Agricultural. That Nationwide professional trials were conducted with very promising results with reference being made to SL8 Evaluation report at page 31 to 38 and pages 25 – 43 of the Plaintiff's Bundle of Documents.

42. **PW1** in his evidence testified that SL Agritech from Philippines and the plaintiff had portioned and incorporated a company-Hyrice seed company Limited with an intention of pursuing planting of Hybrid Rice, however this did not materialize as SL Agritech pulled out due to the squatter problems (see plaintiff's Bundle of documents at pages 133 – 134 and 135 – 146). **PW1, PW2** and **PW3** testified that the plaintiff had planted water melons, onions, chillies, maize, tomatoes, beans and cabbages on 50 acres, being part of the leased land (see plaintiff's Bundle of Documents at pages 48 – 55, 64 – 67, photographic evidence of the crops mentioned above). **PW2** a supervisor, at the plaintiff's leased farm, testified that the plaintiff invested in the farm from 2011 – 2013 and during the two years they had grown various types of crops. The plaintiff witnesses testified that the plaintiff had invested heavily on the land, as it had various machineries and with pumps for irrigation with irrigation systems. **PW1, PW2** and **PW3** evidence is that the plaintiff incurred a lot of losses due to squatter invasion which prevented the plaintiff from proceeding with the intended projects (see page 147 – 187, copy of the plaintiff total expenses on an excel spread sheet from 29th September 2011, to 1st March 2013 and pages 188, summary of expenses incurred by the plaintiff in its agricultural activities on the leased lands). **PW3** in his evidence, the supervisor of the leased farm, testified the squatters would invade the farm for a duration of 3 – 4 weeks and that they ploughed the land with difficulties. That they were being threatened by the squatters and had to leave the farm in 2013 leaving the crops in the land unharvested. That he was later sent to collect the same but the defendant denied them access to the farm and collecting them.

43. In the case of **Speed Wall Building Technologies Limited vs County Government of Migori (2016) eKLR**, the Court held thus:-

"The general principle in award of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase 'restitution in integrum'. The case of Hadley vs Baxendale (1854) 9. Exch.341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach."

44. The defendant contend, that it is misleading for court to be holding and admitting the documents were sufficient to support a specific claim without regard to what documents are required under the law as sufficient to support a specific claim. In the case of **John Mburu vs Consolidated Bank of Kenya C.A No. 162 of 2015 at paragraph 35 of the court's holding, the learned Judge ruled thus:-**

"The court in that case considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege. A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist....."

In view of the above case it is the defendant's contention that the plaintiff is estopped from claiming damages on account of breach and having waived its rights by conduct.

45. The defendant submitted that it challenged documents during the hearing of the case under:-

- a) **The hybrid rice project on pages 135 – 146, submitting the lease agreement is not dated nor executed by parties.**
- b) **Plaintiff's bundle of documents on pages 25 – 43 on hybrid rice project evaluation report by Jamlick Mwathi of Hyrice Seed Company in Kenya, a stranger to the suit and urging no trials had been done at Kiswani land leased to the plaintiff.**
- c) **Photographs attached with regard to the hybrid rice project do not have certificate of process.**
- d) **That the plaintiff did not produce expert evidence.**

It is further urged that the defendant was not aware of any such project and therefore should not, in any way be liable for what it did not have knowledge about. It is further urged the evaluation report on pages 115 – 132 were not supported by expert witness testimony. The defendant further challenges the photographic evidence for activities on the land as proof of crops planted on the land by the plaintiff from pages 44 – 67 urging the same did not meet the standard of admissibility as evidence.

46. The defendant on list of expenses in the plaintiff's bundle of documents from pages 147 – 187 urged the expenses do not bear the logo of the plaintiff's company hence it is difficult to link it with the plaintiff. That it is difficult to ascertain who prepared the list of expenditure of

the farm, is neither by a disclosed person nor checked by a disclosed person and that the same is not dated. It is further urged that there are no payment receipts and as such the plaintiff's claim is not proved. It is submitted the only receipt attached referred to is on pages 17 – 18 and 20 which were later referred as per page 21.

