Kimman Exports Limited & another v Elbur Flora Limited (Land Case 122 of 2016) [2022] KEELC 2451 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2451 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 122 OF 2016

FM NJOROGE, J

JULY 21, 2022

BETWEEN

KIMMAN EXPORTS LIMITED ..... 1ST PLAINTIFF

KIMMAN ROSES LIMITED ..... 2ND PLAINTIFF

AND

ELBUR FLORA LIMITED ..... DEFENDANT

JUDGMENT

1. This is a strange suit in which the plaintiff appears to have forgotten to include substantive prayers in his plaint and as seen later in this judgment, this court had to construe the contents of the said plaint conjunctively with the contents of the reply to defence and counterclaim in order to do substantive justice to the parties in the dispute.

The Plaintiff's Claim.

2. In the Plaint dated 11/4/2016 the prayed for judgment against the Defendant for:

    a. An interim measure of protection by way of interlocutory injunction be and is hereby issued restraining the Defendant, her servants, employees and or agents or otherwise whosoever from interfering, in any manner with the Plaintiffs possession, occupation and use of land titles Nos. Nakuru/Kapsita/2165 and Nakuru/Kapsita 1028 pending inter partes hearing and determination of this suit.

    b. OCS Elburgon be ordered to enforce orders of this court.

    c. Costs of this suit together with interest.

    d. Such other relief that the court may deem fit and just to grant.

3. The prayers sought in the plaint as above are evidently quite ephemeral in nature and what appears to be the main prayer in that plaint was apparently duplicated in the notice of motion dated 11/4/2016. That motion was not heard. It was countered by the defendant's motion dated 8/8/2016 seeking similar injunctive orders against the plaintiffs but in respect of 10 plots and not the two plots mentioned in the plaint. Subsequently, on 8/2/2017, the parties executed a consent by which the two plots were left in the plaintiff's possession while the rest were put into the defendant's unhindered possession.

4. The defendant filed its defence and counterclaim on 19/4/2016 and filed another similar pleading dated 30/6/2021 on 6/8/2021. The latter was adopted and the former expunged by yet another consent of the parties on 24/1/22. The plaintiffs filed their reply to defence and defence to counterclaim on 8/2/2017 and filed another one on October 25, 2021, the latter in response to the defendant's new defence and counterclaim.

5. The original plaint was not amended. A counterclaim is usually considered as a separate suit, and the plaintiffs have responded to it. Therefore, notwithstanding the deficiencies in the original plaint, this court will endeavour to determine the dispute at hand, with the reply to defence and defence to counterclaim and the plaint being collectively deemed to be the plaintiffs' main pleading that has been answered by the counterclaim.

6. While the suit was pending the plaintiffs filed their two replies to the defence and counterclaim but it is only fair to rely on the second one filed on October 25, 2021. I have considered that pleading alongside the body of the plaint in formulating the plaintiffs' defence to the counterclaim, for they can not be said to be having a claim properly so called under a plaint. The plaintiffs acknowledge that the defendant owns all the suit land. The plaintiffs aver that they entered the premises in 2012 when the parties agreed that the plaintiffs would harvest and sell off harvested upper-class roses grown on the properties and in the same year, they were granted a lease over the property and have been in possession since; the plaintiffs' defence is that in April 2014 the 1st plaintiff leased 8 ha. from Titles No. Nakuru/Kapsita 1028 from the defendant and the lease was renewed for a period of 17 years by the parties vide a lease agreement entered into between the parties on 28/2/2013 and so the defendant is not entitled to possession as prayed; that they have been remitting rent in accordance with that lease; that they therefore entered the land with authority and consent of the defendant; that between 1/3/2013 and 1/3/2016 the plaintiffs paid Kshs 900,000/=; that between 1/3/2016 and 1/3/2021 the plaintiffs paid Kshs 1,125,000/= and thereafter the plaintiffs have paid Kshs 1,125,000/=; that between August and November of an unstated year, they prepaid rent under the agreement to the tune of Kshs 5,900,000/=; that it was agreed that the plaintiffs would occupy and enjoy the use of the structures and equipment on the premises, and the plaintiffs paid for piping at the cost of Kshs 400,000/=.

