



**Thige v Nduati (Environment & Land Case 535 of 2017)
[2022] KEELC 4755 (KLR) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 535 OF 2017
EK WABWOTO, J
AUGUST 30, 2022**

BETWEEN

MICHAEL MBUGUA THIGE PLAINTIFF

AND

JOHN NJUGUNA NDUATI DEFENDANT

JUDGMENT

Introduction

1. Through the Complaint dated 11th July, 2017, the Plaintiff prays for Judgment against the Defendant for:-
 - a. An order directing the Defendant to immediately restore the damaged wall and fence on the property to its original state, or in the alternative, an order for the assessed costs of reinstating the wall and the fence to its original state.
 - b. General damages for loss suffered by the Plaintiff as a result of the Defendant's actions.
 - c. Costs of the suit and interest on (b) above since the filing of this suit.
 - d. Any other relief this Honorable court may deem fit to grant.
2. The Defendant upon being served with the Plaintiff's pleadings and summons filed a statement of defence dated 2nd October 2017 when he denied the Plaintiff's allegations and prayed for the dismissal of the suit with costs.

The Plaintiff's case.

3. The Plaintiff averred that he was the registered owner of the property known as NAIROBI/BLOCK 110/671 having acquired the same on 26th January 1998. In the year 2016 he proposed to lease his property to the defendant for purposes of carrying out commercial business.



4. It was the plaintiff's case that he negotiated with the defendant the terms of the lease but before the lease could be signed, there emerged a 3rd party laying claim of ownership on his property. In the circumstances, he could not enter into a lease agreement with the defendant until the third party claims were extinguished.
5. The Plaintiff further averred that despite the frustration of the lease agreement, the defendant proceeded to place 2 shipping containers on the said property and in the process damaged part of the concrete wall and the barbed wire perimeter fence securing the suit property. Owing to the defendant's action the plaintiff filed the current suit and sought the orders pleaded in his Plaint.
6. The Plaintiff testified as PW1 during the hearing of the suit on 14th February 2022. He informed the court that the lease agreement was never signed because a 3rd party laid claim to his property. He also stated that the defendant accessed his property without his permission and proceeded to dump materials, soil and other items which also led to partial damage of his wall. He further stated that as a result of the same he could not use the property and hence he sought for compensation of Kshs 3,000,000/= as the estimated costs for replacing the damaged wall. According to the Plaintiff the lease for the property was estimated to be Kshs.100,000/= per month.
7. When he was cross-examined, he stated that he was sure that the materials belonged to the defendant and there were photos which confirmed the same. He also stated that the defendant had been called to his advocate's office for a meeting and he confirmed that the materials belonged to him. He also stated that he had given the defendant ample time to repair the damaged wall but the defendant failed to do so which action necessitated the filing of the current suit.
8. When re-examined, he stated that the property was leased to John Njuguna Nduati, the defendant herein and not to any company.
9. David Kariuki testified as PW2. He stated that he was a registered and licenced valuer to prepare a valuation report in respect to the property known as Nairobi/Block 110/671. It was his testimony that he visited the site and prepared the report dated 15th November 2019. He told the court that when he visited the site, he found a perimeter wall that had been pulled down. He also found soil that had been dumped on the property. The perimeter wall had been partially damaged. He estimated the costs of the damage at Kshs.1,000,000/= and the value of the property to be at Kshs.30,000,000/=. He also estimated the current rent to be Kshs.100,000/ - 150,000/= which was consistent with the rent sought by the Plaintiff. He also stated that he estimated the value of the property by comparing the same from the neighborhood.
10. When he was cross-examined, he stated that his instructions were not to access the value of the land but only the estimated costs of the damaged wall and he pegged the costs at 1,000,000/=.

The Defendant's case.

11. The defendant filed a statement of defence dated 2nd October 2017. He denied the allegations levelled against him in plaint. He contended that he entered into an oral lease with the Plaintiff which was later reduced into a written one. The lease was in respect to the property herein and he was supposed to pay a monthly rent of Kshs.100,000/= which he paid 3 months rent and was granted possession.
12. He also averred that he incurred costs of Kshs.1,200,000/= in improving the property since the same was initially a swamp. He further averred that the plaintiff terminated the oral lease and directed him to vacate the same.



