



**Mungania v Mbogori & another (Environment & Land Case
E014 of 2021) [2024] KEMC 122 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEMC 122 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
ENVIRONMENT & LAND CASE E014 OF 2021
AT SITATI, SPM
JUNE 28, 2024**

BETWEEN

STEPHEN BUNDI MUNGANIA PLAINTIFF

AND

MBAYA MBOGORI 1ST DEFENDANT

PHINEAS MUTHOMI MBAYA 2ND DEFENDANT

JUDGMENT

1. By an Amended Plaintiff dated 14th March, 2023 verified by an affidavit of similar date, the plaintiff prayed for:
 - a. An order of specific performance of the agreements dated 14th December, 2010, 17th July, 2023, 27th August, 2018, 21st February, 2019 and 21st February, 2019 and in the alternative a refund of all the consideration paid in respect of the agreement plus reimbursement for all the expenses and costs incurred in developing the said land.
 - b. A refund of Kshs 356, 800 from the 1st defendant.
 - c. A refund of Kshs 340, 000 from the 2nd defendant.
 - d. A refund of the initial capital outlay of Kshs 632, 920 from the 1st and 2nd defendants jointly and severally.
 - e. Payment of Kshs 3, 009, 440 against the 1st and 2nd defendants jointly and severally.
 - f. General damages for breach of contract against the 1st and 2nd defendants jointly and severally.
 - g. Costs and interests at court rates.
 - h. Any other relief this court deems necessary.



Accompanying the plaint were:

- a. List of witnesses.
- b. Written witness statement of the plaintiff
- c. Case summary
- d. List of issues for determination
- e. List and bundle of documents to be produced as exhibits
 - i. Lease agreement dated 14th December, 2010.
 - ii. 1st amending agreement for lease dated 17th July, 2013.
 - iii. Sale of land agreement dated 27th August, 2013.
 - iv. Acknowledgement receipt dated 27th August, 2018.
 - v. An undertaking agreement dated 21st February, 2019.
 - vi. Amending agreement dated 21st February, 2019.
 - vii. Ruling in succession cause no.1 of 2013.
 - viii. Minutes dated 21st April, 2021.
- f. Further list and bundle of documents containing the Report by the Ward Agricultural officer.
- g. Further list and bundle of documents containing the KTDA Production report for 6 years 2016 to 2022.

2. G.M. Wanjohi, Mutuma & Company Advocates represented the plaintiff.

The Plaintiff's Case

3. The plaintiff adopted his witness statement dated 20th April, 2021 as his testimony. by it, he told the court that on 14th December, 2010 he entered into a written lease agreement with the 1st defendant wherein the 1st defendant leased him a parcel of land measuring 1.1 acres which were to be excised from LR. Abothuguchi/githongo/489 measuring 4 acres. H the rent was Kshs 7, 200/= per year for 14 years totalling Kshs 100, 800/- which he paid upon the execution of the agreement. The lease was to take effect from 1st January, 2011 to 31st December, 2024. He told the court that it was a term of the lease that he was to plant crops and tea bushes and he did so and began harvesting tea from 2015.
4. He added that on 17th July, 2013 he entered into another agreement to amend the lease of 14th December, 2010 so that the amendment was to extend the lease period by seven (7) years commencing 31st December, 2024 to 31st December, 2031. The annual ground rent was Kshs 8, 000/- and he paid the entire sum of Kshs 56, 000/=.
5. Later, on 27th August, 2018 he entered into a sale agreement with the 2 defendants to purchase the beneficial interest of the 1st defendant in the suit land. The beneficial interest was that the 1st defendant was to get measured 1 acre out the estate of M'Mborongi M'Irambu out of Abtohuguchi/githongo/489 and he sold One-Third of this acre to the plaintiff herein for the agreed consideration of Kshs 330, 000. He paid Kshs 230, 000 and the balance of Kshs 100,000 was to be paid upon transfer to him on or before 31st December, 2019.