7. The consent parties entered into on 8/8/2016 allowed the parties to visit all the parcels mentioned in the instant suit in the company of their private surveyors to establish the actual positions of the parcels and the actual occupation on the ground, and that partied to agree on the issue of access if there was need.

8. The counterclaim seeks orders as follows, verbatim:

    a. An order for permanent injunction restraining the plaintiffs from interfering with parcels of land title numbers Nakuru /Kapsita/1657 Nakuru/Kapsita/1040,Nakuru/Kapsita/1028, Nakuru/Kapsita/2165, Nakuru /Kapsita/1115, Nakuru /Kapsita/2166, Nakuru/Kapsita/1570, Nakuru/Kapsita/1749, Nakuru/Kapsita/1042, Nakuru/Kapsita/1748, and Nakuru/Kapsita/1750, popularly known as Elburgon Flora Farm comprising of approximately 100 acres at Elburgon and an order for eviction do issue against the plaintiffs/defendants in the counterclaim;

b. An order for mesne profits at the rate of 6 million (sic) per year from 2013 to date against the plaintiff's/defendants in the counterclaim;

c. Costs of the suit.

9. It is noteworthy that the parcels Nakuru/Kapsita/1028, and Nakuru/Kapsita/2165, which were omitted in the defendant's earlier pleading, were included in the defence and counterclaim dated 30/6/2021.

10. According to the counterclaim the defendant is the proprietor of all those land parcels known as Nakuru/Kapsita/1657, Nakuru/Kapsita/1040, Nakuru/Kapsita/1028, Nakuru/Kapsita/2165, Nakuru /Kapsita/1115, Nakuru/Kapsita/2166, Nakuru/Kapsita/1570, Nakuru/Kapsita/1749, Nakuru/Kapsita/1042, Nakuru/Kapsita/1748, and Nakuru/Kapsita/1750, popularly known as Elbur Flora Farm comprising of approximately 100 acres all situate at Elburgon; that it has never leased or sold its flower farming business on that farm to the plaintiffs; that the plaintiffs are not licensees on the said land; that the plaintiffs have never paid any lumpsum or monthly rent to the defendant who constructed all the infrastructure on the land; that the defendant has never received any financial assistance from the plaintiffs in relation to the suit properties; that the defendant has never locked out workers of the 1st plaintiff and the said workers are attempting to illegally take over the defendant's business unprocedurally and without consideration; that in 2013 the defendant's managing director was in hospital for treatment for one full year and he also spent the next year under rehabilitation and during these periods the plaintiffs illegally took over operations at the defendant's farm without addressing the defendant's interest therein cannibalised the infrastructure thereon without the authorisation of the defendant; that the defendant resumed operations in the year 2015 and raised the issue with the plaintiffs who paid compensation to the defendant in the sum of Kshs 437,628.00/= only; that the defendant then attempted to have the plaintiffs enter into a formal lease agreement defining the acreage to be leased period and rent payable but the plaintiffs frustrated that proposal and continued to expand their operations without due regard to the defendant's rights to exclusive possession of its land; that the plaintiffs are mere trespassers on the suit land; that the defendant having resumed operations, desires to utilise the land without interruption from the plaintiffs, hence the prayers in the counterclaim. The defendant averred that it has sustained huge losses due to the illegal occupation of part of its farm by the plaintiffs from the year 2013 and it seeks for an order that the plaintiffs pay Kshs 500,000/= as mesne profits per month till the date of giving vacant possession.

11. It appears that as soon as the defendant objected to the jurisdiction of the court at Nairobi the suit was transferred to this court.

12. Hearing of the case took place at Nakuru on 24/1/22 and on 15/2/22.

13. PW1, Daniel Mogi Maina testified on 24/1/22 and adopted his witness statement dated 11/4/2016, which was filed with the now discredited plaint, as his evidence-in-chief in the matter. His evidence is that he is the managing director of the plaintiffs who have leased LR Nos 2165 and 1028 for 4 years commencing April 2012 with the option of automatic renewal of lease; that the plaintiffs have been utilising the land and paying to the defendant the rent due in lump sums as demonstrated by the two cheques he produced; that the defendant wrote to the plaintiffs on December 30, 2015 asking for a large sum of money; that in response the plaintiffs requested the defendant to formalise the lease; that the defendant subsequently sent a letter dated 2/3/2016 purporting to give a notice of eviction; that on 8/4/2016 the plaintiffs' manager informed PW1 that the plaintiffs' workers had been locked out of the premises by the defendant's guards and padlocks placed on the gates.

