



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELCA NO. 5 OF 2019

ESTHER KAKONYO WANJOHI.....APPELLANT

VERSUS

JULIANA WAMBUI GAKURU.....RESPONDENT

(Being an Appeal from the judgment of Hon. Y.M. Barasa – R.M. Delivered on 4th May 2018 in CMCC No. 243 of 2014 – Kerugoya)

JUDGMENT

BACKGROUND

This Appeal arises from the decision by the Hon. Y.M. Barasa delivered on 4th May 2018. The plaintiff in the lower Court who is also the Appellant herein had sued the Respondent for an order of permanent injunction restraining her either by herself or servants and or agents and anyone claiming under her from entering or interfering or picking the 700 tea bushes on land parcel No. INOI/THAITA/130 that the Appellant (plaintiff) had leased until 1/1/2021 when the plaintiff/Appellant will complete her term. The plaintiff/Appellant also sought costs and interest. The plaintiff's suit was straneously opposed by the Defendant/Respondent who filed defence dated 10th November 2014 in which she denied the plaintiff's/Appellant's claim and sought to have the suit dismissed with costs.

APPELLANT'S CASE

The Appellant's case before the lower Court is that she came to know the defendant/Respondent through one Robert Kinyua who told her that the defendant/Respondent's husband wanted to lease out his tea bushes to pay for medical bills. The plaintiff/Appellant averred that they negotiated and agreed to lease 700 tea bushes at Ksh. 12/= per bush for ten (10) years which came to Ksh. 84,000/=. The plaintiff/Appellant further stated that since she did not have a K.T.D.A membership number, she requested her brother Gachoki Joseph Mugo to allow her to use his name in the lease agreement so that she could sell the tea using his number. The plaintiff/Appellant further stated that following those arrangements, she signed the lease agreement on behalf of her brother Gachoki Joseph Mugo with the defendant's/Respondent's husband one Joseph Gakuru Igecha for a period of 14 years effective from 4/12/2003 to 1/1/2014. She took possession of the tea bushes on the suit property L.R. No. INOI/THAITA/130. The plaintiff/Appellant also stated that she paid the defendant/Respondent's husband Joseph Gakuru Igeche Ksh. 84,000/= for the ten (10) years on the date of the lease agreement. After she picked the tea for two years, she got very tired selling the tea in the buying centre of her brother that was far away and requested the defendant/Respondent Juliana Wambui Gakuru's husband to assist her get her own K.T.D.A number.

She stated that the defendant's husband transferred to the defendant 700 tea bushes and was issued with a K.T.D.A number KN0060607 and that she was subsequently given her own number KN0060608. The Appellant/plaintiff further stated that she agreed to give the defendant/Respondent money for a further extension of 5 years as there was an agreed grace period of 1 year so that her term would end in the year 2021. Following the said understanding, they entered into a lease dated 11/12/2006 and that she paid the defendant/Respondent Juliana Wambui the sum of Ksh. 42,000/= making the total amount advanced to the defendant Ksh. 109,200 and that the Appellant was to vacate the suit land on 1st January 2021.

The Appellant also stated that by the time she leased the tea bushes in her name on 11th December 2006, she had only utilized 2 years leaving the balance of Ksh. 67,200/= and that they agreed that the said balance be converted to a further lease period and she added Ksh. 42,000/= so that she could utilize the land for five (5) years terminating on 1/1/2021 inclusive of one year grace period.

The plaintiff contends that she had quiet enjoyment of the suit land until 13/10/2014 when she received a letter from the defendant/Respondent's lawyer M/S Motanya & Co. Advocates demanding that she vacates the suit land. She stated that on 16/10/2014, she wrote a reply to the Respondent's letter. On 23/10/2014, she went to pick her tea bushes at around 8.00 a.m. and was surprised when Juliana Wambui the Respondent herein came and demanded that she stops and vacate immediately. She left with the tea she had picked.

The plaintiff called two witnesses. The first witness was one Robert Kinyua who stated that the plaintiff/Appellant was her friend. He was referred his statement which was adopted by the Court. The statement is dated 1st September 2017. In his testimony, the witness stated that he knew the plaintiff/Appellant whom he had introduced to one Joseph Gakuru Igecha. He stated that the said Joseph Gakuru Igecha had informed him that he wanted to lease his land in order to get money to refund to someone he had sold land to. He stated that after introducing the Appellant to the said Joseph Gakuru Igecha, the latter agreed to lease to the former 700 tea bushes at Ksh. 12 per tea bush for 10 years. They entered into a lease agreement on 4/12/2003 whereby the lessor was paid a total of Ksh. 84,000/=. The agreement was written in the name of Joseph Gachoki Mugo on behalf of the Appellant since the plaintiff/Appellant had no tea grower number. The plaintiff signed the agreement on behalf of her brother Joseph Gachoki Mugo as the lessee while Juliana Wambui Gakuru's husband one Joseph Gakuru Igecha was the lessor. Juliana Wambui Gakuru was a witness for the lessor while he was a witness for the lessee. The plaintiff/Appellant paid the defendant/Respondent's husband Joseph Gakuru Igecha the sum of Ksh. 84,000/= being consideration for a lease of the tea bushes for 10 years.