6. Subsequently, on 21st February, 2019 he recorded another agreement to amend the sale agreement with the 2nd defendant. The amendment was to increase the consideration from Kshs 330,000/- to Kshs 440, 000/-. He thus paid Kshs 340,000 and the balance of Kshs 100, 000 was to be paid upon transfer of the land to him.
7. On that same date of 21st February, 2019 the plaintiff and the 1st defendant entered into an undertaking agreement whereby the 1st defendant agreed to sell the plaintiff his share out of the suit land. On this undertaking he paid Kshs 200, 000/- as consideration. By this time, he had been harvesting tea which he had planted.
8. As expected, the Succession cause was concluded on 27th September, 2018 but the defendants refused and/or failed to transfer him the agreed 1/3 acre. The defendants, instead destroyed his crops and dispossessed him of the land.
9. In support of the case, the plaintiff produced the above listed documents in evidence. The following evidence came to light during cross-examination by the defendants:
 - i. The 1st defendant was a father to the 2nd defendant while the plaintiff was their clansman.
 - ii. The plaintiff planted tea on the portion that the 1st defendant showed him.
 - iii. The 1st defendant inherited portion 2 of the certificate of the confirmation of grant.
 - iv. It was upon the delivery of the High Court Succession ruling subdividing the estate that the defendants started breaching their agreements.
 - v. The administrator of the estate only came into view after the tea had already been planted.
 - vi. In this suit, one of the reliefs sought by the plaintiff was for costs and expenses incurred to be borne by the defendants.
 - vii. After leasing the land from the defendants, the plaintiff had thereafter leased out to Mutiga and Kimari some portion of the same.
9. In re-examination, the plaintiff affirmed that he had not completed the final payment as the defendants had not transferred the land to him.
10. PW2 Julius Kiogora Ariithi, Advocate of the High Court of Kenya testified saying that he was the drafter of the w agreements between the plaintiff and the 2 defendants which he produced as follows:
 - i. Lease agreement of 14/12/2010
 - ii. Lease agreement of 17/07/2013
 - iii. Undertaking dated 01/02/2019
 - iv. Sale agreement dated 21/02/2019.
11. In cross-examination Advocate Kiogora's evidence was that at the time of the Agreements the land parcel number was indicated as a portion of Abothuguchi/githongo/489. In re-examination, the counsel indicated that the interest sold was by the beneficial owner.
12. PW3 Morris Koome Mukaria the Ward Agricultural Officer produced the crop assessment, farm-preparation costs, crop- yield and expected income report dated 12th August, 2021 as an exhibit. The report proved that the plaintiff incurred special damages estimated at not more than Kshs 649, 600 for



land preparation, drilling holes, seedlings, fertilizer, planting, annual fertilizer application, irrigation system, annual weeding and annual pruning.

13. In cross-examination, the witness stated that 5,400 tea bushes were planted by the plaintiff.
14. PW4 Maxwell Gichuhi Advocate of the High Court of Kenya produced the sale agreement dated 27/08/2018 for Abothuguchi/githongo/489 and confirmed that it was between the plaintiff and the 2 defendants. In cross-examination, he affirmed that the parties signed the sale agreement and the consideration paid as per the agreement.
15. PW5 Pauline Kiende Muthomi Clerical Officer from the Githongo Tea Factory produced the tea harvesting an yield report for the years 2016 to 2022 for Grower number GG-049-0025. In cross-examination, the witness affirmed that the report that from 2016 to 2022 it was the plaintiff who harvested the tea although the land parcel number from which the tea was beign harvested was not indicated. She added that from GG-009-0460 the 2nd defendant was the one collecting payments for tea harvested from the subject land. She affirmed that the 2nd defendant picked tea in APRIL, 2023. At the end of her testimony, the plaintiff closed his case.

The Defence Case

16. In this case, the 2 defendants did not file any defences and filed no list and bundle of documents. They, however, gave oral testimonies in their defence denying any liabilities.
17. The 1st Defendant Mbaya Mbogori denied recording any agreements with the plaintiff whatsoever. He stated that the plaintiff wanted to defraud him of the property. He, however, admitted that the plaintiff leased the land after uprooting the coffee bushes and planting tea in their place. He asked for the costs of the uprooted coffee bushes.
18. In cross-examination, the 1st defendant admitted that he leased out the land to the plaintiff and confirmed that the lease term was 20 years. He challenged the advocates evidence confirming the recording of the lease and sale agreements.
19. The 2nd defendant Phineas Muthomi MbayA told the court that the transactions were suspicious and should be rejected. He told the court that the plaintiff had prosecuted him in Criminal Case Number 694/2019 for malicious damage of the crops but the case was dismissed. He stated that his father had a history of mental instability and could not have recorded the agreement in the correct state of mind. He relied on a printout from the Githongo tea Factory.
20. In cross-examination, he admitted that the leases existed and he signed on them but denied that he recorded the sale agreement. At that stage the defendants closed their case.
21. The duty of this Honourable Court is to determine whether or not the plaintiff has established his case on a balance of probabilities on each and every head of claim in the plaint.

Determination

22. From the tested evidence, the court makes the following factual findings and resultant determinations:
 1. Lease Agreements: The plaintiff and the 2 defendants recorded lease agreements as proved by the documentary evidence and oral testimonies of the advocates who recorded the same.
These leases, however, being for a term exceeding 5 years were not registered as required by section 4(1)(vi) of the [Registration of Documents Act](#). The failure to register the lease only meant



that the plaintiff did not create an encumbrance on the title. The failure, however, does not deprive the plaintiff of equitable reliefs to recover appropriately under a contract.