14. Upon cross-examination by Mr Ndubi, PW1 stated that he is director in both plaintiff companies; that the relationship between the plaintiffs and the defendants began in or around the year 2008 with the plaintiffs role being the purchasing and exporting of the defendant's flowers; that he dealt with Mr Gerald Wachira in 2012 when the relationship changed and the plaintiffs took over a portion of the farm while other parcels had been leased out to other individuals; that the lease entered into was for 17 years, that he was to pay Kshs 75,000/= monthly and Kshs 900,000/= yearly; that the lease was executed by a director of the defendant; that the plaintiffs wanted to have the lease registered; that the plaintiffs were not utilising 60 ha but only 25 - 30 acres; that he last made payments to the defendant between 2012 and 2013; that that between 2013 and 2015 he could not trace the director of the defendant; that when the director appeared he alleged vandalism in respect of pipes and driplines and sought recompense and was paid in the same year Kshs 437,000/= despite every item still being intact; that between 2011-2012 he paid USD 4000/= in two tranches; that no inventory was taken while the plaintiffs were taking over and that the plaintiffs never took over the farm due to the defendant's director's poor health.

15. In re-examination he stated that in 2008 when the plaintiff and defendant began relating, it was the defendant's sales persons who approached him in Nairobi and they entered into a contract to grow a certain variety of crops; that though he made payments, the defendant failed to abide by the contractual terms; that since the defendant was unable to refund monies to the plaintiffs, it told him to take over the farm and therefore the plaintiffs took over and paid the workers arrears; he stated that he was present when the defendant's director signed the lease; that at one point there was an intention to sell the farm; that the plaintiffs occupy only between 70%-80% of the two parcels mentioned in the plaint; that he is still growing flowers on the farm; that the facilities are still in good condition but the parties have never sat to reconcile their accounts.

16. DW1 testified on 15/2/2022 and adopted his written witness statement dated 30/6/2021 in the matter. His evidence is that he is the director of the defendant company which grew flowers for the export market from the year 2004; that the plaintiffs were buyers or brokers buying flowers from farmers including the defendants; that in 2012 he fell seriously ill and was hospitalised for 2 years; that after his health improved he found that the plaintiffs had taken over the flower farm; that upon inquiry from PW1 he was informed that the plaintiffs had entered into an agreement with one Mr Kairu who was DW1's brother-in-law; that before, the farm was running well but when he came back the green houses and offcut fences had fallen down and the piping had been removed and the plaintiff companies were growing outdoor flowers while utilising about 60 acres out of several parcels that is 1028,1027,2165 and 1048; that the defendant never entered into a lease with the plaintiffs; that PW1 sent him an email dated 19/3/2014 seeking a formal lease; that he never executed PExh 7; that in any event none of the monies stipulated under PExh 7 were paid; that when he left the farm, he wrote a letter to the plaintiffs dated October 11, 2015 but they never responded; that though he was demanding to have a lease agreement with the plaintiffs they never availed themselves for one; the plaintiffs never paid more than Kshs 437,000/= for damaged piping though the damage was greater; that in a letter dated December 30, 2015, he demanded for payment for the usage of the land at Kshs 150,000/= per month for various facilities; Kshs 50,000/= per month for the borehole; Kshs 50,000/= for fertigation usage and Kshs 5000/= per acre per month, totalling up to Kshs 550,000/= per month. He received a response dated 6/1/2016 but the plaintiffs never agreed to pay the demanded amount. He made another demand on 2/3/2016 and have a notice to vacate. In 2018, the plaintiffs vacated some portions of the suit land in compliance with a court order. The defendant had taken a loan of Kshs 100,000,000/= from the Bank of Africa but the plaintiffs did not allow it to retake the land or water for use on other portions of land and the defendant has never been paid a cent since 2012 for the suit land. According to the witness all the cheques in US$ were payments for the flowers the plaintiffs had bought from the defendant.

17. Upon cross-examination by Mr Munyororo, DW1 stated that the titles the plaintiffs cited in their plaint have a combined acreage of about 42 acres and that the plaintiffs proposed to purchase the farm.

