

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO. 4B OF 2019

BETWEEN
PAUL MACHUMA MANDERA.....

.....APPELLANT

VRS
JEPHETHER OPANDE.....1ST

RESPONDENT

SILAS NYONGESA.....2ND

RESPONDENT

(AS CONSOLIDATED WITH HCCA NO 3 OF 2019)
JEPHETHER OPANDE.....

.....APPELLANT

VERSUS

PAUL MACHUMA MANDERA.....1ST

RESPONDENT

SILAS NYONGESA.....2ND

RESPONDENT

**(Being appeals arising from the Judgment and Decree of Hon. P. K. Mutai
SRM) in Kitale CMCC No. E156 of 2008 delivered on 17th December, 2018)**

JUDGMENT

Background of the Appeals

1. Through an amended plaint dated 3rd November 2010, Jephether Opande (the respondent herein) instituted proceedings against Paul Machuma Manderu and Silas Nyogesa (the appellant/cross appellants and 2nd respondent, respectively). He alleged breach of contract and sought to recover mesne profits assessed at twenty (20) bags per acre for twenty-eight (28) acres of agricultural produce for the years 2008 and 2009.
2. The 1st respondent's case was that on or about 4th August 2007, he entered into a lease agreement with the appellant for a 28-acre parcel of agricultural land situated in Tegemeo. It was an express term of the agreement that he would cultivate and harvest produce on the said land for three agricultural years; 2007, 2008, and 2009. He further averred that the total lease consideration was Kshs. 420,000/-, calculated at Kshs. 5,000/- per acre per year, out of which he paid a sum of Kshs. 245,000/-.
3. The 1st respondent contended that the appellant breached the terms of the lease agreement. He claimed that during the 2007 agricultural year, he was only able to cultivate 18 acres instead of the agreed 28 acres because the 1st respondent failed to release the remaining 10 acres. For the 2008 agricultural year, he alleged that the 1st respondent leased out the entire parcel of land to a third party, despite having received Kshs. 155,000/- from the respondent, of

which Kshs. 100,000/- was paid into the account of the 2nd respondent, who was acting as the agent of the 1st respondent.

4. In his amended defense dated 22nd October 2010, the appellant denied breaching the lease agreement between himself and the 1st respondent. He contended that the clauses alleged by the appellant to have been breached were not part of the original agreement and accused the 1st respondent of having inserted the clause without his knowledge or consent. He further stated that he did not receive the Kshs. 100,000/- deposited into the 2nd respondent's account, explaining that the 2nd respondent retained Kshs. 50,000/- on the allegation that the appellant was indebted to him. He, in turn, accused the 1st respondent of breaching the lease agreement by failing to pay the full lease consideration.
5. In his statement of defense, the 2nd respondent admitted that he witnessed the execution of the lease agreement between the appellant and the 1st respondent. He further averred that he duly transmitted the sum of Kshs. 100,000/-, which he had received from the 1st respondent to the appellant.
6. In a judgment delivered on 17th December 2018, the trial magistrate found that a valid lease agreement existed between the parties and that both the appellant and the 1st respondent had breached its terms. The Court further held that, based on the lease consideration, the amount paid, and the acreage cultivated, the appellant was

indebted to the 1st respondent in the sum of Kshs. 65,000/- and lastly that because both parties were found to be at fault, the trial Court declined to award costs to either party.

7. The decision aggrieved both parties culminating into the two appeals being filed to challenge it. The appellant filed a memorandum of appeal dated 11th February 2019 on the same day while the 1st respondent had filed his dated 7th January 2019 on the 11.01.2019.
8. For the purposes of this judgment, the appellant in No 4B of 2019, Paul Machuma Manderu shall be referred to as the Appellant while that in No 3 of 2019 shall be called Respondent/Cross Appellants. In both the appeal and cross appeal, both sides seek the upsetting of the judgment on different grounds. While the respondent seeks the setting aside of only the portion of the judgment entering a judgment of Kshs 65,000 against him, the cross appellant seeks the quashing of the entire judgment.
9. Even though the appellants Memorandum of Appeal lists five grounds, the five in reality amount to only two grounds; that the trial court erred by considering extraneous matters and failing to consider the relevant matters and that the decision was against the grain and weight of evidence.
10. On the other hand, the cross-appellant fault the trial court for misapprehending the case before it and reached a wrong and

erroneous conclusion in the entry of judgment against him against the grain and weight of the evidence.