On this aspect of the failure to register a lease required by law to be registered in the case of Mega Garment Limited –v- Mistry Jadva Parbat & Co.(EPZ) Limited (2016)eKLR the Court of Appeal discussed the status of an unregistered lease and stated as follows:

“The time-honoured decision of this court in Bachelors Bakery Ltd –v- Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties.

That exposition of the law hold true in this case...”¹³. In line with the above decision, and as rightly submitted by the Appellant, any unregistered lease is only a contract between the parties. The same gives no protection against the rights of third parties. In the present case, the unregistered lease was between the Respondent and the Appellant herein”

2. The plaintiff and the defendants entered into a sale agreement as proved by the documentary and oral testimonies of the advocates who recorded the same. This was also breached by the failure to transfer the land. The sale agreement had a remedy for the breach through a penalty clause in term 12:

In the event of breach, the innocent party shall be entitled to -a) if the party in breach is the vendor, he shall refund any consideration received plus pay a further sum of Kshs 33, 000 being liquidated damages together with any expenses that may have been incurred in developing the property.

3. The 2 defendants breached both the sale and lease agreements by terminating the same and dispossessing the plaintiff of the leased land. There was also a penalty clause in the lease agreement:

Lease dated 14th December, 2010:

Clause 9 If any party defaults in the performance of this agreement, the party in default will be liable to pay the innocent party a sum of KSHS 100, 800 (One Hundred Thousand Eight Hundred Only) being liquidated damaged for breach of contract.

4. The effect of a penalty clause has been discussed by the Court of Appeal in the on this question of penalty clauses, the Court of Appeal had this to say in Samuel Ngige Kiarie v Njowamu Construction Company Limited & another [2019] eKLR E. M. Githinji, Asike-Makhandia & P. KIAGE, JJ.A)

“Looking at the literal interpretation of clause 3 it is clear that the parties had intent to impose a penalty of Kshs. 25,000 on the 1st respondent in the event of a delay in the payment of the two instalments of the balance of the purchase price. Like many other contracts that foresee certain contingencies that may come up during the pendency of the agreement that may force a purchaser to delay in remitting the funds on time, such a clause is put in order to safeguard the vendor from losses



incurred as a result of the delay. It also serves as a deterrent to the purchaser not to inordinately delay in remitting the required payments.”

The learned Judges went on to hold that:

“It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this Court had in mind in *National Bank of Kenya V Pipeplastic Samkolit (k) Ltd & Another* [2001] eKLR:

“The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

Therefore, on the penalty clause, the court enters judgement as per the 2 penalty clauses for the sums of Kshs 100, 800 and Kshs 33, 000 for the plaintiff following the defendants’ breaches.

Further, when the 2 defendants breached the sale agreement by refusing to transfer the sold portion on which the plaintiff had planted tea and was collecting payments from the Githongo tea Factory, their actions entitled the plaintiff to a refund of the purchase price under section 7 of the *Land Control Act*:

7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22

Applying the foregoing to this case leads this Honourable Court to and it hereby enters judgement for the plaintiff for a refund of the purchase price as provided for not only in their penalty clause but also in section 7 of the *Land Control Act*.

General Damages for Breach of Contract

23. In the authority of *Pwani Telecomms Limited v Taita Taveta County Government* (2021) eKLR (Ong’ino J.) had this to state on the issue of payment of general damages for breach of contract:

“32. In its plaint, the plaintiff also claimed loss of income and business at Kshs. 2,790,000 and general damages for breach of contract. On loss of income and business, the plaintiff in its submissions conceded that no evidence was adduced to support this claim. Accordingly, when it comes to general damages, it is well settled in law that it cannot be awarded on a claim anchored on a



breach of contract. In affirming that position, the Court of Appeal in the case of Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR) which was cited by the Court in James Maranya Mwita v South Nyanza Sugar Co. Ltd [2017] eKLR emphatically expressed itself thus:

.... As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract....."

33. The Court in in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd [2015] eKLR explained why general damages cannot be awarded in cases of breach of a contract as hereunder: -“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose 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.

This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR*). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale (1854) 9. Exch. 341* that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”On the strength of the foregoing authorities, the court dismisses the prayer for general damages for breach of contract as untenable in law.