18. The plaintiffs filed submissions on 9/5/2022 and the defendant on 12/4/2022.

The Plaintiffs' Submissions.

19. The plaintiffs framed the following issues for determination: whether the plaintiffs are legally in possession as lessees of LR No Nakuru /Kapsita/2165 and LR No Nakuru /Kapsita/1028; whether the plaintiffs are entitled to the reliefs sought; and who bears the costs of the suit. In respect of the first issue the plaintiffs cited the land lease agreement dated 28/2/2013 and rent payment receipts as the basis for the legality of their possession of the suit lands. The plaintiffs cited the case of *Ram International Limited v Maasai Mara University* [2021] eKLR and Section 2 of the *Land Act*. They stated that PW1's evidence had demonstrated that they had been given exclusive possession of the farm since 2012 for a definite term, and that the lease was unregistered but still binding and enforceable between the parties. They cited *Liquid International Ltd v Panari Centre Ltd* [2009] eKLR; that the defendant had knowledge of the plaintiff's presence and possession and it never served the plaintiffs any notice of eviction therefrom until 2/3/2016; they could not therefore be illegally evicted and the defendant is therefore not entitled to the prayers it seeks; citing P. Exh 6 (a letter of business partnership dated October 26, 2010,) the plaintiffs stated that it was made before the defendant's managing director left for treatment and he was therefore aware that the plaintiffs were in possession. The letter of intention to sell the property to the plaintiffs in 2013 allegedly signed by the defendant's managing director was also cited as evidence of the deceitful conduct and misrepresentation on the part of the defendant. The plaintiffs also paid medical bills on behalf of the defendant's managing director when he was ill and not able to run the business and some or all of those payments were supposed to be considered as the rent payable after the lease was executed. Apparently, repayment of the amounts was requested or demanded but the defendant had either failed or refused to repay the money owed to the plaintiffs. It was argued that mesne profits refer to profits paid for wrongful possession of property that may have actually or with ordinary diligence been received therefrom, and they are not applicable since there existed a valid lease over the suit land.

The defendant's submissions.

20. The defendant's submission is that the issues for determination are as follows: whether the plaintiffs are legally occupying the defendant's parcels of land as lessees; whether the plaintiffs are entitled to an order of injunction; whether the defendant is entitled to mesne profits and if so, how much; whether the defendant is entitled to orders of permanent injunction and/or eviction orders against the plaintiffs in respect of parcels no 1028 and 2165. The defendant averred that the plaintiffs claim in the plaint and in PW1's oral evidence is that in 2012 they leased the land for 4 years but no lease dated April 2012 was produced in evidence. Instead, a purported lease dated 28/22013 for a period of 17 years was produced which is inconsistent with the plaintiff's pleaded claim and which the defendant termed a forgery and in respect of which in any event the plaintiffs have not tendered any evidence of payment. That the defendant's director fell sick and on return in 2014, he found that the would-be buyers of the farm had taken possession thereof and PW1 wrote electronic mail asking for a lease; that therefore the plaintiffs had not established that they had leased the land; that the plaintiffs have not sought an order of injunction and so none can be granted; that the plaintiffs having acknowledged that they are liable to pay for the use of the land, they failed to declare how much they had paid as rent and at what rate and the periodic recurrence of such payments while the defendant has specifically denied having ever been paid any rent; that the defendant seeks Kshs 6,000,000/= per year as mesne profits. The defendant relied on the case of *Frederick Korir v Soin United Women Group* Kericho ELC No

104 of 2017 [2018] eKLR; that it is without doubt that the plaintiffs were initially occupying 5 plots of land with an aggregate acreage of 60 acres; that after the consent executed on 8/2/2017 in the suit, the plaintiffs released the other parcels except 2 with aggregate acreage of 42 acres from which they have derived substantial benefits illegally; that since the plaintiffs never responded to the demand for rent payment dated December 30, 2015, they should pay the amount demanded which to date in the computation of the defendant stands at Kshs 49,950,000/=, with further accrual of Kshs 460,000/= per month until vacant possession is given. The defendant also averred that it is entitled to orders of eviction and vacant possession in respect of the two parcels the plaintiffs occupy since it has title to the suit land.