47. Section 107 of the Evidence Act provides:-

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

48. In the **Great Lakes Transport Co. (U) Ltd vs Kenya Revenue Authority, (2009) eKLR 720**, the Court, considered how proof of payment, in a claim for special damages may be established and distinguished an invoice from a receipt in the following terms:-

"Although the claim was pleaded at paragraph 7(b) of the amended plaint and for in the prayers, the proof advanced in respect of it did not meet the required standard. There was no receipt produced to show that actual cash was paid , or any payment made for the alleged purchase of tyres. A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have proved very easily by producing either a receipt.....With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for..."

49. Similarly, in **Hahn vs Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at page 717, and 721** where the learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. –held:-

"Special damages must not only be specifically claimed (pleaded) but also strictly proved for... they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves."

50. The defendant has further submitted no evidence was adduced to support claim for lost revenue and no returns were filed to prove that the plaintiff made profit or losses.

51. In the instant suit, there is no dispute to plaintiff's Bundle of documents dated 29/10/2014 and supplementary list of documents dated 16/03/2015 were adduced as evidence by consent of the parties herein but such consent and production in my view does not render documents made by experts admissible without calling the maker (s), when both parties have not agreed to dispense with evidence of such witnesses. It is further trite law that special damages must be specifically pleaded and strictly proved. In the instant suit, under paragraph 15 of the plaint the plaintiff has pleaded special damages but I find no receipts were produced to support the special damages especially under sub-heading particulars of loss. That without proof the same cannot be granted. On lost revenue opportunity this is in my view a claim for general damages put not claim for special damages. **PW1, PW2 and PW3's** evidence confirm the plaintiff had heavily invested in the leased property with a view to give it a Revenue, however following the plaintiffs removal from the farm by squatter activities, the plaintiff lost revenue opportunity. There is no evidence of rice having been produced on the leased land nor any experiments on the leased land. No expert witness was called; however the court find that the removal of the plaintiff from the leased land before the expiry date of the lease it left crops unharvested resulted in the plaintiff losing revenue opportunity considering all the evidence and what the plaintiff estimated would be revenue had it not been unceremoniously removed by squatters activities and denied to harvest the crops by the defendant, I am satisfied the plaintiff lost the revenue opportunity and crops. I would find general damages of Kshs.15, 000,000/-would be fair and reasonable.

52. In the instant suit, I have found that the defendant breached the lease agreement between itself and the plaintiff, that the plaintiff has demonstrated that it suffered losses to which it is entitled to be compensated in respect of the unharvested crops which has been specifically pleaded The plaintiff in support of lost revenue relied on particulars on various pages in its bundles of documents. I find the plaintiff has proved it has suffered loss and damage and lost revenue opportunity as a result of defendant's breach of the contract and is entitled to damages.

E) Whether the defendant's counter-claim against the plaintiff was proved?

53. It is contended by the defendant, that the plaintiff received 172 pipes from the defendant amounting to Kshs.1, 204,000 but has since not paid for them. The plaintiff as per its statement by **PW1**, statement by **DW3** and **DW4** there is no dispute that the 172 **PVC** Pipes were brought by the plaintiff from Galana Kulalu Farm. **PW1** testified that he was told by the defendant to transport and use the pipes at his own cost since they were lying idle in Galana Kulalu Farm and he was not told in any way to pay for the same (*see plaintiff's copy of letter dated 4/7/2014*). *To the contrary* the defendant in its defence stated the plaintiff was supposed to pay Kshs. 1,204,000/- for the pipes. The plaintiff on 1/12/2012 received a delivery note from the Defendant for only 25 **PVC** pipes and told an invoice was to follow which the plaintiff received after 1 year (*see Defendants Bundle on page 13*). The defendant avers they issued 2 delivery notes each for 25 **PVC** Pipes dated 1/12/2012 and 21.10/2012. That defendant issued an invoice on 31/3/2013.