11. When the matter first landed before this court, counsel for both parties agreed that the two be consolidated for arising from the same judgment and that the matter be decided on the basis of the submissions filed by both in No 4B of 2019. The court has taken the proceedings in File No 4B of 2019 and will use the standing of parties in it for the consolidated judgment. In that scheme of things, and as said before, Paul Machuma Manderu shall be the appellant while Jephether Opande and Silas Nyongesa shall be respondents. A brief summary of the parties' respective submission shall suffice for the purposes of this decision.

Appellant's Submissions

12. The appellant begins by faulting the learned trial magistrate's decision to deduct a sum of Kshs 90,000/- for the year 2007, arguing that this was not an issue in dispute between the parties. He contends that, based on the lease agreement produced, the sum of Kshs 155,000/- paid related to the agricultural years 2008 and 2009. He maintains that there was no evidence to show that the respondent entered into any agreement for the year 2007, noting that the lease relied upon by the respondent was executed in August 2007.

13. The appellant further argues that since the respondent admitted to having been granted possession of 18 acres out of the total 28 acres, it is clear that this occupation related to the 2008 agricultural year. Consequently, the deduction of Kshs 90,000/- by the trial Court properly reflected the value of the 18 acres the respondent had ploughed in 2008. He reasons that the respondent cannot claim the deduction pertained to 2007 when there was no evidence that any payment had been made for that year.

14. On the issue of breach of contract, the appellant submits that the lease agreement expressly provided for a two-year term covering 2008 and 2009, with an agreed total consideration of Kshs. 280,000/-. He maintains that the Kshs. 140,000/- paid constituted payment for the first year 2008 and part payment for 2009. He argues that payment of Kshs. 140,000/- for the year 2008 did not vary the agreement into a one-year lease, and that the 1st respondent's failure to pay the balance due for 2009 amounted to a breach of the contractual terms.

15. The appellant concurs with the trial magistrate's finding that both parties were in breach of the agreement. He further challenges the applicability of the default clause cited by the respondent, arguing that it was inherently unfair as it only contemplated a scenario in which only him would be in breach, without addressing potential default by the respondent.

Respondent's Submissions

16. The 1st respondent begins by affirming that he paid a total of Kshs 140,000/- for the lease of the 1st respondent's 28-acre parcel of land for the year 2008, and a further part payment of Kshs 15,000/- for the year 2009. He clarifies that the appellant breached the lease agreement dated 4th August 2008 by leasing the entire 28 acres to a third party. He submits that, pursuant to the default clause in the agreement, the appellant was obligated to compensate him the equivalent value of 20 bags of maize per acre for the 28 acres, over a period of two years (totaling 1,120 bags), at prevailing market rates.
17. He identifies and submits on four issues. The first issue is whether the learned trial magistrate erred in law and fact in holding that both parties breached the contract. He submits in the negative, arguing that it was solely the appellant who breached the contract by failing to grant him vacant possession of the 28 acres as agreed, and instead leasing the same to a third party. He maintains that the appellant actions amounted to a clear breach of contract, and that this Court cannot rewrite the terms of their agreement, as parties are bound by their contractual obligations. In support of this submission, he cites **Mugo v Equity Bank Limited (Civil Appeal No. E62 of 2023) [2023] KEHC 24167 (KLR)**.

18. The second issue is whether the learned trial magistrate erred in law and fact by deducting Kshs 90,000/- for the year 2007 from the total consideration paid for the years 2008 and 2009. He faults the magistrate's finding that the sum of Kshs 90,000/- was to be subtracted from the Kshs 155,000/- paid, on the basis that the same amount had allegedly been redeemed through cultivation of 18 out of the 28 acres.
19. The respondent contends that, according to the appellant's own evidence, the parties had an arrangement for the cultivation of 18 acres at a consideration of Kshs. 90,000/- in 2007. He maintains that this arrangement is not captured in the lease agreement dated 4th August 2008 and therefore constitutes a separate agreement altogether. He explains that the Kshs. 155,000/- paid was strictly for the lease of 2008 and partly for 2009. It is therefore illogical, he argues, for the trial Court to deduct an amount relating to 2007 from payments made for subsequent years. He further states that in 2008, he did not cultivate any portion of the 28 acres, as the land had already been leased to a third party by the 1st respondent. Accordingly, he argues that if the trial Court intended to order a refund, the proper amount should have been Kshs. 155,000/- and not Kshs. 65,000/-.
20. The third issue is whether the learned trial magistrate erred in law and fact by failing to properly interpret and apply the default