After picking the tea for two (2) years, the plaintiff got tired selling the tea in the buying centre of her brother that was far away and she requested the lessor to assist her get her own K.T.D.A number. Since the K.T.D.A regulations provide that one cannot assist a lessee to get a K.T.D.A number unless she leases out the whole tea plantation, it was not possible for Juliana's husband to assist Esther Kakonyo. The witness stated that after a lengthy discussion, they agreed that he transfers the 700 tea bushes to Juliana so that he remains with 1000 tea bushes. The lessor transferred 700 tea bushes to Juliana (Respondent) who thereafter acquired K.T.D.A number KN0060607. The witness stated that after acquiring the 700 tea bushes, Juliana Wambui then entered into a lease agreement with the Appellant Esther Kakonyo with effect from 11/12/2006 and acknowledged receipt of Ksh. 109,200/ being the lease price of 700 tea bushes for 14 years at Ksh. 12 per stem commencing from 1/1/2007 and ending on 1/1/2021 due to the one year grace period. He stated that Esther Kakonyo moved from the portion of 700 tea bushes she was picking to the new area of 700 tea bushes. Her term of picking the tea bushes had not lapsed as it was to lapse on 1/1/2014. They did calculations with Mr. Gakuru for the spent years and she vacated that particular portion of the land to the new portion shown to her by Mr. Gakuru and his wife Juliana. They then went to the K.T.D.A offices where Juliana signed a lease agreement dated 21/12/2006 and that the plaintiff/Appellant was issued with Grower No. KN0060608.

PW3 was Joseph Gachoki Mugo. He stated that he is brother to the plaintiff Esther Kakonyo. He stated that in the year 2003, the plaintiff/Appellant approached her with a view to selling tea to K.T.D.A using his tea number as she had not acquired a number. He stated that he allowed her to sell her tea using his number 405. The witness further stated that her sister informed her that she had been leased 700 tea bushes by one Joseph Gakuru Igecha at Ksh. 12 per tea bush. He said that her sister requested him to go and pick the lessor from his house so that they can go to Kangaita Tea Factory to present the agreement which they had entered into with the said lessor in his name for him to give his consent to the factory. They presented the lease agreement at the factory jointly with Joseph Gakuru Igecha and the records were adjusted accordingly and the 700 tea bushes were transferred to his number 405. He could then sell the tea and withdrew money for his sister from the proceeds of the said sale for two (2) years before she acquired her own number. She said that Juliana Wambui is the wife of Joseph Gakuru Igecha and that when he went to pick Joseph Gakuru Igecha to go to Kangaita Tea Factory, she was at home and that she was aware of the transaction.

On cross-examination, the witness stated that he signed agreement on behalf of his sister in 2003 which was to expire after 10 years in 2014. He stated that he was not aware of any other agreement.

DEFENDANT/RESPONDENT'S CASE

The Respondent who was the defendant in the case before the lower Court testified alone and called no witness. She was referred to her statement dated 8/7/2016 which was adopted in her evidence. She was also referred a list of documents containing three (3) items dated 8th July 2016. The documents are as follows:

1. Lease agreement dated 4th December 2003 between Joseph Gakuru Igecha and Gachoki Joseph Mugo.
2. Death certificate of one Joseph Gakuru Igecha and
3. Demand letter to Esther Kakonyo Wanjohi dated 13/10/2014.

These items were produced as Exhibits by the defendant/Respondent. According to her, one Joseph Gachoki Mugo entered into a lease agreement with her late husband Joseph Gakuru Igecha for 700 tea bushes for a term of 10 years on 4/12/2003. The said lease was to expire on 1/10/2014. The plaintiff/Appellant is the one who was picking the tea leaves from the 700 tea bushes leased out by her late husband. She stated that upon expiry of the lease period, she instructed her lawyers to write a letter to the plaintiff to give vacant possession dated 13/10/2014. She stated that the plaintiff did not comply with the demand letter but instead filed a suit in the subordinate Court which is the subject of this Appeal. She argued that she did not enter into any lease agreement extending the lease term from 10 years which was to commence in 2014 to 2021 as alleged.