13. During the hearing of the defendant's case on 12th May 2022, he testified as the sole defendant's witness. He stated that he was introduced to the plaintiff through one David Thige who was his elder brother. It was his testimony that the Plaintiff authorized his brother David to lease the property to him which in essence confirmed that the Plaintiff gave his consent.
14. According to the Defendant, the terms of the agreement were that he was to pay Kshs.100,000/= per month as rent. He subsequently paid Kshs 300,000/= to David Thige and Kshs.150,000/= was paid separately as brokers fees. He further stated that he brought murrum to stabilize the property which was initially swampy.
15. He further stated that he abandoned the lease because the Plaintiff made some adjustments to the same. It was also his testimony that the Plaintiff became angry after he learnt that his brother David had been paid some money in respect to the property. He concluded his evidence in chief by adopting his witness statement and further stating that Kshs.300,000/= which had been paid to David, the plaintiff's brother was refunded to him.
16. When he was cross-examined, he stated that he signed the lease but could not remember when he entered into negotiations on the same. He also stated that he paid Kshs. 300,000/= though he did not have the said documentation in court.
17. On further cross examination, he stated that the lease agreement collapsed owing to a misunderstanding between the plaintiff and his brother.
18. On cross examination, he stated that he only dumped murrum on the property and he was doing the same to make the property usable. He also reiterated that the plaintiff never objected to him using the said property when they met at the plaintiff's advocates offices and neither was he a stranger to the plaintiff.

The Plaintiff's submission

19. The plaintiff filed written submissions dated 27th May 2022. Counsel for the Plaintiff submitted that indeed the Plaintiff had intended to get into a lease agreement with the defendant however the same was frustrated by a third party claim to the suit property. Counsel also submitted that despite the defendant being informed of the said frustration in July 2016, he still went ahead and took possession of the same without the knowledge of the Plaintiff. It was also submitted that the defendant proceeded to put two shipping containers, damaged the wall frontage and even dumped soil on the property making the same inhabitable.
20. Counsel further submitted that the actions of the defendant amounted to trespass since the defendant had not been given any consent to use the said property.
21. On the Plaintiff's claim for general damages, counsel submitted that the rent payable was Kshs.100,000/= and the plaintiff had lost mesne profits between August 2016 to November 2016 and he submitted for mesne profit of kshs.100,000/= from the date of institution of the suit until payment in full. Counsel relied on the case of *Philip Ayaya Aluchio Vs Crispinous S Kiilu Vs Jianga Water and Hydropower Construction Kenya Limited* (2019) eKLR.

The Defendant's submissions.

22. They are dated 12th July 2022. Counsel for the defendant submitted that the parties herein never formalized the lease agreement even though the defendant entered occupation and improved the property at his costs. It was also submitted that the plaintiff's claim was an afterthought since the



plaintiff had not mentioned in the letter dated 4th February 2016, nor in the draft lease agreement that the defendant had destroyed the wall and fence to his property or that he was obligated to restore the same.

23. In respect to the value of the damaged wall, counsel submitted that the plaintiff had not pleaded nor proved the same. Counsel also argued that there was no reasonable cause of action against the defendant since the plaintiff's brother had refunded the three months' rent of Kshs.300,000/= and further that the claim of trespass could not hold since the defendant took possession and occupation of the suit property with the knowledge and acceptance of the plaintiff. Counsel relied on the letter dated 4th February 2016 which was produced as PExhibit 1 in support of this position. Counsel concluded his submissions by urging the court to dismiss the same with costs to the defendant.

Analysis and determination

24. I have considered the pleadings and evidence on record. I have also considered the written submissions and authorities cited. The issues which are for determination are as follows:
- i. Whether there existed a lease agreement between the plaintiff and the defendant.
 - ii. If the answer to issue No.(i) is in the affirmative, whether there was any frustration and or breach of the said lease of the said lease agreement.
 - iii. Whether the remedies sought are available.
 - iv. Who should bear the costs of the suit.

Issue No. 1.