clause. The appellant submits in the affirmative, emphasizing that the lease agreement, produced in Court, contained the following clause:

“In case of change of mind in rescinding the agreement, the landlord will refund all the monies equivalent to the average output of 20 bags per acre in proceeds in damages.”

21. He submits that the clause entitles him to the equivalent of 20 bags of maize per acre for the 28 acres over two years, totaling 1,120 bags. Based on the prevailing price of Kshs 5,000/- per bag, he prays for an award of Kshs 5,600,000/--.
22. The fourth issue is on costs, the appellant submits that it is trite law that costs follow the event, and therefore, as the successful party, he is entitled to the costs of this appeal.

Issues, Analysis and Determination

23. This Court has considered the pleadings, the judgment of the trial Court, the memorandums of appeal and the submissions by the parties and identifies the following issues for determination;

- a) **What were the terms of the lease agreement between the appellant and the 1st respondent?**
- b) **Was the agreement duly performed by both sides?**
- c) **Did the trial court err in computing the sums payable, including the deduction of Kshs 90,000/?**

d) If (b) above be answered in the negative, what are the appropriate remedies available to the parties?

e) What are the appropriate orders on costs?

What were the terms of the lease agreement between the appellant and the 1st respondent?

24. There are several basic rules of construction of document including statutes. In contracts, the object and goals of every interpretation, is primarily, to give effect to the intention of the parties and to cure the mischief targeted by the parties. In this matter, the contract for lease, found at pages 25 and 29 of the record of appeal, is basic in its drafting and language. It discloses, inelegance notwithstanding, the land to be leased to known as Tegemeo Farm, the area to be leased as 28 acres and consideration as Kshs 5,000 per acre per year for the agricultural years 2008 and 2009.

25. On payment of the rent, the agreement says that of the 140,000 for 2008, Kshs 100,000 had been deposited into the landlord's account at National Bank of Kenya Ltd, sum of Kshs 20,000 would be paid before end of September 2007, Kshs 30,000, as part payment for rent of 2009 would be paid before October 2008 with the entire balance of rent for the year 2009 being payable before end of March 2009.

26. The agreement then incorporated a default clause worded thus:

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“In case of change of mind in rescinding the agreement the landlord will refund all the monies equivalent to the average output of 20 bags per acre in proceeds in damages”

27. From the terms plain words of the agreement, it is clear and evident that the lease of the 28-acre Tegemeo farm was intended to cover only the 2008 and 2009 agricultural years. That is the plain meaning and construction of the agreement. While the plaintiff asserted that the period of lease was to cover three years; 2007, 2008 and 2009, that is not supported by the agreement. The party is however entitled to and bound by his pleading.

28. That pleading on the duration of the lease was never specifically denied by the appellant who by the amended defense only contested the default clause. Without specific denial of the period pleaded, there was never a joinder to the pleading but the same is deemed admitted under Order 2 Rule 11 Civil Procedure Rules. Consequently, it becomes axiomatic that the learned trial magistrate never erred in concluding that the lease agreement extended to the year 2007. The court was as much bound by the pleadings as the parties themselves.

Was the agreement duly performed by both sides?