54. I note there is no denial that the plaintiff was served with invoices for the pipes delivered and had it that the collected pipes were not supposed to be paid for the plaintiff would have challenged the delivery of the invoices. I find his conduct of not protesting the delivery of the invoice is a clear confirmation of the parties having had an agreement for the plaintiff to pay for the pipes supplied. The plaintiff did not contest the invoices but proceeded to make use of the defendant's pipes. He is by his conduct estopped from denying he was supposed to pay for the pipes.

55. In the instant case, there is undisputed evidence that when the plaintiff left due to squatters problems, it left all its investments including irrigation pumps, and even the pipe at the leased properties. **PW1, PW2 and PW3** testified that when the plaintiff went to collect engine

pumps, the defendant's officers refused with them and impounded the plaintiff's properties. **DW2** stated the plaintiff did not give them the option of purchasing the equipment as per clause 7 (b) of the lease agreement. Further no evidence of agreement of sale of the pipes has been produced in this matter and the agreed purchase price. There is evidence from the defendant that all the pipes claimed are still lying on the leased land. The defendant did not allow the plaintiff to collect the said pipes and other properties belonging to the plaintiff, I find the defendant having acted in a manner adverse to the plaintiff's right to enjoy its properties it should not claim payment of what they claim to have sold and deprived the plaintiff by denying it access and collection of its properties. I find no basis for awarding the claim Kshs.1, 204,000 to the defendant as it has not been specifically proved and even if it was, I would find no basis for defendant who has refused the plaintiff to take possession of the said property to claim for the payment. The defendant has not released the pipes and cannot be paid for the same.

56. In the case of **Valentinos Footwear Manufactures Limited vs Bata Shoe Company Limited [2011] eKLR** the Court held that:-

"In order for the agreement... to be understood, it must be placed in context. The time has long passed when agreement, even those under seal, were isolated, from the matrix of the facts in which they were set and interpreted purely on internal linguistic consideration... We must... inquire beyond the language and see what the circumstances were with reference to which words were used, and the object, appearing from those circumstances, which the person using them had in view... In my opinion, then.... evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim of the transaction.'"

57. The defendant claims rent arrears rent of Kshs.517, 000 being outstanding rent payable for the period ending 31st July 2014 and Kshs.471, 000 being outstanding rent payable for the period commencing from 1st August 2011.

58. The plaintiff contend that by virtue of clause (I) of the lease agreement it was exempted from liability under the lease arising out of the defendants' failure to prevent the encroachment or systematic trespass upon the leased land by the squatters.

59. In the instant case, **PW1, PW2** and **PW3** reported to the defendant on the encroachment of the leased land by squatters severally but the defendant did not take any step to stop the encroachment on the leased land. The plaintiff's effort to stop encroachment through negotiation and discussion with the squatters failed and the defendant failed to stop the squatters. The plaintiff was entitled by the lease agreement to be exempted from liability out of the failure of the defendant to ensure the squatters did not invade the leased land.

60. The upshot is that the plaintiff's suit succeeds. I enter judgement for the plaintiff as follows:-

A) i) Special damages nil.

ii) General damages Kshs.15, 000,000.

iii) An order of recession of the lease Agreement/Contract be and is HEREBY granted.

iv) An order be and is HEREBY issued for release of all the plaintiff's farm machinery and equipment detained by the Defendant's officers, servants and/or agents within 30 days from today.

v) In the alternative to ((IV)) above the defendant is ordered and/or directed to give monetary compensation at market value of the plaintiff's farm machinery and equipment detained by the defendant's officer, servants and/or agents.

vi) Costs of the suit to the plaintiff.

B) The defendants counter-claim be and is hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 21st day of February, 2019.

.....

J .A. MAKAU

JUDGE