



**M'Ngiti v Gatua (Environment and Land Appeal 96 of 2021)
[2022] KEELC 2653 (KLR) (6 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 96 OF 2021**

CK NZILI, J

JULY 6, 2022

BETWEEN

ELIAS MUNGA M'NGITI APPELLANT

AND

DANIEL MUNUGU GATUA RESPONDENT

JUDGMENT

A. Pleadings

1. By an amended plaint dated 25.10.2018 the appellant sued the respondent in the trial court for a permanent order of injunction barring and restraining him from interfering with his peaceful occupation and possession of L.R No. Abogeta/Nkachie 244 on account of an existing lease of three acres for a period of 7 years with effect from 16.7.2010. He also sought for declaratory orders for compensation of all the developments thereon.
2. By an amended defence and counterclaim dated 18.12.2018 the respondent averred that the lease had expired on 31st July 2015 with no clause for renewal and denied any alleged extension thereafter as averred or at all.
3. Further the respondent pleaded upon the expiry as a matter of right, he was entitled to vacant possession hence could not be said to have trespassed into his own land and that any alleged developments thereon after the surrender of the land were subject to the lease.
4. In his counterclaim the respondent admitted there was a lease agreement for his 3 acres running from 16.6.2010 to 31.7.2015 following whose expiry the appellant refused to surrender vacant possession causing him loss and damage. He prayed for eviction, vacant possession and mesne profits.
5. Through an application dated 19.9.2019 the appellant sought to further amend the plaint and omit prayer(s) alleged to have been overtaken by events and bring in a claim for damages over the breach



of the lease agreement and for the compensation over developments on the suitland. The trial court disallowed the application by a ruling dated 5.2.2020 on the basis that the amendments proposed did not substantially differ with those in the amended plaint and were not helpful to the court's determination for the real question in controversy.

B. Evidence

6. The appellants case was that he entered into a lease agreement dated 16.7.2010 after which he took vacant possession for the land on 15.7.2010 which was to run until 31.7.2015. He said before the expiry of the lease, the respondent visited his home and requested that he hands over the suit premises since he was desirous of putting up a hotel. He thereafter requested him to give him more time to remove his bananas which were likely to mature after 3-4 years and or in the alternative extend to him the lease for another two years so that he could harvest the mature bananas given he had paid him a considerable amount of money.
7. The appellant testified that the respondent orally agreed to his request following which he spread manure over the suit land approximated at Kshs.300,000. Unfortunately, the respondent invaded the land, cut down the banana plants and ordered him to vacate his land.
8. The appellant stated he sought for an agricultural officer's report which he produced as p. ex 1, 2& 3 respectively. He sought for compensation for the losses incurred plus costs.
9. In support of his claim, the appellant called the agricultural officer to produce P. exh 3 estimating the loss at Kshs.4.8 million.
10. The respondent's evidence was that he leased his three acres of land to the appellant which expired on 31.7.2015 after which he informed the appellant that he was not going to extend the lease due to his planned development.
11. He testified that they agreed to meet on 16.8.2015 to assess the status of the land and hand over vacant possession but the appellant failed to show up in person. Instead the appellant requested him for time until 30.9.2015 to remove his items from the suit land which he did by removing the water piping systems. He stated whatever else remained on the land belonged to him.
12. Nevertheless, he testified he allowed the appellant to continue picking bananas therefrom till November 2015 while he started refencing his land in October 2015. He also said he put up a farm house, dug a pit latrine and installed electricity following which on 27.12.2015 the appellant allegedly caused his workers to be arrested by police officers from Mitunguu police station yet the lease had expired.
13. In cross examination the respondent insisted that the lease was for agricultural purposes only though the appellant had in the course of five years destroyed all indigenous plants near the river bank. Further the appellant was categorical there was no intention of renewing the lease orally or otherwise as alleged by the appellant; nevertheless, the two years had already lapsed by the time his application dated 26.11.2018 was filed since the appellant was still interfering with his land.
14. As regards his counter claim the respondent told the court the appellant had made him suffer mental anguish, interfered with his quiet possession of the land for six years after the lease expired and hence sought for quiet and peaceful enjoyment of his land.



C. Appeal

15. The appellant faults the trial courts decision for: allowing the counterclaim against the weight of the evidence tendered; holding he was a trespasser when there was no such pleading; awarding mesne profits without such a pleading and or proof; arbitrarily quantifying mesne profits against the established legal jurisprudential principles and lastly condemning him to pay costs of the suit.

D. Written Submissions

16. With leave of court parties were ordered to put in written submissions by 10.4.2022. The appellant was also to file a supplementary record of appeal to include the decree.
17. The appellant submitted that the respondent forcefully took vacant possession of the suit land on 19.10.2015 prompting the filing of the suit hence he could not be entitled to mesne profits both in fact and in law since none was pleaded and or proved to entitle the trial court to award Kshs.300,000.
18. Reliance was placed on Fredrick Korir v Soin United Women Group sued Mr. Eunice Towett, Jane Mwolomet and Lucia Mebocho [2018] eKLR.

E. Role of Appellate Court

19. This being a first appeal the court is mandated to rehear, rehearse and re-applause itself on the lower court record and come up with its own independent conclusion and findings on fact and law while mindful the trial court had the benefit of hearing and noting the demeanor of the witnesses first hand. See Peter v Sunday Post Ltd [1958] EA 424.

F. Issues for Determination

20. Having reviewed the pleadings, documents filed alongside the pleadings, interlocutory applications and rulings, the evidence tendered, grounds of appeal and written submissions herein the issues commending themselves for my determination are:-
 - (i) If the failure to extract and file the lower court decree is fatal to this appeal.
 - (ii) If the trial court was right in dismissing the appellant's claim and allowing the counter claim.
 - (iii) If the appeal has merits.
21. The appellants claim as captured in the amended plant dated 25.10.2018 at paragraph 6 (9) was that on 8.11.2015 the respondent trespassed into his farm, evicted him, took over the crops and all developments thereon assessed at Kshs.4.8 million. He pleaded that he was entitled to work on the suit land for two years and sought for damages thereof.
22. In his amended plaint he sought for a permanent injunction against the respondent from interference with his peaceful occupation and possession thereof and a declaration that he was entitled to compensation for the damage thereon. In support of his claim the appellant attached a valuation report for compensation dated 9.11.2015 by J.K Muthamia Ward Agricultural officer for Abogeta East.
23. In his testimony the appellant produced the lease agreement dated 16.7.2010, undated photos, a demand letter and a valuation report. On the other hand, the respondent by an amended defence and counterclaim dated 15.12.2018 insisted the lease had expired on 31.7.2015 and was not extended either orally or in writing since it lacked such an option and as a matter of right the appellant had a duty to surrender vacant possession upon the expiry. Further the respondent pleaded there was no



agreement to compensate for any alleged developments thereon hence the claim by the appellant was legally unsustainable.

24. The respondent therefore, counterclaim for eviction, vacant possession and mesne profits.
25. It is trite law parties are bound by their pleadings and issues flow from pleadings. See IEBC & another v Stephen Mutinda Mule & 3 others [2014] eKLR. Order 8 Civil Procedure Rules deals with the amendment of pleadings. Specifically, sub-rule 7 thereof deal with the mode of amendments.
26. Whereas the appellant was allowed to amend the plaint he did not strike out the prayer for permanent injunction.
27. Similarly, once the respondent was allowed to amend the defence dated 28.11.2015 and bring on board a counterclaim he was bound by Order 7 Rules 5, 8 and 20 of the Civil Procedure Rules and accompany the counterclaim with a verifying affidavit as per Order 4 Rule 1 (2) and (5) Civil Procedure Rules.
28. Likewise, the appellant was expected to file a reply to the defence and defence to the counterclaim with 14 days upon service by the respondent in line with Order 7 Rule (1) Civil Procedure Rules.
29. There is no indication if the respondent filed and or paid for a valid amended defence and counterclaim on 20.12.2018 accompanied by a verifying affidavit which could have enabled him to rely on it and seek for the said prayers in his defence tendered on 19.5.2021.
30. Further, Order 7 Rule 5 Civil Procedure Rules requires a counter claim to be accompanied by a verifying affidavit, list of documents, written statements by witnesses and a list of documents to be relied upon during the trial.
31. In absence of the foregoing, my finding is that the only valid defence before trial court was the one dated 28.11.2015.
32. Coming to the issue of whether the appellant proved his claim once he amended his plaint and acknowledgment that their respondent had taken vacant possession after the lease expired the onus was on him to prove that he was entitled in law and in fact with compensation for any developments on the suit land after the lease expired.
33. Exh 1 had no clause on both extension and or compensation for any developments over the suit land. It is trite law that courts cannot rewrite contracts for and or behalf of parties and that parole evidence may not be used to contradict the contents of a contract. This is provided under section 97 and 98 of the [Evidence Act](#). See Fidelity Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd [2017] eKLR.
34. The parties herein did not call the witness to the lease agreement to shed light as to whether there was an intention to renew the lease and under what terms.
35. There was nothing stated in the lease agreement as regards to compensation for any developments done on the suit land by the appellant.
36. Again, there was nothing in the lease agreement as regards the notice to vacate and hand over vacant possession. What is clear however is that the lease expired and parties met during which a verbal notice to vacate was made and a verbal request to give more time to vacate was made. Unfortunately, the parties did not reduce it into writing. Whereas verbal or oral or informal agreements are enforceable in the law same can only happen where the terms are clear, direct and or valid.
37. In this matter it is quite apparent that there was no meeting of minds as to whether there was going to be extension or not and under what terms. See Sands v Mutual Benefits Ltd [1971] EA 156.



38. The appellant did not state if he agreed on the amount payable for the lease, monthly or otherwise and when it fell due. There was nothing paid to the respondent and which he alleged as a condition to agreeing for an extension of the lease for two years as alleged. See *African Universal Merchandise Ltd v Kulia Investment Ltd* [1980] eKLR.
39. In absence of evidence on the above my finding is that the appellant failed to plead and prove that there was an agreement for a lease extension for two years which the respondent breached and was liable to pay for any consequent damages.
40. As regards, the assessment by the appellant for the loss and damages even if there was such a liability the onus was on the appellant to plead and prove such loss with clear particulars since the same fall under special damages. At the body of the amended plaint none of the said details are pleaded as special damages. See *Habu v Singh* [1985] KLR 716
41. Similarly, the claim for Kshs. 4.8 million was not paid for as special damages. Whereas the court has powers to grant declaratory reliefs, the onus was on the appellant to plead and prove the said loss by way of receipts, licences, permits and other documentary evidence that he had made farm inputs and was making such profits from his farming business.
42. In absence of such evidence my finding is that the appellant failed to prove prayer no. 2 of the amended plaint.
43. Having made a finding that there was no valid counterclaim at the time the respondent testified in court, it goes without saying that the trial court erred in law and in fact in granting prayers which were neither pleaded nor prayed for by the respondent. See *Caltex Oil Kenya Ltd v Rono Ltd* [2016] eKLR.
44. Lastly, as regards the decree appealed against Order 42 Rule 2 Civil Procedure Rules requires a decree to be filed alongside the memorandum of appeal. The appellant's appeal was admitted for hearing notwithstanding this anomaly. He was subsequently given enough time to comply. This appeal was filed on 24.8.2021. The appellant had more than sufficient time to comply with the law.
45. Be that as it may I take the view that a decree under Section 2 of the *Civil Procedure Act* includes judgement and a judgment shall be appealable notwithstanding the fact that a formal decree may not have been drawn.
46. In any event under Section 1B *Civil Procedure Act* as read together with Article 159 of *the Constitution* the overriding objective of this court is to render substantive justice to the parties, unless there is no prejudice, to the opposite party. None has been stated by the respondent in this appeal.
47. In the premises, my conclusion is the appeal has merits. The lower court decision is hereby overturned with an order dismissing both the appellant's suit and the respondent's defence and the purported counterclaim. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 6TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

E. Kimathi for Muriuki for appellant

Waweru for Juma for respondent



HON. C.K. NZILI
ELC JUDGE

