



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CAUSE NO. 341 OF 2017**

**FORMERLY KISII ELC NO. 260 OF 2016**

**PETER PERERUA OLE NTURURU.....PLAINTIFF**

**VERSUS**

**JOSEPHINE RENOI SANKEI.....DEFENDANT**

**JUDGEMENT**

The Plaintiff had by a plaint dated 24<sup>th</sup> August, 2016 sought for the following orders: -

- (a) A declaration that the lease agreement between the Plaintiff and the Defendant has been rescinded, terminated and avoided owing to material breach in the part of the Defendant.
- (b) A permanent injunction do issue restraining the Defendant for continuing to do any act which would seek to confer any benefit arising from the rescinded, terminated and/or avoided contract, either by cultivating, accessing, harvesting or in any manner utilizing the suit land.
- (c) An order directing the Defendant to forthwith pay the Plaintiff the sum of kshs. 995,000/- being damages as spelt out in clause 9 of the lease agreement.
- (d) Costs
- (e) And any other relief the court deems just to grant

It is the plaintiff's contention that he is the registered owner of land parcel Trans Mara/Nkararo Adjudication Section /14 and that on 27<sup>th</sup> July, 2012 he issued out to the Defendant about 15 acres of his land hereinafter referred to as the suit land for sugarcane growing for a period of 3 harvests for a consideration of kshs. 675,00 which terms the Defendant had accepted upon expiring of the said lease agreement. The Plaintiff avers that pursuant to the terms of the lease and more particularly clause 4 of the lease agreement the defendant was to pay the 1<sup>st</sup> instalment of kshs. 300,000 at the execution of the agreement and the balance of kshs. 375,000 was to be paid in two instalments of kshs. 150,000 payable on or before 17<sup>th</sup> August, 2012 and the sum of kshs. 225,000 payable immediately after the 1<sup>st</sup> harvest, however, the plaintiff contends that the defendant though having taken possession of the land and had cultivated sugarcane and made 2 harvests she refused and neglected to pay the amounts due and payable as per the lease agreement.

The Plaintiff further contends that as a result of the Defendants inability to pay the balance he invoked the provisions of clause 4 of the lease agreement and on 6<sup>th</sup> June, 2014 he terminated the lease agreement and consequently he has suffered loss as he was prevented from the use of the land.

The Defendant in her statement of defence in reply to the plaint admitted the plaintiff's assertion that indeed the Plaintiff was the owner of the suit land, she entered into a lease agreement for 15 acres of his land to grow sugar cane and the terms of the said lease with respect to the consideration that was payable. The Defendant further averred that in fulfillment of the terms of the lease she took possession of the suit land and made payments in favour of the plaintiff that were due upon the execution of the agreement.

The Defendant alleges that upon the first harvest she had made a deposit of the sum of kshs. 225,000 on October, 2014 to the firm of Jumba and Company Advocates with instructions for forward transmission to the plaintiff and her willingness to pay the other outstanding amounts, however, the Defendant states that the Plaintiff became evasive and elusive promising to collect the money but to no avail and thus blames the Plaintiff for the failure to collect the balance.

On the termination of the lease it is the Defendant's contention that there was no specific clause dealing with vacation and termination of the lease and accusing the Plaintiff is guilty of breaching the terms and conditions of the lease agreement.

The Defendant in her defence had mounted a counter claim in which she alleged that the Plaintiff/Defendant is guilty of hiring portions of the sugar cane plantation and sustained a loss of kshs. 279,000 and consequently seeks for the payment of the aforesaid sum and in the alternative seeks to set off.

The Plaintiff in his evidence produced a copy of the lease agreement dated 27/7/2012, a demand notice and bank statements. He contended that he had not refused to receive the final balance of kshs. 225,000 but the Defendant having known his back account which previous payments were made should have deposited the money in his accounts and that he was never informed about the deposit being held by MS. Jumba and Company advocates.

The Defendant in her evidence stated that she had not refused to pay the balance and her willingness on the same was demonstrated by the deposits she made which the plaintiff had refused.

I have considered the pleadings and the evidence of the parties and the submissions filed by both parties and the issues for determination as framed by the parties are:-

- (i) Whether there existed a valid contract between the plaintiff and the defendant
- (ii) Whether there was a breach and violation of the terms of the agreement and by who
- (iii) Whether the Plaintiff is entitled to compensation for breach of the agreement.
- (iv) Whether the Defendant is entitled to his counter claim

On the 1<sup>st</sup> issue for determination it is not disputed by either of the parties that they have entered into a lease agreement in respect of the 15 acres of land and the same was executed on 27/7/2012 and the terms of the lease and consideration thereof was well spelt. None of the parties had indicated that there was fraud or mistrust made during the negotiations and subsequent to the execution thereof. However, upon the execution of payment of the initial payments made there seems to have been mistrust between the parties. The plaintiff alleges that the Defendant had breached the terms of the payments as she failed to make payment of the sum of kshs. 225,000. The Defendant states she made the payment to the firm of Jumba and Company advocates.

I have read the lease agreement and I find no clause in which the mode of payment was outlined either through bank transfer or any other mode. Further I did not see the reasons why the defendant had deposited the money with the law firm.

From the foregoing I find that there was a valid agreement between the parties up to 6<sup>th</sup> June, 2016 when the plaintiff unilaterally decided to terminate the same invoking the provisions of clause 8 of the lease agreement.

On whether there was a breach of the said lease and its violation the agreement was express in terms and the due dates of payment were very clear. The Defendant was to pay the sum of kshs. 375,000 by two instalments of kshs. 150,000 on or before 17/8/2012 and the sum of kshs. 225,000 paid immediately after the 1<sup>st</sup> harvest. However, the Defendant had made a deposit of kshs. 225,000 with the firm of Jumba and company advocates, from the foregoing the Plaintiff has not denied his knowledge of the deposit made and no reasons were given by the plaintiff as to why he could not collect the said money knowing that it was part of the sum that was due and payable and consequently I find that there was no breach of the lease agreement prior to that and the plaintiff invoking the provisions of clause 8 of the agreement was premature. Furthermore, there was no demand by the plaintiff for the payment of the outstanding amount and in view of his premature action I find that the plaintiff is not entitled to damages for breach of contract or the sum of kshs. 995,000 being damages as envisaged under clause 9 of the lease agreement.

On the counter claim I find that the plaintiff in her evidence in chief has stated that she did not know who actually destroyed her sugar cane. There was no evidence linking the plaintiff to the destruction of the cane and hence the claim of kshs. 279,000 as value of the destroyed cane has not been proved on a balance of probabilities. The upshot of the above is that the counter claim fails.

From the foregoing and taking into account the defendants was due to pay the plaintiff the sum of kshs. 225,000 that was deposited with the firm of Jumbos and company advocates I order that the sum of kshs150,000 be released to the plaintiff since the defendant had cultivated and made her 1<sup>st</sup> harvest. Each party shall also bear the costs of the suit.

**DATED, SIGNED and DELIVERED IN OPEN COURT at NAROK on this 6<sup>th</sup> day of MAY, 2020.**

**Mohammed Kullow**

**Judge**

**6/5/2020**

In the presence of:

CA:Chuma

N/A for advocates and parties

**Mohammed Kullow**

**Judge**

**6/5/2020**