



**Mwaniki v Nyaga (Environment and Land Appeal 37 of 2018)
[2025] KEELC 3657 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 37 OF 2018**

AK BOR, J

APRIL 24, 2025

BETWEEN

ESTON RUGANO MWANIKI APPELLANT

AND

ROSALINE KAGENDO NYAGA RESPONDENT

JUDGMENT

1. Being dissatisfied with the judgment delivered by Honourable Ndeng'eri, Chief Magistrate, on 22/11/2018 in Embu CMCC Case No. 172 of 2017, the Appellant lodged this appeal seeking to have that judgment set aside and substituted with an order dismissing the Respondent's case and allowing the Appellant's counterclaim with costs. The main grounds set out in the memorandum of appeal dated 13/12/2018 were that the Learned Magistrate erred in finding that the Respondent had proved her claim on a balance of probabilities. It was contended that the court erred when it failed to find that the Appellant had proved his counterclaim on a balance of probabilities. The Appellant urged that the trial court disregarded his evidence and that the court failed to fairly evaluate and analyse the evidence adduced.
2. The background to this dispute is that the Respondent filed the plaint dated 13/9/2017 claiming that she entered into an agreement with the Appellant on 18/2/2017 for the lease of khat (miraa) stems on the land known as Mbeti/Gachoka/719 (the leased land) on certain conditions including the provision that as lessee, the Respondent would enjoy quiet use of the leased property. She claimed that on or about 6/8/2017, the Appellant accosted her employees who were working on the leased land and assaulted one of them. Further, that the Appellant disconnected the water supply used to water the miraa, locked the leased land and denied the Respondent access to the land and when she attempted to access the land, her motor vehicle was maliciously damaged. The Respondent sought general damages for breach of contract as well as liquidated damages. She also sought compensation for the amount she had invested on the leased land.



3. In the defence and counterclaim dated 17/10/2017, the Appellant denied the Respondent's claim and averred that the employee referred to by the Respondent was his former employee and that he had been charged with stealing in Siakago SPMC Criminal Case No. 806 of 2017. He averred that the water was disconnected by EWASCO officers with justified reasons. He contended that it was the Respondent who breached the lease agreement.
4. He averred that the lease was to run from 1/4/2017 until 31/3/2018, however, in July 2017, he noticed that the Respondent was not taking good care of the leased land and that she was cutting down the stems and branches besides not watering the miraa bushes. He claimed that the Respondent had sublet the leased land to George Mburu Kimani and that she was never on the land whenever he visited. He sought to have the Respondent pay damages of Kshs. 250,000/= under clause 16 and for her to vacate his property.
5. He counterclaimed for a declaration that the Respondent had breached the lease and that he had acquired the right to re-enter the leased land. He also sought the eviction of the Respondent and her agents from the leased land and for the Respondent to pay general damages for breach of contract.
6. The suit was heard by Hon. Ndeng'eri, Resident Magistrate on 2/8/2018 when both parties gave evidence and in addition, the Appellant called Francis Muriuki Kabui to testify. In the judgment delivered on 22/11/2018, the trial court dismissed the counterclaim and entered judgment in favour of the plaintiff (Respondent) after finding that the Appellant had breached the lease agreement.
7. Based on the directions given by this court, the appeal was canvassed through written submissions. The Appellant submitted that he entered into the lease with the Respondent but that before expiry of the lease agreement, the Respondent breached the terms of the agreement and despite being served with a demand to vacate the leased land, she refused to accede. He submitted that the Respondent breached the terms of the lease when she failed to take good care of the leased miraa and that the Respondent cut down the miraa stems and branches against the terms stipulated in clauses 12 and 13 of the agreement. Additionally, that the Respondent failed to properly water the miraa bushes thereby leaving many bushes to turn yellow and wither. He claimed that the Respondent failed to comply with clause 10 of the agreement and that the Respondent or her agents had damaged the water tanks on the leased land.
8. He added that clause 11 of the lease allowed him to make routine surveys on the leased land and that every time he went to the land, he only met one George Mburu Kimani and that he later came to learn that the leased land had been sublet to George Mburu Kimani contrary to the terms of the agreement between him and the Respondent.
9. The Appellant cited clause 9 of the agreement which permitted the Respondent to apply for her own water meter and claimed that the Respondent delegated the authority granted to her under that clause without consulting the Appellant or seeking his authority. He relied on the undisputed fact that the water meter was registered in the name of George Mburu Kimani, who was not a party to the agreement.
10. The other point taken up by the Appellant in the submissions was that the Respondent breached clauses 7 and 8 since she was to lease the one room house at Kshs. 500/= and pay for it 6 months upfront. She was also required to pay 30,000/= as security for the water meter that was to be installed on the leased land. The Appellant invited the court to analyse the lease agreement and find that the Respondent failed to discharge her obligations and that she should be held liable to pay the damages under clause 16 of the agreement.
11. The Appellant submitted that despite the Respondent claiming that she worked on the leased land with her husband George Mburu Kimani and Anthony Muthi Kinyua, those persons were never called