Determination

21. This court has considered the pleadings the evidence and the submissions of the parties. It is common ground that the defendant owns the 11 parcels mentioned in the suit and that the plaintiffs are in possession of some of the defendant's lands. The plaintiffs insist that they are lawfully in possession by virtue of a lease which the defendant denies. The plaintiffs also insist that the rent payments under lease agreement are up to date which the defendant also denies. Both parties also differ on whether or not mesne profits are payable to the defendant for the use of the land by the plaintiffs. The issues that arise for determination in the instant suit are therefore as follows:

    a. How much of the defendant's land did the plaintiffs occupy or has been occupying and since when?

    b. Has the plaintiffs' occupation of the defendant's land been legal?

    c. Is the defendant entitled to mesne profits from the plaintiffs and if so, what is the quantum thereof?

    d. Should orders of eviction against the plaintiffs and vacant possession to the defendant issue?

    e. Who should pay the costs of the suit?

    The issues are addressed as hereunder.

22. In respect of the first issue, the plaintiffs pleaded only two plots in the plaint dated 11/4/2016 and sought quiet possession of "the suit properties." The defendant, alleging occupation of a larger area than the plaintiffs have admitted, was under a legal obligation to prove that the plaintiffs occupied land beyond the borders of plots nos 1028 and 2165. The defendant's statement of defence and counterclaim dated 30/6/2021 admits at paragraph 19 that only part of the farm was taken over by the plaintiffs; that part appears to have had some agrarian infrastructure on it. At paragraph 21 the defendant alleged that the plaintiffs had continued to expand their operations without stating which parcels were affected. In the prayers the defendant sought eviction orders against the plaintiffs in respect of 11 plots including the two that the plaintiffs had admitted being in possession of. The witness statement of DW1 stated that the area that the plaintiffs had been utilising was 60 acres comprised of 5 plots that included the two admitted by the plaintiffs, that is, 1028,1027,2165,1048 and 1750. By the consent order dated 8/2/2017 the plaintiffs were to retain only two parcels, 2165 and 1028 and the parties were to visit the land to establish the actual positions of the parcels involved in this suit and the actual occupation on the ground. The plaintiffs' pleadings are not helpful in respect of identifying the area they occupied because though plots no 2165 and 1028 as whole parcels are mentioned in the plaint, only about 8 ha out of parcel no 1028 (which is comprised of 11.39 ha) are admitted to have been leased to them in the lease dated 28/2/2013 for 17 years. An illegible map was supplied by the defendant at the interlocutory stages of this suit, which map does not show location of the plots in

relation to each other and it did not help in the matter. In his evidence under cross-examination PW1 stated as follows:

> " I was using about 25-30 acres. Other people used the rest."

23. It should have occurred to the defendant that a surveyor's report made under the auspices of the order of consent dated 8/2/2017 would have quite easily settled the question of the extent of land the plaintiffs were in occupation of. The demand notice dated 30/12/15 from the defendant to the plaintiffs' claims charges for the plaintiffs' use of the land backdated to the year 2012. The reply to demand letter dated 30/12/2015 admits that the plaintiffs had been utilising the land since 2012. I think that by the evidence given by the plaintiffs' chief witness as earlier restated, it is a safe conclusion that the plaintiffs have been in occupation of only 33.78 acres since 2012. That was the amount of land comprised in LR No Nakuru /Kapsita/2165 and LR No Nakuru /Kapsita/1028.

24. The next question that arises is whether the plaintiff's occupation of the defendant's land has been legal. Within the general context of the present dispute the more accurate question would be whether that occupation was pursuant to a valid lease between the plaintiffs and the defendant and if so, whether the plaintiffs have been up to date in their rent payments under the lease.

25. The first issue to be addressed is how the two plaintiffs obtained possession of the suit land in the first place. There is an acknowledgment by both parties that the relationship between them was at first that of buyer and seller of flowers, with the defendant producing the flowers and the plaintiffs exporting them. I have no doubt that the relationship commenced in the year 2008 as stated by PW1 in cross-examination by Mr Ndubi. PExh 6 is a copy of a letter dated 26/10/2010 from the defendant expressing the defendant's wish to partner with the plaintiffs, due to their experience, in selling its "best quality" flowers in Europe and the Middle East. PExh 8 is a supply contract between the plaintiffs and the defendant dated 22/2/2011 for a duration of 15 years, terminable by a minimum of a 12-month notice by either party, stating that the defendant agrees that all upper-class roses grown will be sold through the plaintiffs either locally or abroad and the defendant would not sell them without consulting the plaintiffs. PW1 then stated that the relationship changed in 2012 when the plaintiffs took over a portion of the farm and when the parties entered into a written lease agreement which was allegedly signed by DW1 on behalf of the defendant. The defendant denies there was such a lease agreement. However, DW1 gave evidence that attempted to show the manner in which the plaintiffs obtained possession. He stated that there had been overtures regarding sale of the farm. In the defendant's submissions it is stated that the plaintiffs "converted themselves from buyers of flowers from the defendant to be owners." In his evidence DW1 stated as follows:

> " Kimman said they were to buy the farm. He proposed to buy the farm."

26. By "he", this court understands DW1 to mean "PW1," whom in his evidence sometimes appeared to be synonymous with the Plaintiffs. It is clear that the personal relationship between DW1 and PW1 had somehow by virtue of some sort of trust transcended and blurred the commercial nature of the enterprise the plaintiffs and the defendant had entered into. The plaintiffs were therefore the prospective buyers of the farm before the alleged lease said to have been signed between the parties on 28/2/2013. Before that the parties had settled on a supply contract on 22/2/2011. The only person that the plaintiffs could have debated over the proposed purchase of the farm was the owner, the defendant represented by DW1. When DW1 states in his evidence that he "spoke with Kimman verbally" regarding the sale, to this court, he means that he spoke with PW1 regarding the prospective sale. In the familiar timeline of events in this dispute, that conversation must have occurred sometime after the supply contract, and that is between 2012 and 2013.

27. In the purported lease dated 28/2/2013 the plaintiffs are termed as "the new owner" who was, according to the terms therein take over the farm and manage it independently of the defendant for 17 years; by its terms, the lessee would not take over any of the defendant's liabilities. PExh 9 is a letter stating that the parties had agreed on the sale of the farm to the plaintiffs who were at liberty to obtain any information from the Bank of Africa to enable them proceed with making the necessary financial arrangements. The letter is undated but from its contents it must have been written soon after October 22, 2013. The electronic mail dated 19/8/2014 from the plaintiffs to the defendant has the proposed sale as the subject, and by it the plaintiffs sought to have the draft sale agreement from the defendant. That mail was in response to a mail written by the defendant earlier on the same date indicating that the parcels occupied by the plaintiffs were the ones to be sold upon valuation for the purpose of applying the proceeds towards settling the debt with the Bank of Africa.

28. Over time the plaintiffs appear to have been making certain payments to the defendant whose pattern is as follows:

    a. 28/8/2011..... 4000 dollars

    b. 8/9/2011.....4000 dollars

    c. 5/10/2011 .....6000 dollars

    d. 27/10/2011..... 6000 dollars

    e. 17/11/2011 .....5000 dollars

    f. 13/12/2011 .....4000 dollars

    g. 9/1/2012 .....5000 dollars

    h. 27/1/2012 .....10,000 dollars

    i. 6/2/2012 .....10,000 dollars

    j. 28/3/2012 .....5000 dollars

    Total paid: ..... 59,000 dollars.

29. So, between 2010 to 2013, the relationship between the parties developed gradually from one of buyer/ broker to exclusive buyer/ supplier to lessee/lessor to prospective land buyer/prospective land seller.

30. It therefore appears that it is safe to state that all these payments made before the lease made on 28/2/2013 were in respect of the supply contract dated 22/2/2011 unless the contrary can be demonstrated. However, a curious incident happened in between 28/3/2012 and 28/2/2013. That curious incident is that there was no record of activities by either party. What could have happened? The evidence of PW1 at the hearing of this matter went as follows:

> " From (March) 2012 to 2015 there was no payment. We could not trace the director (DW1)."

31. Later on, at the end of his cross-examination by Mr Ndubi, PW1 stated as follows:

> " All the cheques are of between 2011 and 2012. In 2011 I was purchasing and exporting flowers. There are 2012 cheques. I can not recall but my taking over was in 2012. We did not do an inventory when I was taking over."

32. DW1 stated as follows in his evidence:

> "In 2012, I got ill. Seriously ill. I was hospitalised for 2 years from 2012 -2014 ... After improvement of my health, I went and found that the plaintiffs had taken over the flower farm... PW1, Daniel Moge Maina was the one responsible. I asked him. He told me he had an agreement with Kairu, my brother-in-law. When I went to the farm, Kairu was not there. ...we have never entered into any lease agreement with the plaintiffs."

