



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS

Civil Case 117 of 2007

**SIMON M. ETHANGATTA ..... PLAINTIFF**

**VERSUS**

**EDDAH WANJIRU MBIYI .....1<sup>ST</sup> 1<sup>ST</sup> DEFENDANT**

**MARGARET NJERI MBIYU .....1<sup>ST</sup> 2<sup>ND</sup> DEFENDANT**

**(As the Administrators of the estate of the Late Mbiyu Koinange)**

**ENCLAIRE MANAGEMENT LINTIED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**1. Background**

1. From the on set, this suit before me appeared to be one of Landlord/tenant involving Agricultural land in Nairobi being

LR 22 Close burn Estate.

2. Simon M. Ethangatta is the tenant and plaintiff in this suit. He stated in evidence before this court of how he entered into a lease agreement with one Damaris Koinange (not party to this suit) to be leased portion of that vast estate being an area of 30 acres only for purposes of cultivating agricultural produce. Later he went into the flower growing business. All this was for commercial purposes.

3. The lease agreement was in effect negotiated with Damaris Koinange but executed by her son David Waiganjo Koinage (PW2) on the 22 July 2002. This lease agreement commenced on the 1 July 2002 and expired on 20 July 2003. The rents was payable in advance semi annually or quarterly and was for Ksh.360,000/- per annum.

4. This lease agreement was never executed again after it expired in 2003. Instead the parties continued with the status whereby the plaintiff paid his rent and continued to cultivate.

5. On 16 December 2006, all the horticultural crops on five acres out of the 30 acres were destroyed. He the plaintiff was not able to know who did this illegal act. He proceeded to the police station and made a report. The police came to the ground and witnessed the already destructed area that included the crops and equipment.

6. He later discovered persons involved in the destruction and damages to his property were in effect one Eddah Wanjiru Mbiyu described herein as the first defendant and Margaret Njeri Mbiyu described herein as the first second defendant.

7. These two defendants are the administratrix of the estate of the late Mbiyu Koinange. It was the two whom the plaintiff alleged hired a group of 200 thugs to come on the land and destroy his property. He sued them in this suit for the damages incurred.

8. He also sued M/s Enclaire Management Ltd, the second defendant herein whom he discovered was the purchaser of the land.

## II: Procedure

9. Initially the plaintiff filed this suit in the Commercial Law Division of the High Court of Nairobi being Hccc46/07. He filed a certificate of urgency that the said defendants be compelled to deposit Ksh.16,469,260/- to court as being the total sum that he incurred by way of Special Damage claim. The Hon. Judge in charge of the Commercial Division, Waweru J, declined to certify the matter (22 February 2007) and in effect claimed that this was not a matter under the Commercial Law Division but under the Land Environmental Law Division. He placed this file before this Division through the duty judge K. Kariuki (5 February 07).

10. When the parties appeared before me it was agreed that the applications seeking the defendants to deposit the Special damage claim to court of Ksh.16,469,260/- be withdrawn and parties proceed to the main suit.

11. After summons to enter appearance was served upon the defendants, and their defence duly filed, parties agreed to do their pre-trial conference under their own supervision This was partly done by them and before the court where the issues for determination was agreed to and settled together with the documentary evidence to be relied on.

12. The trial commenced from 25 September 2007 to  
26 September 2006.

## III: Issues for determination

13. The parties agreed that I determine fourteen issues before this court. These issues are inter alia as follows;-

### i) Issue No.1

Was there an agreement between the plaintiff and Damaris Koinange, the executrix and or beneficiary of the estate of Mbiyu Koinange, to lease to the plaintiff 30 acres of Agricultural land or land Ref. 22 Close burn estate for agricultural purposes at an annual rent of Ksh.360,000/-.

14. The plaintiff stated that he first discovered about the suit land when the company of Estate agents he was working for as senior valuer called Tyson Ltd were given a court order to value the said land for purpose of sale. Whilst on the land he noticed peasant farmers cultivating the land. He approached Damaris Koinange and requested her if she too could lease some of the land for purposes of cultivation. The reason why he approached her was that she was residing on the said land. He was aware the land belonged to the late Mbiyu Koinange and he had several widows. He was under the assumptions that the said widows lived in their respective portions of land and in effect, the land Damaris was residing on belonged to her.

15. With the assistances of her son, one David Wangaijo Koinange (PW2) a lease agreement was drawn between the two of them. The terms of this lease was that its duration would be for 12 months with effect from 1 July 2002. The rent would be paid at Ksh.360,000/- annually and paid at the rate similar annually and or quarterly in advance.

16. This lease agreement was signed by David Waiganjo Koingage (PW2) on behalf of his mother who was described as the land owner of the suit land. David Waiganjo Koinange confirmed this to court. He was emotional when he stated that the said estate of his late father had dragged on for many years. This was due to disagreements amongst the administratrix and the family. It was as a result of these squabbles that he and his siblings were not able to be educated due to lack of school fees. His mother would lease portions of land for the up keep of herself and her family. She in effect negotiated the lease of the said 30 acres which he signed on behalf of the said mother.

17. He did admit nonetheless in evidence that there was aware the portion of land would be sold. The effected area of five acres being cultivated by the plaintiff was in fact a road reserve and would not have been touched. It seems that he did tell the plaintiff that the said land would be sold and was the reasons that the lease agreement was only for one year. He was aware of the sale as from the year 2001, through a court order.

18. From the evidence that thereafter transpired, the plaintiff paid rent to Damaris Koinange. This money went to her up keep and towards her hospital bills when she was ailing. She has since left her house and is now living with a daughter. The reason that David W. Koinange was involved was due to her difficulties to write or stand and thus he would step in to assist. Further, David W. Koinange admitted being paid Ksh.120,000/- to sort out his personal affairs from the proceeds of the rent.

19. He indeed was upset that the defendants failed to give notice of the said eviction to the plaintiff as required by law.

20 David Waiganjo Mbiyu's purpose of becoming to court is to say that "yes, a lease was granted to the plaintiff that was lawful and legal."

## II Defence

21. The defendant, on the other hand, called Peter Muhoho Kimani an advocate of the High Court of Kenya who was involved in the sale transaction of the suit land. He informed this court that his firm and another firm were assigned the task of selling the portion of the suit land being 291 acres. This sale was to assist in paying off the debts – some of which is disputed – and thereafter distribute the estate. The said involved his undertaking in order to allow free access to the land which had creditors interests. The land was to be sold by way of vacant possession. He was therefore taken aback when he became aware of the cultivation activities by the plaintiff.

22. When he was shown the lease agreement he rejected it on the grounds that Damaris Koinange was not the owner of the land. The owner of the land was the estate which was being managed by four administratrix of whom Damaris Koinange was one. Further, the said Damaris Koinange had never signed the said lease. Even if she did she had no capacity to do so. The law required the lease to be registered under section 6(a) of the Land Control Act as the land was agricultural land. This was never done. The said agreement, he stated, was in effect illegal.

### iii) Agreed issues – finding 1 -2

23. My findings on the agreed issues is that there was a written agreement drawn and entered into between Damaris Koinange the executive and beneficiary of the estate of Mbiyu Koinange to lease 30 acres of agricultural land at an annual rent of Ksh.360,000/-. This lease though is invalid because it was in effect not signed by Damaris Koinange. The evidence before court comes from her son that she indeed entered into the agreement. Even if it was per chance, valid that lease expired in 2003.

24. It therefore follows that the said lease agreement was not binding on the administratrix of the estate of Mbiyu Koinange. That the lease agreement was unlawful and not valid with regard to section 3(3) of the Law of Contract and section 6(a) of the Land Control Act.

25. The plaintiff produced no further lease agreement to court. There was only the one. The said lease was never reviewed and the plaintiff and David Waigajo Mbiyu, the beneficiary of the estate, continued on with the relationship for three years, more so without the knowledge of the other administratrix.

v) Issues No.4 finding

26. The defendants most certainly were not aware of the plaintiffs presence on the land. DW2 stated he visited the land physically in 2001. He saw no cultivation at all. He was therefore surprised to find the plaintiffs presence on the land.

27. At this particular time the said defendants had entered into a sale agreement whose conditions was that the said land must be in vacant possession.