- as witnesses to corroborate the Respondent's evidence to prove that indeed they were working under her instructions as her employees and not in their own authority. The Appellant relied on Section 107(1) of the *Evidence Act* on the burden of proof.
12. Regarding the Respondent's allegation that the Appellant disconnected the water supply, he submitted that he proved that he reported the illegal water connection that had been done by a stranger to EWASCO who disconnected the water supply. He maintained that he only carried out his due diligence under the law as the registered proprietor of the leased land.
 13. The Appellant submitted that clause 9 of the agreement stipulated that the lessee was to apply for her own water account and that the clause did not provide for a husband or agent to undertake this on behalf of the lessee. Further, that the clause did not require the Appellant to give notice and wait for a response from the Respondent before acting as the trial court reasoned. The Appellant therefore submitted that the trial court erred in law and fact by failing to evaluate and analyse the evidence on record.
 14. He urged that having proved breach of the lease by the Respondent and based on clause 16 of the agreement which provided for any party who breached the agreement to pay the innocent party a sum of Kshs. 250,000/=, he was entitled to this sum. He urged the court to allow his appeal.
 15. The Respondent submitted that it was the Appellant in breach of the agreement as the trial court rightly observed. That he breached clauses 7 to 13 of the agreement. That despite the Appellant alleging that the Respondent failed to comply with clauses 12 and 13 of the agreement by cutting down the miraa stems and branches and failing to water the miraa, he did not produce evidence in court to prove this fact. She submitted that the trial court was right in rejecting the evidence of the second witness called by the defence as being biased and of negligible value to the proceedings. The Respondent submitted that no evidence was adduced of the destruction of the Appellant's water tanks.
 16. On the issue of subletting the leased land, the Respondent submitted that no evidence was led to prove this save for the allegation that the Respondent's husband signed the application for the water meter. She urged that the agreement merely mandated her to apply for her own water meter but it did not require that she had to sign the actual application. She maintained that the issue of the water meter and the fact that the Respondent's husband was working on the farm did not prove that she had sublet the leased land.
 17. Regarding the lease of the one room, the Respondent submitted that the lease stated that it was to be complied with by 31/9/2017 yet by then she had already vacated the leased land. That despite the rent being payable by 31/9/2017, the Appellant had confirmed that that amount was paid by 4/5/2017. The Respondent concluded that the main reason why the Appellant acclaimed that she was in breach of the lease agreement was the involvement of her husband on the suit property yet nothing prevented her from engaging workers or other people to work on the farm including George Mburu.
 18. The issue for determination is whether the court should allow the appeal. It is not in contention that the parties to this suit entered into the agreement for lease dated 18/2/2017 which was to run for a year with the option of renewal of the lease. The lease was to run from 1/4/2017 to 31/3/2018. The agreement stipulated when the payments were to be made. Clause 7 provided that the consideration for the one room house was payable 6 months in advance with effect from 1/4/2017. The lease required the Respondent as lessee to apply for her own water meter. The water tanks were freely given to the lessee and she was required to return them in perfect condition upon termination of the lease.
 19. Clause 11 provided that the lessor would be sending his agent or employee to the leased portion to survey the smooth running of the leased portion while clause 12 stipulated that the miraa was leased in



good working condition and it would be surrendered back in the same condition. Clause 13 required the lessee to prune the miraa but not cut the stems or branches. Clause 16 set the liquidated damages payable by the offending party to the innocent party at Kshs. 250,000/=.

20. What falls for determination is who between the Appellant and the Respondent breached the terms of the lease agreement. The Appellant failed to prove that the Respondent sublet the leased property. He did not also prove that the Respondent cut down miraa bushes or that she neglected the miraa bushes by not watering them. Having instigated the disconnection of the water to the leased land, it was expected that watering the miraa would not be possible.
21. The lease agreement did not provide that the lessor could re-enter the leased land as he purports to have done. The agreement did not require that the lessee to be on the leased land every time the lessor visited the leased land. Clause 11 merely stipulated that the lessor could send his agent or employees to the leased land to survey the smooth running of the leased portion. That clause cannot be construed in the context which Appellant ascribed to it to mean that as lessor he would supervise what the lessee was doing on the leased land during the term of the lease.
22. Parties entered into the lease agreement which was to run for a year from 1/4/2017 but the Appellant as lessor instigated the disconnection of the water to the leased premises in August 2017 and denied the lessee access to the leased property. That was 4 months into the term of the lease. The provision giving the liquidated damages payable in case of breach of the agreement was intended to cushion either party in the event of breach and would have been available to the Appellant had the Respondent breached the term of the lease obligating the Respondent to maintain the miraa in good form and condition.
23. This court is not inclined to interfere with the finding made by the trial court that the Appellant breached the terms of the lease agreement.
24. The appeal fails. The Respondent is awarded the costs of the appeal.

DELIVERED VIRTUALLY AT EMBU THIS 24TH DAY OF APRIL 2025.

K. BOR

JUDGE

In the presence of: -

Ms. Sylvia Ndwiga for the Appellant

Diana Kemboi- Court Assistant

No appearance for the Respondent