33. DW1 relied on his letter dated October 11, 2015 to the plaintiffs. In that letter, which exhibits a surfeit of bitterness, DW1 accused the plaintiffs of many things including "being on the periphery awaiting ... bad anticipated consequences by the bank to serve ...(the plaintiffs')... ill thought ambitions." He concluded by stating that the plaintiffs had no written or verbal leased agreement, that they had occupied the farm by word of mouth, and that they had failed to commit on any agreeable lease amount to even enable the farm reduce the bank arrears.

34. It is the case that no lease agreement was filed with the plaint despite the claim that the plaintiffs had leased the land in 2012. The purported lease that was brought to court was one dated 28/2/2013. From the earlier and intensive analysis of the evidence, this court is persuaded that from March 2012 to 2015 there was no payment as the plaintiffs, by their own confession made through PW1's evidence, could not trace DW1 with whom they had earlier dealt. Even in the absence of medical records from DW1, it is probable that DW1 was somehow unable to manage the farm personally during that period.

35. The defendant disowns the lease agreement dated 28/2/2013. Nevertheless, he who alleges proves, and it was upon the defendant to establish by way of evidence that DW1 was so sick or affected by circumstances that disabled him from managing the defendant's affairs, including execution of crucial documents such as the purported lease produced by the plaintiffs.

36. Regarding the plaintiffs' claim that they were legally in possession of the land, the logical question that arises is: if DW1 was by the plaintiffs' admission not available to receive payments from the plaintiffs by 28/2/2013, how is it possible that he was available to execute the purported lease on that date? And how can DExh 11, a copy of an email apparently from PW1 requesting for a lease from the defendant be accounted for? And what kind of coincidence is it anyway that no payment for any purpose appears to have been ever made by the plaintiffs to the defendant from 28/2/2013? There is no proper explanation from the plaintiffs to these questions.

37. However, after all the above analysis regarding the plaintiffs, attention must be focused on the defendant too. How is this court to treat PExh 9, a letter from DW1 stating that the parties had agreed on the sale of the farm to the plaintiffs and the parties' electronic mails which were written in the same period of DW1's alleged absence? And how can DW1's failure to report to the police that there had been forgery of a lease agreement by the plaintiffs be accounted for? Why did the defendant not commission a handwriting expert analyst to establish that the signature on the lease was not his own? Lastly how can the apparent similarity of signatures in DW1's witness statement and in the purported lease agreement, even on a cursory glance, be accounted for? There is also no proper explanation from DW1 for these questions too.

38. It is only after reflection on the foregoing questions that it can be realised that DW1's failure to produce competent medical evidence and failure call a handwriting expert to testify regarding the alleged forgery of DW1's signature dealt a very serious, and possibly fatal, blow to the defendant's case. It must also be remembered that the defendant only came to court to respond to a claim filed by the plaintiffs. He had never filed any claim before then for eviction or injunction.

39. DW1's hesitant conduct as noted on the record in answering questions relating to his letter confirming that the plaintiffs and the defendants had agreed on the sale of the farm to the plaintiffs (P. Exh 9) showed that he was not entirely candid with the court regarding his alleged total absence between 2012-2014 and also regarding the execution of the purported lease agreement dated 28/2/2013. Both documents appear to have been made during the period he states he was sick and away yet he never denied having written PExh 9. The question that arises is how his apparent admission that he signed one of them (PExh 9) be reconciled with his denial that he signed the other yet they were both made during the period of his recuperation? If there was any forgery as he would have this court believe, he failed to explain why he never reported to the police a fraud regarding his valuable multi-million-shilling property. Besides he had nothing to say on cross-examination regarding the similarity between his signature on his witness statement dated 30/6/2021 and that immediately above his name and designation in the purported lease agreement. I think that I have accorded DW1 a very extensive range of benefit of doubt regarding whether or not he executed the lease dated 28/2/2013 but the only conclusion this court arrives at from the very minute scrutiny of evidence above is that he executed the lease dated 28/2/2013 which the plaintiffs are relying on for their claim. That being the case, this court is of the view that the plaintiffs were in occupation of the premises with the consent and authority of the defendant. In that case their occupation can not be deemed as illegal.