Whether there existed a lease agreement between the plaintiff and the defendant

25. It was the plaintiff's case that he had proposed to lease his property to the defendant sometimes in the year 2016 for the purposes of carrying out commercial business . The same was negotiated but never signed by the parties due to emergence of a third party claim laying ownership to the said property. The defendant on the other hand argued that there was a letter of acknowledgement, intent and acceptance of the lease dated 4th February 2016 in respect to the plaintiff's property NAIROBI/BLOCK 110/671 which was for a period of 5 years for a monthly rent of Kshs. 100,000/=
26. From the testimony that was adduced in court, it is evident that both parties never formalized the lease agreement even though the defendant had entered occupation as from 1st October 2015 which fact was acknowledged by the plaintiff in his letter of acknowledgement, intent and acceptance dated 4th February 2016 which was produced as P Exhibit 1.
27. The *Blacks Law dictionary* 11th Edition, page 1066 defines a lease as:-

“A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, rent. The term can be for life, for a fixed period, or for a period terminable at will”



28. Legal authorities in *Cherire, Fitoot and formstons, The Law of Contract*, 14th Edition stated in page 34 and 35 that:

“The first task of the Plaintiff is to prove the presence of a definite offer made ...proof of an offer to enter into legal relation, upon definite terms must be followed by the produce of evidence from which the court may infer an intention by the offeree to accept that offer”.

Whereas the foregone are only persuasive they set out the correct legal principles applicable in contract law generally. Therefore, the approach by a court in considering whether a contract exists is an objective one as opposed to a subjective one.

In *Rose and Frank Co. v J. R. Crompton & Bros Ltd* (1923) 2 KB it was held that:

“To create a contract there must be a common intention of the parties to enter into legal obligations mutually communicated expressly or impliedly”.

In the Court of Appeal case of *William Muthce Muthami Vs Bank of Baroda* (2014) eKLR , it was stated that :

“In law of contract, the aggrieved party to an agreement must in addition, prove that there was offer, acceptance and consideration . It is only when those three elements are available that an innocent party can bring a claim against the party in breach”.

30. On implied contracts, the Court of Appeal in *Ali Mobammed v Kenya Shell & Co. Ltd* (2017) eKLR referred to the following persuasive decisions.

“.....in *Lamb v Oraro* (1893) 1 CH 218}, Bowen LJ stated :

The common law, it is true, treats the matter from the point of view of an implied contract and assures that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without it would be futile’.

Bingham L J in the Aramis (1989) 1 Lloyds Rep 213 made some general observations about the circumstances in which a contract might be implied at pages 223 Col. 1 he said;-

“As the question whether or nor any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case and the different sets of facts which arise for consideration in these cases as legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary that is to say, in order to give business reality to a transaction and to create a flexible obligation between parties who are dealing with the one another in circumstances in which one would expect that business reality and those enforceable obligations to exist”.

31. The foregone reveal several legal imperatives may be in writing or implied, that whether a contract is in writing or is implied the elements of offer, acceptance and consideration must be proved on implying a contract the conduct of the parties remain paramount, that an objective approach in contract interpretation is to be adopted among others.



32. In the instant case, there was no written lease agreement. Therefore, this court is enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract. If that yields in the affirmative then a contract may be implied.

33. From the testimony that was adduced the plaintiff produced in evidence a letter dated 4th February 2016 and a draft lease agreement. The said letter clearly indicated at paragraph 1 therefore that :-

“I Michael Mbugua Thige, of 189 Robinson Lane, Wappinger Fall, New York, USA and Kenya Citizen do hereby state that I am the sole owner of the above reference property, and pleased to present to you the following letter of acknowledgement, intent and acceptance of leasing to you the above mentioned property. The following summarizes the basic non binding terms and conditions upon which you the tenant Mr. John Njuguna Nduati, will be entering into the lease agreement “.

1. Proposed Tenant: Mr Njuguna Nduati
2. Leased Premises: Nairobi/Block 110/67
- A Lease Commencement Date: 31st September 2020
3. Tenant’s Occupancy Date: 1st October 2015
4. Length of Lease Term: 5 Years
5. Initial Base Rent: KSH.100,000 Per Month With 2 Year Review.

