



**Yusuf & another v Adanje (Environment and Land Appeal  
E024 of 2023) [2024] KEELC 6617 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6617 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E024 OF 2023**

**E ASATI, J**

**OCTOBER 9, 2024**

**BETWEEN**

**ADAN OSMAN YUSUF ..... 1<sup>ST</sup> APPELLANT**

**TOUCH ENERGY COMPANY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HENRY OLUOCH ADANJE ..... RESPONDENT**

*(An appeal against a portion of the judgement and decree of the Hon. S.O. Temu Senior  
Principal Magistrate in Nyando PMC E L CASE NO. E061 OF 2022 delivered on 9th May 2023)*

**JUDGMENT**

**Background**

1. The Appellants herein were the Defendants in Nyando Srnc Environment & Land Case No.61 OF 2022. The Respondent sued them vide the plaint dated 25<sup>th</sup> October, 2022 over a parcel of land known as Kisumu/muhoroni/L.R. No.1282/R No.50536.
2. The Respondent claimed that the Appellants breached a tenancy agreement between himself and the Appellants. He therefore sought for: -
  - a. damages for breach of contract in terms of the conditions clause 2(h) of the Lease Agreement dated 22<sup>nd</sup> September, 2022.
  - b. a permanent injunction stopping and restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, or employees from entering onto, occupying and continuing to occupy, use and deal in and with the suit property known as Kisumu Muhoroni/LR No.1282 IR No.50536.
  - c. costs of the suit.



3. The record of appeal shows that the Appellants filed Amended Written Statement of Defence of Defendants and Counter-claim dated 25<sup>th</sup> November, 2022. The Appellant's denied the Respondent's claim and vide the Counter-claim prayed for various orders.
4. The record shows further that the suit was heard by the trial court which vide the judgement dated 9<sup>th</sup> May, 2023 made the following orders;
  - i. The Plaintiff's case has no merit as it is meant to defraud the Defendant his rent, fuel and renovation charges and costs.
  - ii. The Plaintiff should refund the Defendant his rent paid of Kshs.1.3 million with interest from the date of payment.
  - iii. The parties assess the renovation done jointly with the help of the government quantity surveyor and the Defendant to be refunded the cost as Plaintiff did not allow him to take over the premises as per the lease agreement whereas he had authorized him to conduct renovation. The said assessment to be paid through costs.
  - iv. The parties to visit the site/premises and the Defendant to be allowed to remove his fuel with the help of the OCS to the nearest police station that is Muhoroni if the Plaintiff will not hand over the premises to the Defendant with a fresh lease agreement on commencement dates.
  - v. The Plaintiff to pay costs of the suit with interest.
5. Dissatisfied with part of this judgement, the Appellants filed the present appeal vide the Memorandum of Appeal dated 8<sup>th</sup> June, 2023 seeking that;
  - a. The appeal be allowed with costs.
  - b. The judgement and decree of Honourable S.O. Temu – Senior Principal Magistrate in Nyando PMC EL Case No. E061 of 2022 delivered on 9<sup>th</sup> May, 2023 be reviewed to include the following prayers amongst those already granted by the court;
    - i. a declaration that the Respondent is in breach of the lease agreement dated 22<sup>nd</sup> September, 2022 for land parcel L.R. Kisumu/Muhoroni/1282 (IR.50536)
    - ii. a permanent injunction do issue restraining the Respondent, his servants and/or agents jointly and severally from evicting, disposing, dealing and/or interfering with the Appellant's leased premises L.R. Kisumu/Muhoroni/1282 (IR.50536).
    - iii. refund of Kshs.166,000/- by the Respondent to the 2<sup>nd</sup> appellant being the value of the fuel the Respondent stole from the 2<sup>nd</sup> being the value of the fuel the Respondent stole from the 2<sup>nd</sup> Appellant.
    - iv. payment of loss of business by the Respondent to the 2<sup>nd</sup> Appellant at the rate of Kshs.10,000/= per day from 24<sup>th</sup> September, 2022 to the date the premises will be returned back to the appellant.
    - v. payment of Kshs.3,000,000/- by the Respondent to the appellant being general damages for breach of contract as provided for in clause 2(h) of the lease agreement dated 22<sup>nd</sup> September, 2022 that the parties willingly and freely executed.
6. Directions were given on 12<sup>th</sup> February, 2024, inter alia, that the appeal be argued by way of written submissions.