28. DW2 then issued a four day notice to quit.

Vi) Issues No.3

What was the status of the plaintiffs on the suit land?

Was he a tenant, licensee, and or trespasser?

29. The defendants state that the plaintiff was a trespasser. First and foremost he never informed the estate that he was on the land. He had no colour of right to be on the said premises.

30. I would, in effect, agree that the plaintiff was a trespasser upon the said land. He in effect did a valuation on the suit property whilst working for Tysons Ltd a reputable land estate company. He did so under a court order. He knew the purpose of it was the sale of the said land. This most certainly was a conflict of interest on his part.

31. I further find that as a trespasser therein, the defendants were not only not aware of his presence they never obtained any of the said rents to the estate.

32. When the defendants became aware of the plaintiffs presence, the mode of eviction was through a notice that was issued to him but delivered by DW3 a representative of the 2<sup>nd</sup> defendant. I believe this service of the notice was irregular as the persons to deliver the said notice was to be the representative of the

defendant No.1 and not the defendant No.2. Service was further made upon a worker whom it is believed to be PW4 – another alleged tenant. She did not return to court when the case adjourned to be identified by the witness.

33. The defendants state the plaintiff was not entitled to any notice at all. He was a trespasser and accordingly they were being polite in so giving him a four day notice.

34. I would hold that the plaintiff would have been entitled to a notice though it appears that the notice was given to him after the event of eviction occurred.

35. I find that property was damaged during the process of eviction. The defendants claim that the 30 acres included other portion of land across the road. They were therefore unable to confirm from PW3's valuation report of damaged items, if it was one and the same thing.

36. The rules of natural justice requires that a party be given an opportunity to leave their premises, unlawfully so occupied, within reasonable time required. In his case the rules of natural justice had not been followed. Properties were maliciously damaged.

37. The reason for this, which is denied by the defendant that property was maliciously damaged, was the fact that the advocate under extreme pressure had given his undertaking to meet the creditors debts at the sale of the partial property. The property had to be sold under vacant possession. No notice was required to be given as they were not aware of the said trespasser.

38. The defendant No.2, on the other hand, had made no use of the land.

### III Finding

39. The plaintiff here is in a special circumstances in this case. He was aware in his capacity as a valuer, the status of the land and the reasons why the court of law had given his company, where he worked as a valuer, the task to value the land. Instead, he took due advantage and deliberately and unlawfully coveted the land, entered upon it and cultivated.

40. If he was a lawful tenant the law would have protected him, as described in the two case laws relied on by his advocate being:-

Helsop & Another

V

Burns & Another

(174) 3 All ER

And

Gusil Mwalimu Investment Company

V

Nico Auctioneers Ltd

CA 160/95 Kisumu

Where the rights of the tenants is exclusive and there is a method in which tenants are removed from their premises.

41. In this case the plaintiff was an unlawful trespasser. He was required to be evicted. To do so the rules of national justice required to be followed. Thuggery must at all times be discouraged and is hereby condemned.

42. I find that the plaintiff was a trespasser and therefore not entitled to the claim made for damages.

43. The law requires that I indicate what my award would have been if he was indeed successful in this suit

44. For special damages claim it must not only be pleaded but proved strictly. The plaintiff brought a valuer who gave a figure of Ksh.16,469,260/- as special damages. I would have awarded that said sum of Ksh.16,469,260/-.

45. I would not have awarded General Damages as this is a special damages claim

46. I accordingly dismiss this suit with costs to the defendant/respondent.

47. In summary

47.1. Claim for damages for unlawful eviction

47.2. Suit dismiss as plaintiff was a trespasser

47.3. Possible award if successful

Special damages only Ksh.16,469,260/-

**Dated this 4<sup>th</sup> Day of October 2007 at Nairobi.**

**M.A. ANG'AWA**

**JUDGE**

O. Oluoch for Oluoch- Olunya & Co. Advocates for the plaintiff- present

D.G. Kocha for 1<sup>st</sup> 1<sup>st</sup> defendant - present

B.Kariuki for B. Kariuki & Associates advocates for the 1<sup>st</sup> 2<sup>nd</sup> defendant-present

Billing for Guram & Co. Advocates for the 2<sup>nd</sup> defendant