In her Appeal, the Appellant raised the following ten (10) grounds:

- 1. The learned magistrate erred in fact and in law in holding that the Appellant agreements were not authentic and failing to take into account that the Appellant clarified that when they entered into the agreement as drawn, the parties had not physically counted the tea bushes.**
- 2. The learned magistrate erred in fact and in law in failing to enforce the agreement dated 11th December 2006 and placing weight on previous agreements between the Appellant and the Respondent's deceased husband whose terms had expired and failing to note the Respondent was not sued as a legal representative of her deceased husband.**
- 3. The learned magistrate erred in fact and in law in failing to hold that the Respondent was bound by the agreement of**

4/12/2006 where she acknowledged receipt of Ksh. 109,200/= being the lease price of 700 tea bushes for 14 years at Ksh. 12 per stem commencing on 1/1/2007 and lapsing on 1/1/2021 due to the one year grace period for pruning

4. The learned magistrate erred in fact and in law in failing to place any weight on the transaction at K.T.D.A office where the Respondent went to Kangaita K.T.D.A office and the Respondent signed a lease agreement dated 21/12/2006.

5. The learned magistrate erred in fact and in law in failing to note that the Respondent never denied anywhere that she signed the documents at the K.T.D.A offices.

6. The learned magistrate erred in fact and in law holding that the Appellant did not prove her case when there was evidence that the Respondent demanded that she vacates with the tea she had picked.

7. The learned magistrate erred in fact and in law holding that the Appellant did not discharge the burden of proof.

8. The learned magistrate erred in fact and in law holding that there was a contradiction between the Appellant's documents and statement.

9. The learned magistrate erred in fact and in law making wrong calculations that the lease was expiring in 2012 against the weight of evidence.

10. The learned magistrate erred in fact and in law in condemning the Appellant to pay costs of the suit and dismissing her case making judgment that was not based on the evidence before the Court and relying on extraneous matters to make his judgment.

RE-EVALUATION AND DECISION

It is trite law that the duty of the first Appeal Court is to re-evaluate the evidence presented in the trial Court before making a determination. That is the decision of the Court of Appeal in the case of *Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates (2013) e K.L.R* where it was held as follows:

“This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, to assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

From the ten grounds of Appeal in this case, the Appellant is challenging the impugned decision by the trial magistrate for failing to put weight on her evidence and the documents produced thereto particularly the sale agreement dated 11/12/2006. Having looked at and re-evaluated the evidence adduced before the trial magistrate, I note that there were two agreements produced by the plaintiff dated 14/12/2003 and 11/12/2006 respectively. The first agreement was entered between one Joseph Gakuru Igecha as the lessor of one part and Gachoki Joseph Mugo as the lessee of the other part. The subject of the two agreements was 700 tea bushes on land parcel No. INOI/THAITA/130 registered in the name of Joseph Gakuru Igecha. The term of the lease in respect of the first agreement was ten (10) years and the consideration was Ksh. 12 per stem per year making a total of Ksh. 84,000/= for the ten years. The second lease agreement dated 11/12/2006 is between Juliana Wambui Gakuru as the lessor and Esther Kakonyo Wanjohi as the lessee. The subject of the lease are 700 tea bushes planted on land parcel No. INOI/THAITA/130 registered in the names of Joseph Gakuru Igecha for a period of 14 years from 1st January 2007 to 1st January 2021 at a sum of Ksh. 109,200/=. I have noted that the second lease agreement was entered two years after the first lease agreement was entered. I also note that the first lease was entered between Joseph Gakuru Igecha who is the registered proprietor of the suit property L.R No. INOI/THAITA/130 and one Gachoki Joseph Mugo. The lease agreement was to expire on 1st January 2014. When the second lease agreement was purportedly being entered into, the first lease agreement was still subsisting. First, the party who is indicated as the lessor is the Respondent, Juliana Wambui Gakuru who is the wife of the registered owner Joseph Gakuru Igecha. There is no indication from the lease agreement or any other evidence that the registered proprietor granted consent to the said Juliana Wambui Gakuru to lease out his land to the Appellant herein.

The second lease agreement is not an addendum to the first lease agreement. Since the two lease agreements are mutually exclusive, the second lease agreement could not have any binding force when the first lease agreement was in existence. I therefore find that the trial magistrate properly directed his mind to the law and fact when he held that the plaintiff/Appellant failed to prove that she entered into a valid lease agreement with the defendant/Respondent. In the final result, I find this Appeal lacking in merit and the same is hereby dismissed with costs.

READ, DELIVERD and SIGNED in open Court this 24th day of January 2020.

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E.C. CHERONO

ELC JUDGE

24TH JANUARY, 2020

In the presence of:

1. Mr. Muchira for Respondent
2. Mr. Munene holding brief for Ann Thungu for Appellant
3. Court clerk - Mbogo