5. Prayer for Loss of Expected Income

24. Prayer (f) of the Amended Pleadings was essentially a prayer for loss of expected income. The same was computed based on the agricultural officer’s report and the factory returns produced in evidence.
25. In the court’s considered view, if the court is to allow this prayer, it would amount to double compensation because the contract between the parties had expressly provided a remedy for the breach by a penalty sum of a liquidated amount already ascertained in the contract. Double compensation is not the just thing to do in law because in law, damages are meant to restore or put the party back to the position they would have been but for the breach but is not meant to unjustly enrich the innocent party or unjustly punish the guilty party. If the contract had been silent on the compensation by way of a penalty clause, the court would have gone ahead to assess the loss of the expected income using the following guidance from the authority of *Hydro Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021]*



- “23. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court’s function is confined to enforcing either the primary obligation to perform, or the contract breaker’s secondary obligation to pay damages as a substitute for performance.
24. The objective of compensating the claimant for the loss sustained as a result of non-performance makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant’s actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.
25. The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments Ltd v Browallia Cal Ltd* (formerly *Union Cal Ltd*): -¹⁷{2010} EWCA Civ 486; [2011] QB 477, para 22. “Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant’s wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.”
26. An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill.¹⁸The assessment of damages in such circumstances often involves what Lord Shaw described in *Watson, Laidlaw* at pp 29-30 as “the exercise of a sound imagination and the practice of the broad axe.”¹⁸See *Chitty on Contracts*, 32nd ed (2015), paras 26-172 - 26-174.
27. The American case of *Griffin v Colver*¹⁹ in which the New York Court of Appeals set the tone for the more modern rule of lost profits damages is apposite. It stated: -¹⁹*Griffin v Colver*, 16 NY 489, 491 (1858). “It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or



conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. Griffin thus concluded that lost profits are recoverable in contract cases, but only if the aggrieved party proved them with certainty. Griffin quickly became the "leading American case on recovery of lost profits."

28. Since the above decision, (Griffin), it has been relatively clear that lost profits are available where the parties' contract clearly anticipated them and the party seeking them could prove the amount with relative certainty. Lost-profit damages are now available in a variety of civil contexts—tort actions (both personal and business), breach of contract actions, antitrust suits, and claims for trademark and patent infringement.²⁰ Nonetheless, courts continue to face the often-difficult questions of how to assess whether the parties contemplated lost-profit damages, whether a party actually suffered them, and if so, how to measure those lost profits.²¹²⁰Erwin v Mendenhall, 433 P 3d 1090, 1095 (Alaska 2018).²¹Todd R Smyth, Recovery of Anticipated Lost Profits of New Business: Post-1965 cases, 55 ALR 4th 507 (1987).

29. Perhaps the most important consideration in any lost-profits case is how much and what type of evidence a party needs to prove the alleged lost profits. To understand the necessary quantum of evidence, it is helpful first to understand the definition of lost-profits damages. Typically, lost-profits damages refer to the loss of net profits, rather than gross profits or revenue.²² "Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity."²³ However, courts may award gross profits when operating expenses are fixed.²⁴ After calculating net lost profits, the plaintiff (typically, but not always) must show:- (a) that the conduct upon which the claim is based caused the lost profit damages; (b) that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct; and (c) that the lost profit damages are capable of proof with reasonable certainty.²⁵ These three elements of the claim are commonly known as proximate cause, foreseeability, and reasonable certainty.²²Erwin v Mendenhall, 433 P 3d 1090, 1095 (Alaska 2018).²³Ginn v Stonecreek Dental Care, 30 NE 3d 1034, 1043 (Ohio Ct App 2015).²⁴22 Am Jur 2d Damages § 57 (2019).²⁵Jonathan Dunitz & Nancy Fannon, The Comprehensive Guide to Economic Damages (5th ed, 2018); Bona Fide Conglomerate, Inc v Source America, 2017 US Dist LEXIS 116329, at *13 (SD Cal July 24, 2017).

26. Having already been awarded the specified penalty clauses, the court rejects prayer (f) for loss of expected income only because it would amount to double compensation.



Costs: under section 27 of the *Civil Procedure Act*, costs follow events the the court allows costs to the plaintiff.

Final Orders: Judgement entered in favour of the plaintiff against the 2 defendants jointly and severally as follows

* Specific performance is declined.

* A refund of Kshs 356, 800 is allowed with 14% interest from date of filing the suit till payment in full.

* A refund of Kshs Kshs 340, 000 is allowed with 14% interest from the date of filing the suit till payment in full.

* The sum of capital investment for the land preparation and planting of over 5,400 teach bushes is allowed at Kshs 632, 920 with 14% interest from the date of filing the suit till payment in full.

* Payment of loss of expected income is dismissed.

* Penalty clause for Kshs 100, 800 is enforceable and is allowed as liquidated penalty for the leases at 14% interest from date of filing the suit.

* Penalty clause for Kshs 33, 000 is enforceable and is allowed as liquidated penalty for the breach of the sale agreement at 14% interest from the date of filing the suit till payment in full.

* Costs of the litigation allowed to the plaintiff.

It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28TH DAY IF JUNE, 2024

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Present

Miss Onyango Adv HB for Mutuma for the Plaintiff

Both Defendants

Ronny Court Asssistant