34. There was also evidence that the Plaintiff paid a sum of Kshs.300,000 which was considered as rent even though the same was refunded when it became apparent that the parties could not proceed with the lease. I have carefully considered the evidence and exhibits on record and it is suffice to say that there was offer, acceptance and performance. Considering the conduct of the parties herein, it is the finding of this court that an implied lease agreement existed.

Issue No.2

Whether there was frustration of the lease agreement

35. It was the Plaintiff’s case that the lease agreement was frustrated when a third party laid claim to the property. Defendant equally confirmed as much. The evidence that was adduced by the parties equally confirmed the same.

36. The basis and principles of doctrine of frustration can be summarized as follows:-

“The doctrine of frustration was evolved to mitigate the rigor of the common laws insistence on literal performance of absolute premises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances ...(2) since the effect of frustration is to kill the contract and discharge the parties from further liability under it ...(3) frustration brings the contract to an end forthwith , without more and automatically. The essence of frustration is that it should not be due to the act of election of the party seeking to rely on it...A frustrating event must be some outside event or extraneous change of situation ...



(5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it”.

37. These were the words of Lord Bingham MR in the case of *J Lauritzen As Vs Wijsmuller BV* (1990) Llyods Rep 1,8.
38. In the instant case, the supervening event is an alleged claim by a third party to the Plaintiff’s property. There was also overwhelming evidence by the parties which confirmed the same. In view of the foregoing, it is the findings of this court that there was frustration of the implied lease agreement that existed between the plaintiff and the defendant.

Issue No. 3

Whether the remedies sought are available.

39. The plaintiff sought for various reliefs which was stated in his plaint. These included, an order directing the defendant to restore the damaged wall or in the alternative to pay assessed costs of the same, general damages for loss and costs of the suit together with interest.
40. The defendant submitted at length that the plaintiff’s claim did not raise any reasonable cause of action against the defendant and that the same was an afterthought. Counsel for the defendant also submitted that the plaintiff in his submissions had sought mesne profits which had not been pleaded nor proved.
41. In my view, after hearing the evidence of the parties and analysis the same, it is clear that the plaintiff granted the defendant occupation to the suit property on 1st October 2015 which was before the frustration of the lease agreement. As such, I am inclined to agree with the submissions made by the defendant that the plaintiff’s contention that the defendant entered into occupation after the alleged frustration is misplaced.
42. The defendant also entered and or occupied the said property with the knowledge of and consent of the plaintiff which fact was acknowledged in the letter dated 4th February 2016. As such any claim for trespass against the defendant cannot be sustained and granted by this court.
43. In as much as there was frustration of the lease, the plaintiff in his testimony never demonstrated at what point or time did the defendant damage his wall and or placed the two shipping containers in his property. The Plaintiff was not able to prove the same and further in his letter dated 26th July 2016 and 1st November 2016 he equally never raised the issue of the alleged destroyed wall and removal of the two shipping containers. In the circumstances, I am inclined to agree with the submissions made by the counsel for the plaintiff that the claim against the defendant is an afterthought.
44. It is trite law that a party who alleges must prove. This is set out under Section 107 (1) (2) of the Evidence Act Cap 80 of the Laws of Kenya which provides as follows:
- (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 exists “
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on the person”.



Section 109 and 112 of the same Act states:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person”.

Section 112

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings , the burden of proving or disproving that fact is upon him”.

Conclusion.

45. In conclusion, I find that the suit is not merited. I am not convinced by the Plaintiff’s evidence or by the Plaintiff’s submissions that the Plaintiff has proved his case even on a basic balance of probabilities. Following from the foregoing, it follows that the plaintiff has failed to prove his case to the required standard as against the defendant and hence he is not entitled to the prayers sought. In the circumstances, I have no option but to dismiss the suit.
46. On the issue of costs which follow the event, I find no reason to hold otherwise. The Plaintiff who is unsuccessful shall pay the costs of the suit to the Defendant.
47. Judgment accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022

E.K WABWOTO

JUDGE

In the Virtual Presence of:-

Mr. Maina for the Plaintiff.

Mr. Otieno holding brief for Mr. Ombwayo for the Defendant.

Court Assistant: Caroline Nafuna.

E.K WABWOTO

JUDGE