## Submissions

7. On whether or not the trial Magistrate erred in both law and fact in failing to enter judgement for the 2<sup>nd</sup> Appellant against the Respondent on the 2<sup>nd</sup> Appellant's Counter-claim, Counsel for the Appellants submitted that the 2<sup>nd</sup> Appellant vide the Counter-claim dated 25<sup>th</sup> November, 2022 prayed for judgement against the Respondent. That having dismissed the Respondent's case, the court ought to have directed itself and made a determination on the counterclaim and the issues therein but that it did not. That the error forms the substance of the appeal.
8. Counsel concurred with the trial court's finding that the Respondent's case did not have merit and was meant to defraud the Appellants.
9. On whether or not there was breach of the terms of lease agreement, Counsel submitted that from the evidence adduced before the trial court, it is evident that the Respondent was in breach of the terms of the lease agreement for failing to grant the Appellants a peaceful and quiet possession of the leased premises after the same was handed over to the Appellants for renovation. That the Respondent was in breach of the lease agreement and as such the Appellants are liable to compensation subject to the terms of the lease agreement which is binding upon the parties.
10. Counsel submitted further that the Appellants pleaded damages arising from the breach of contract resultant from the actions of the Respondent in the sum of Kshs.3,000,000/= pursuant to the provisions of the lease agreement.
11. Counsel relied on the case of Speed Wall Building Technologies Ltd -vs- County Government of Migori (2016)eKLR where the court held that 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 as encapsulated in the latin phrase restitution in integrum.
12. That the Appellants are entitled to damages in clause 2(h) of the lease agreement which provided that "take notice that in case of the breach of contract by either party, the defaulting party is to pay a fine of Kshs.3,000,000/- plus damages incurred.
13. On the prayer for refund of Kshs.166,000, Counsel submitted that due to the Respondent's action of hiring of goons in a bid to evict the Appellants, the Appellants fuel worth Kshs.166,000/- was stolen and sold to members of the public at a profit. That the 1<sup>st</sup> Appellant produced delivery note and receipt to show that the fuel was delivered in readiness for commencement of business on 1<sup>st</sup> December, 2022. That this prayer was adequately pleaded and proved as special damages.
14. On the claim for loss of business at the rate of Kshs.10,000 per day from 24<sup>th</sup> September, 2022, Counsel submitted that the Appellants were not in occupation of the leased premises and they continue to suffer loss of income resulting from the breach of contract by the Respondent and they should be awarded the prayer.
15. On the prayer for permanent injunction, Counsel submitted that the trial court erred in failing to find that it is on the provisions of paragraph (c) of the Lease Agreement that the Appellant sought for the relief. That paragraph (c) provided that any notice to be given to either party on modification or termination of the agreement should be done after 5 years.
16. That since the Respondent did not prove his case on a balance of probabilities, an injunction ought to issue as prayed.



17. Counsel prayed that the appeal be allowed and the prayers itemized in the Memorandum of Appeal be granted.

No submissions were filed on behalf of the Respondent.

18. On 4<sup>th</sup> April, 2024 Counsel for the Respondent requested for more time to file written submission. Though more time was granted, the Respondent still did not comply.

### **Issues for Determination**

19. The grounds of appeal contained in the Memorandum of Appeal are that;

- a. the learned trial Magistrate erred in both law and fact in failing to enter judgement for the 2<sup>nd</sup> Appellant against the Respondent on the 2<sup>nd</sup> Appellant's counterclaim as pleaded.
- b. The learned trial Magistrate erred in both law and fact in failing to find that the Respondent was in utter breach of the lease agreement dated 22<sup>nd</sup> September, 2022 for land parcel LR KISUMU/MUHORONI/1282 (IR 50536).
- c. the learned trial Magistrate erred in both law and fact in failing to find that the Appellant were entitled to a permanent injunction to issue restraining the Respondent, his servants and/or agents jointly and severally from evicting, disposing, dealing and/or interfering whatsoever with the Appellant's leased premises LR KISUMU/MUHORONI/1282 (IR 50536).
- d. the learned trial Magistrate erred in both law and facts in failing to find that the 2<sup>nd</sup> Appellant was entitled to a refund of Kshs.166,000/- by the Respondent being the value of the 2<sup>nd</sup> Appellant fuel that the Respondent stole from the 2<sup>nd</sup> Appellant plus loss of business at the rate of Kshs.10,000/- per day from 24<sup>th</sup> September, 2022 to the date the premises will be turned back to the Appellant.
- e. the learned trial Magistrate erred in both law and fact in failing to find that the 2<sup>nd</sup> Appellant was entitled to general damages for breach of the lease agreement to the tune of Kshs.3,000,000/- as provided for in clause 2(h) of the lease agreement dated 22<sup>nd</sup> September, 2022 that provide that in case of breach of contract by the other party, the defaulting party is to pay affine of Kshs.3,000,000 plus damages.
- f. The learned trial magistrate erred in both law and fact in failing to consider the Applicants' written submissions on the counterclaim before arriving at his decision.

### **Analysis and determination**

20. This being a first appeal, the court reminds itself of the duty to re-examine the evidence placed before the trial court.

21. The evidence placed before the trial court by the Appellants comprised of the testimony of the 1<sup>st</sup> Appellant and the exhibits that he produced. He testified through his witness statement filed on 4<sup>th</sup> November, 2022 that he was a director of the 2<sup>nd</sup> Appellant. That the Appellants had entered into a lease agreement with the Respondent on 22<sup>nd</sup> September, 2022 over the suit land for a period of 5 years. That it was a term in the lease agreement that any notice to be given to either party of modification or termination of the agreement should be done after 5 years. That so far none of the parties to the agreement has issued any notice to terminate the tenancy. That he did not terminate the lease.



22. That the lease was still in force and that the Appellants were in occupation of the premises operating their business. That it was the Plaintiff who had breached the terms of the agreement by failing to grant the Appellant peaceful occupation. That the Plaintiff invaded the tenancy premises in the company of armed youths in an attempt to evict the Appellants therefrom which attempt the Appellants resisted and reported to the police who summoned the Plaintiff.
23. That the police cautioned the Respondent to follow due process if he wanted to terminate the lease bearing in mind that the Appellant had paid rent in advance for 2 years amounting to 1,350,000/= and undertaken renovation worth Kshs.300,000/- and was entitled to enjoy the space.
24. That the Respondent wrote to the police that he will refund the money by 28<sup>th</sup> October, 2022 so that the Appellant could move out but that the Respondent neither made any refund nor issued any termination letter. That the Respondent was not entitled to the relief sought.
25. He testified further that on 24<sup>th</sup> September, 2022 the Respondent had handed over the station to him. That he wanted the Plaintiff to give him his money being Kshs.1.3 million or the petrol station to run for 5 years as per the lease.
26. He testified further that he had put fuel in the tanks namely; 500 litres Diesel and 500 litres Petrol. That the Respondent chased him away from the petrol station.
27. On cross-examination, the 1<sup>st</sup> Appellant stated that it was the Respondent who wanted to refund him. That the rent was to be refunded.
28. He stated on re-examination that it was the Respondent who breached the agreement then took back the petrol station and took the Appellants' money.
29. That he had paid for and received the fuel. The Appellant produced 2 exhibits namely handover note dated 24<sup>th</sup> September, 2022 and delivery note and receipt dated 4<sup>th</sup> November, 2022 for fuel worth Kshs.166,000/-.
30. The evidence of the Respondent comprised of his own testimony and the documents he produced as exhibits. He testified through his witness statement dated 13<sup>th</sup> February, 2023 that he is the legal owner of property known as LR KISUMU/MUHORONI/1282 IR 50536, a petrol station in Muhoroni and Lessor of the said property to the Appellants vide lease agreement dated 22<sup>nd</sup> September, 2022 with effect from 1<sup>st</sup> December, 2022. That to enable the Appellant make necessary refurbishment before the lease commenced, he handed over to the Appellant the subject premises on 24<sup>th</sup> September, 2022 for purposes of refurbishment which was to be undertaken with his authority, consent and supervision in accordance with the lease agreement.
31. That however the 1<sup>st</sup> Appellant without any notice whatsoever caused his (Respondent's) arrest at Oyugis police station where he demanded a refund of the 2 years rent paid of Kshs.1,350,000/- thereby terminating the lease agreement dated 22<sup>nd</sup> September, 2022 without notice.
32. That he wrote an "I owe You" and a statement at Oyugis police station of his alleged indebtedness to the Appellants upon which he was informed that he refunds the rent or be charged with a criminal offence.
33. That he was coerced into making the "I Owe You" of his indebtedness to the Applicants at the Oyugis police station and that he signed it under duress after the Appellants had terminated the lease agreement.
34. He denied that he had denied the Appellant quiet possession.
35. That the Appellants terminated the lease on the 18<sup>th</sup> October, 2022 in breach of the lease;



- a. by terminating the lease agreement before the lapse of 5 years term contrary to the express terms of clause (c) at page one (1) of the lease.
  - b. by amending the lease agreement by demanding refund of rent paid in advance in violation of clause (c) at page 1 of the lease.
  - c. by failing to pay fine and damages of Kshs.3,000,000/= for breach required of defaulting parties, the Appellants herein per clause 2(h) of the lease agreement. He produced documents as exhibits.
36. On cross-examination, he stated that the Appellants ordered the police to arrest him because they wanted their money back.
37. That the Appellant was not at the premises. That he did not know why the Appellant was not at the site as he did not evict them. That he had not refunded the money to the Appellants. That he was the one in occupation of the property.
38. On re-examination, he stated that when he was arrested, the full amount of Kshs.1.3 million was required of him. That that meant that the lease had been terminated. That on 18<sup>th</sup> October, 2022 (the date he was arrested) the Appellants were not in possession of the site. That the Appellants had never been in possession of the site.
39. That the Appellant had breached the lease as per paragraph 7(b) and (c) of the plaint.
40. In their submissions, the Appellants framed 2 issues for determination.
41. Firstly, on whether the trial court erred in failing to enter judgement in favour of the 2<sup>nd</sup> Defendant on his counter claim. It is not disputed that the 2<sup>nd</sup> Defendant filed a counter-claim. A reading of the judgement of the trial court shows that the court found that it was the Plaintiff (Respondent herein) who had breached the contract through the court as the Appellants had not refused to take over the premises on 1<sup>st</sup> December, 2022 as per the lease agreement.
42. In addition to dismissing the suit, the court made some orders in favour of the Appellants.
43. The Appellants fault the court that the orders granted were not what was prayed for in the counterclaim. In the counterclaim, the 2<sup>nd</sup> Appellant prayed for: -
- a. a declaration that the Respondent is in breach of the lease agreement dated 22<sup>nd</sup> September, 2022 for land parcel LR Kisumu/Muhoroni/1282 (IR 50536).
  - b. a permanent injunction do issue restraining the Respondent, his servants and/or agents jointly and severally from evicting, disposing, dealing and/or interfering with the Appellant's leased premises L.R. Kisumu/Muhoroni/1282 (IR.50536).
  - c. refund of stolen petrol worth Kshs.166,000/- and loss of business at the rate of Kshs.10,000/- per day from 24<sup>th</sup> September, 2022 to the date the premises will be returned back to the counter-claimant.
  - d. general damages for breach of contract.
  - e. costs of the suit.
  - f. any such other or further reliefs the court may deem appropriate to be made.



44. The court in its judgement found that the Respondent had breached the lease contract but did not issue a declaration to that effect.
45. I have read the evidence placed before the trial court, the judgement and the submissions made. With respect I find that the trial court ought to have made a finding as to whether the 2<sup>nd</sup> Defendant (appellant herein) had proved the claim in the Counter-claim or not. But given the final orders granted, it is clear that the trial court found that the Counter-claim had been proved.
46. Further, as it was an express term of the lease agreement that the defaulting party was to pay the innocent party damages of Kshs.3,000,000 on breach of the lease, the court ought to have proceeded to award the prayer for general damages as the parties had agreed beforehand in the lease agreement.
47. Again, having found that the Appellant loaded fuel worth Kshs.166,000/- onto the fuel tanks, the court ought to have made an order for refund as the appellants were no longer in the tenancy premises and there was evidence that the appellants had loaded fuel into the tanks which fuel was yet to be used/ sold .
48. On loss of income, the evidence on record is that the Appellant had not commenced business on the site before he was interrupted and stopped by the Respondent. I find no basis for an award of loss of income of Kshs.10,000/- per day. There is no evidence to support his claim.
49. On the prayer for permanent injunction, the evidence placed before the trial court was that the Appellant was removed from the premises before the date of commencement of the lease period. It was the appellants' evidence that the Respondent chased him away from the petrol station. The Respondent conceded that the appellants were not in occupation of the suit premises. That he was the one in occupation. The prayer for injunction had therefore been overtaken by events because what it sought to restrain had already taken place.
50. Instead the appellants will be entitled to refund of rent and cost of renovation.
51. The upshot is that the appeal succeeds. The same is allowed. The judgement of the trial court is hereby reviewed, set aside and replaced with judgement in the following terms: -
  - i. The plaintiff's case is dismissed.
  - ii. The counter-claim by the 2<sup>nd</sup> defendant (2<sup>nd</sup> appellant herein) has been proved on a balance of probabilities and judgement is entered in favour of the 2<sup>nd</sup> Defendant (2<sup>nd</sup> appellant herein) on the Counter-claim for:
    - a. a declaration that the Respondent was in breach of the lease agreement.
    - b. general damages of Kshs 3,000,000/ for breach of contract.
    - c. refund of the rent paid of Kshs.1.3 million with interest from the date of payment.
    - d. Refund of the cost of renovation of the tenancy premises after the parties assess the renovation jointly with the help of the government quantity surveyor.
    - e. Refund of Kshs.166,000 being cost of fuel that was stolen.
    - f. The Plaintiff to pay costs of the suit and Counter-claim.
    - v. Costs of the appeal to the appellants.

Orders accordingly.



**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen - Court Assistant.

Akinyi h/b for Odeny for the Appellants.

No appearance for the Respondent.