40. Concerning the question whether the plaintiffs have paid the appropriate rents under that lease this court notes that all the cheques they exhibited relate to the period before the lease was executed. The plaintiffs, despite acknowledging that they have not paid any monies as rent to the defendant since the execution of the lease, have failed to demonstrate that any of the monies that were paid before the lease were assigned or allocated to the period after the lease as land rents. Consequently, this court is of the conclusion that the plaintiffs cannot validly claim that are up to date with the rent payments in respect of the defendant's properties that they occupy.

41. The natural sequel to the findings set out hereinbefore in this judgment is that the defendant would, had it claimed in the appropriate terms, been entitled in this suit to rent arrears from the plaintiffs in accordance with the terms of the lease that the parties executed and not to mesne profits as sought in its counterclaim; Mesne profits are awarded on the basis of illegal occupation of land.

42. Parties must be strictly held to their pleadings. In the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR it was stated by the Court of Appeal as follows:

> " It is trite that a court is required to base its decision on the pleadings before it. The Malawi Supreme Court in Malawi Railways Ltd v Nyasulu [1998] MWSC 3 quoting an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." published in [1960] Current Legal problems, at page174 stated:
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> > "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of

speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

43. In the case of *Ayub Ndungu v Marion Waithera Gacheru* [2006] eKLR it was stated as follows:

> " I find it necessary to point at this stage that parties are bound by their pleadings and the issues that the court is called to determine are those issues as can be said to flow from the pleadings themselves, or put in another way, those disputed facts in which parties can be said to have "joined issue" at the close of the pleadings. The plaintiff's claim being founded on an alleged trespass and illegal occupation of his land by the Defendant and the Defendant's defence being that she is lawfully on the land having acquired a right thereto by virtue of a sale transaction between the Plaintiff and her late husband and as administratrix (therefore as beneficiary), the main issue for determination is whether the alleged Sale Agreement, which is not denied, did give rise to a legal interest capable of conferring a legal right over the suit property to the Defendant. Although in his Plaint the Plaintiff did not disclose that there was an agreement for sale over the suit premises between himself and the Defendant's late husband, he admits the same in paragraph 2 of his Defence to counterclaim, whilst averring in the alternative that "the Defendant's husband breached the Sale Agreement by failing to pay the full purchase price and in maliciously tampering with the boundary of the suit premises thereby making him rescind the agreement for sale."

44. In the light of the foregoing case law, the defendant's claim therefore, not having been based on an existing lease but on a claim of trespass, has failed due to a finding by this court that there was a lease executed between the parties. No specific claim for rent arrears was made by the defendant and this court is not capable suo motu of deeming a claim for mesne profits to be convertible into a claim for rent arrears for the purpose of an award to the defendant.

45. The upshot of the foregoing is that the plaintiffs' claim must fail as they failed to seek any orders beyond an order of interim injunction pending the hearing and determination of the suit. The defendant's claim must also fail in that this court having found that there is a lease agreement and the plaintiffs occupy only the land they were allowed by the defendant, the claims for injunction and mesne profits are misplaced.

46. It appears to the court that both parties drank to their fill from the symbiotic relationship between them and, so sated, pursued their own course. None of them was completely candid with this court as to the happenings between the years 2012 and 2016, leaving the court to draw its own conclusions on many issues. For example, vital details of the plaintiffs' takeover were omitted by either party, yet it included sensitive matters such as handling by the plaintiffs of employees previously employed by the defendant, their emoluments, tax liabilities payments of outgoings to authorities and the like. In such circumstances, it is no wonder that there are disputed financial accounts to date. An agreement for taking over a business, or a lease, is not to be taken as casually as the parties did. The demonstrated cordial nature of the relationship and communications between the two parties before their fallout

explains why they later approached their business so casually with the result that it ended up in a dispute and that was their great mistake.

47. This court also notes that the dispute between the two parties, who enjoyed a good business relationship time back, was not very complex and it could have been easily resolved between them round a table with their counsel had there been full candour, courtesy and willingness to do so and on the part of both of them.

48. Consequently, I hereby dismiss both the plaintiffs' claim in the plaint and the defendant's counterclaim and I order that each party shall bear their own costs of these proceedings.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU