



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nguu & another v Nyaga (Civil Appeal E083 of 2023)  
[2025] KEHC 7829 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E083 OF 2023  
RM MWONGO, J  
JUNE 4, 2025**

**BETWEEN**

**ISABELLA WAWIRA NGUU ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MUNENE NJIRU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JAMES KAMAU NYAGA ..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. Endoo in Embu  
MCCC No. E067 of 2022 delivered on 24th November 2023)*

**JUDGMENT**

**The Appeal**

1. The appellant filed a memorandum of appeal dated 18<sup>th</sup> December 2023 seeking orders that:
  1. The judgement in CMCC No. 67 of 2022 be and is hereby set aside;
  2. The honorable court deem it fit to substitute the said judgment with reasonable judgment as per evidence tendered in court; and
  3. The Respondent be ordered to pay costs of the suit.
2. The appeal is premised on the grounds that:
  1. The learned trial magistrate erred in law and facts in failing to consider the defence put forward by the appellants in arriving at her final decision;
  2. The Learned trial magistrate erred in law and fact in finding that the appellants had breached the contract, a fact which was never proved by evidence tendered in court;



3. The Learned trial magistrate erred in law and fact in making a finding that the paid-up contractual sum was Kshs.150,000/= instead of Kshs.100,000/= which was confirmed by the Plaintiff and the Defendants in their evidence;
4. The learned trial magistrate erred in law and fact in failing to consider the evidence tendered by the Appellants; and
5. The Leaned trial magistrate erred in law and fact in awarding damages for breach of contract at the sum of Kshs.245,000/=.

### **Pleadings in the lower Court**

3. The respondent filed a plaint seeking judgment against the appellants jointly and severally for payment of Kshs.245,000/= and costs of the suit. He stated that he had entered into a Tea Bushes Lease Agreement dated 08<sup>th</sup> September 2021 with the appellants. They leased him a part of their land namely parcel number Gaturi/Nembure/16982, which had tea bushes on it, for a period of 5 years starting from 01<sup>st</sup> October 2021 for Kshs.150,000/=. Upon signing the agreement, he paid the lease amount in full and the appellants gave him possession of the land as lessee.
4. However, in April 2022, the appellants turned hostile and denied him access to the land. The termination notice period was 6 months at any time after the 3<sup>rd</sup> year of the lease period. However, the appellants did not give him such notice, neither did they return the money he had paid them; hence they breached the contract. The respondent stated that he had incurred costs in buying farm inputs for the tea crop yet he had not recovered the money. He claimed a full refund of the lease amount of Kshs.150,000/=. 50% of the lease amount as liquidated damages according to the agreement and Kshs.20,000/= for the farm inputs.
5. The appellants filed a statement of defense and counterclaim in which they denied the respondent's averments in the plaint. They stated that it was the respondent who breached the contract and they tried to negotiate afresh but the negotiations failed. That after the negotiations failed, the respondent voluntarily vacated the land citing frustration and lack of goodwill from the appellants. After these events, the appellants invoked clause 5 of the agreement on termination.
6. The appellants counterclaimed for the 50% liquidated damages on the lease amount according to the agreement, costs of the counterclaim and interest at court rates.

### **Hearing in the Trial Court.**

7. The matter was heard viva voce. PW1 was the respondent who adopted his witness statement as evidence. He stated that he paid the appellants the total lease amount and he also paid the Advocates who drafted and witnessed the agreements. That the payments were via M-Pesa. That he harvested the tea for about 1 year before he was forced out of the land by the appellants.
8. PW2 was Njeru Ithiga, the Advocate who drew the agreement. He stated that the form was on Gaturi/Nembure/16982 with tea bushes belonging to Isabella Wawira Nguu and Stephen James Kamau. He stated that the respondent paid the applicant the total sum of Kshs.150,000/= in his presence after both parties executed the agreement, which he produced as evidence. The appellants acknowledged receipt of the full agreed amount. They never agreed that any further payments would be made in the future.
9. DW1 was the 1<sup>st</sup> appellant who adopted her witness statement as evidence. She stated that upon signing the agreement, the respondent did not pay the full lease amount but he kept paying in small



installments. She denied ever acknowledging receipt of the money in writing or otherwise. She referred to her M-Pesa statement and stated that the respondent paid her a total of Kshs.100,000/= in 4 installments of different amounts.

10. The balance of Kshs.50,000/= was not paid and then the respondent sued the appellants. She denied chasing the respondent away from the land and stated that the respondent called to inform her that he was being chased away from the land. She stated that the land belongs to her husband who permitted her to use it as she pleased.
11. DW2 was the 2<sup>nd</sup> appellant who stated that the respondent did not pay the full lease amount. That the respondent had paid some money before the agreement and he demanded that the terms be written before he made further payments in the future.
12. The trial court found that the appellants had breached the terms of the agreement and were liable to pay the respondent the amount stated.

### **Parties' submissions on appeal**

13. The appeal was canvassed by way of written submissions.
14. The appellant relied on the case of Hydro Water Well (K) Limited v Sechere & 2 others (sued in their representative capacity as the officers of Chae Kenya Society & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) [2021] KEHC 22 (KLR) and argued that the respondent did not produce evidence that he was denied access to the property which he had leased.
15. They stated that since the signing of the agreement, the respondent neglected the tea bushes, leaving them to overgrow. That nobody chased the respondent away from the property, but rather that he himself abandoned the land. They relied on the cases of Jackline Njeri Kariuki v Moses Njung'e Njau [2021] KEHC 4818 (KLR) and Mwangi v Kiiru [1984] KECA 43 (KLR) and denied the allegation that they breached any contract. They urged the court to find in their favour as regards the counterclaim.
16. The respondent submitted that once he had entered into a contract with the appellants, he bought fertilizer and applied it on the crop. When the crop started doing well, the appellants began harvesting it and denied him access to the farm which he had leased. He urged the court to view the agreement as a valid contract with all the requirements of a valid contract. He relied on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR) and urged the court to uphold the finding of the trial court.

### **Issue for Determination**

17. The issue for determination is whether the appeal has merit.

### **Analysis and Determination**

18. The appellate court makes its decision based on the record of the trial court through reexamination of evidence. This was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, where it was stated:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

19. The respondent produced a Tea Bushes Lease Agreement dated 08<sup>th</sup> September 2021 between the appellants and the respondent. The respondent (PW1) and his advocate (PW2) stated that upon signing this agreement, the respondent paid the appellants Kshs.150,000/= being the lease amount. PW1 stated that he made the payments through different M-Pesa transactions, a position that was confirmed by DW1, the 1<sup>st</sup> appellant, from her M-Pesa statements. DW1 contended that the respondent only paid her Kshs.100,000/= in total and so she invoked clause 5 of the agreement. The clause states:

“5. That during the 3<sup>rd</sup> year of the lease, the lessors are free if they so desire to terminate the lease and refund the monies for the remaining lease period upon giving the lessor adequate notice of Six (6) Months.”

20. DW2 testified that by the time the agreement was reduced to writing, the respondent had already paid some amount to the 1<sup>st</sup> appellant and he would make more payments after the agreement was signed. From the evidence, it is clear that there was an agreement between the parties. The respondent paid some money before and after signing of the agreement. The cumulative sum was Kshs.150,000/= as consideration for leasing the land which had tea bushes on it. The respondent proceeded to carry out his activities on the land until he claimed that he was chased away, a fact that the appellants disputed. The 1<sup>st</sup> appellant stated that the land belonged to her husband but he had allowed her to deal in it in whatever manner she pleased, this is why she leased it to the respondent.
21. For a contract to stand, the elements thereof must be established firmly. First, there must be an offer and acceptance, and consideration. The contracting parties must possess the capacity to enter into the contract before it creates binding obligations between them. In this case, the 1<sup>st</sup> appellant stated that she was not the owner of the land but she took the consideration from the respondent. The respondent did not raise the issue of ownership of the land but he only focused on the consideration, which is the issue before this court.
22. The conduct of both parties suggests that whatever the circumstances, there was a contract between them. However, the validity of the contract comes into question because there seemed to be someone else stopping the respondent from enjoying the lease. This is especially noted when the appellants testified that they did not deny the respondent access to the property where he had started investing. It would appear that there is, indeed, a third party to the contract; or that the appellants leased land that did not belong to them from the onset, without the knowledge or consent of the owner. This aligns with PW2, Ithiga Njeru’s testimony, that the tea bushes belong[ed] to Wawira and Stephen. In the meantime, DW1 Isabella Wawira stated “the owner of the land took the land from Samuel Njiru who is my husband. He permitted to lease. He did not sign the agreement.”
23. The issue arising in that case is that the respondent’s rights under the contract are curtailed because the appellants misrepresented the fact of ownership at the time of signing the agreement. The appellants named themselves as lessors of the land which did not belong to them at the time of signing the agreement. Misrepresentation is a vitiating factor to a contract. In the case of *Amos Karobia Gichuki v Bernard Kamau Wagakoru* [2020] KEHC 1626 (KLR), the court held:

“According to Halsbury’s Laws of England, a misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person (‘the representor’) makes



a misrepresentation to another ('the representee') which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally elect to regard the contract as rescinded. (See Halsbury's Laws of England/Misrepresentation And Fraud (volume 31 (2003 Reissue))/1. Actionable Misrepresentation, paragraph 701).

The innocent party may invoke the aid of the court, which may confirm by declaration his entitlement to regard the contract as rescinded, and grant him such other relief as may flow directly from the fact of rescission, for example, the return of money paid or chattels delivered by him pursuant to the terms of the contract. (See Paragraph 812 of Halsbury's Laws of England, supra)"

24. According to the Black's Law Dictionary, 9<sup>th</sup> Edition, Misrepresentation in contract denotes a false statement that is likely to induce a reasonable person to assent or that the maker knows is likely to induce the recipient to assent. Misrepresentation, therefore, makes the contract void ab initio. In the case of a void contract such as that between the parties herein, there are no binding obligations. In this case, the appellants must to be held to have breached the contract through misrepresentation.
25. This means, further, that the terms of the agreement as to termination are not applicable, hence, the 50% liquidated damages cannot apply since the contract was void ab initio. The lease amount of Kshs.150,000/= is treated as a normal debt that is recoverable.
26. On the issue of the expenses incurred by the respondent on farm inputs, the trial court was correct in finding that it was not proved. Given the present circumstances of the void contract, it is the case that the expenses ought to have been proved before being awarded.

### **Conclusions and Disposition**

27. Due to misrepresentation by the lessors, the contract entered into by the parties must be and is deemed to be void ab initio, and its terms unenforceable.
28. Accordingly, the appeal partially succeeds, and the following orders are made:
  1. The judgement in CMCC No. 67 of 2022 is hereby set aside and substituted with an order that the appellants pay the respondent Kshs.150,000/= with interest at court rates from the date of filing the plaint;
  2. The appellants' counterclaim is hereby dismissed; and
  3. The appellants are awarded 50% of the costs of this appeal.
29. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 4<sup>TH</sup> DAY OF JUNE, 2025.**

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**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Waititu for Appellant

No Representation for Ndeke for Respondent

Francis Munyao - Court Assistant