29. It is clear from the terms of the lease agreement which further reveal that, in addition to the sum of Kshs. 100,000/- paid by the respondent and acknowledged by the appellant, the respondent was additionally bound to pay a further sum of Kshs. 20,000/- on or before September 2007 and Kshs 30,000 on or before October 2008. There is no evidence that any money was paid in September of October 2007. Even the assertion by the respondent that he paid up to 155,000 is difficult to vouch for. Difficult to vouch for because even the 2nd Respondent was adamant in his evidence that he was only aware of Kshs 100,000.
30. On the totality of the evidence, the court finds that for the period 2008 and 2009, the respondent only paid to the appellant the sum of Kshs 100,000 through the 2nd respondent. It therefore follows that the respondent was in breach of the terms of the agreement because he did not pay on the dates agreed.
31. How did the Appellant perform his side of the bargain? Even though the Amended defense generally and ambivalently denied the existence of the agreement, that denial fall short of the requirements of Order 2 Rule 11(3) Civil Procedure Rules. It does not because the ambivalent language leads to the interpretation that there was indeed an agreement but the addendum to it was incorporated behind his back fraudulently. The court thus finds that the appellant

indeed entered the agreement willingly and conscientiously, signed the same and got a partial consideration for the 1st respondent.

32. Having so covenanted, it was pleaded in the amended plaint that the appellant was in breach by leasing the land to a third party thus failing to avail same as agreed. To that pleading, the appellant once again failed to make a sufficient traverse with the consequence that it stood admitted. If so admitted, the alleged breach was admitted. The appellant was equally in breach of the agreement.

33. Before addressing the issue about the appropriate orders to make, there was a contestation about the validity and enforceability of the default clause. The 1st respondent contested the inclusion of this clause, alleging that the version of the contract containing it had been tampered with and that his signature had been forged. In **Ng'ang'a v Njabani (Civil Appeal E029 of 2021) [2024] KEHC 2290 (KLR)**, the Court, citing **Lole v Butcher (1949) All E.R 1107**, held that once a document bearing a party's signature is produced, there is prima facie evidence of execution, and the burden shifts to the party alleging forgery to prove it.

34. In the present case, during cross-examination, the 1st respondent stated that he noticed the alleged forgery but admitted that he took no steps to report the matter to the authorities. Consequently, the Court finds that the 1st respondent failed to discharge his burden of proof in establishing forgery.

35. The 1st respondent further contended that the default clause was unfair, as it only envisaged a situation where he, as the landlord, would be in breach of the contract, without addressing default by the appellant.

36. While the principle of freedom of contract, otherwise called party autonomy is sacrosanct, courts are nonetheless empowered to intervene where contractual terms are oppressive, one-sided, or unconscionable. In this matter, party autonomy must be upheld and enforced for there is no demonstration parties negotiated consequence for damages payable in case of default is one sided, oppressive or unconscionable.

Did the trial court err in computing the sums payable, including the deduction of Kshs 90,000/?

37. In both evidence in chief and upon cross-examination, the respondent, who testified as PW1, told the court that he paid a total of Kshs. 55,000/- in cash and a further Kshs. 100,000/- through the bank into the account of the 2nd respondent, which payment the 1st respondent duly acknowledged.

38. The 2nd respondent, testifying as DW1, confirmed that he received Kshs. 100,000/- from the appellant as part of the lease consideration, which he subsequently transmitted to the 1st respondent. The appellant, on his part admitted that he received a total of Kshs. 150,000/- from the appellant. The court finds that at

least the payment of Kshs.150,000/- was duly admitted. The question which stands out is for what period was the payment meant to cover.

39. Having found that the pleadings converged that the lease period was for 2007 to 2009, it must follow that payment received be applied in a sequential manner. However, in his evidence in chief, the appellant at page 113 of the Record of Appeal, is recorded to have said: -

I know Joseph Opande. I know Silas Nyongesa. He is a mechanic. I never had any agreement with Opande. He cultivated my land in 2007. He gave me Kshs 90,000 while in Nairobi on acre was Kshs 5,000.

40. That excerpt show that the appellant acknowledged having been paid in full for the 2007 cultivation and he was not claiming any debt on that account. The court is satisfied that the parties had a separate agreement for 2007 which was fully performed with no outstanding obligations. It was thus an error on the part of the trial court to apply money it found to have been paid for another period to the year 2007. With that finding, the trial court could not have been right at all when it found that part of the sum paid be applied for the year 2007. For that error, the judgment entered for the appellant for the 2007 season is set aside.

What are the appropriate remedies available to the parties?

41. Having made the findings that the respondent was in breach of the lease agreement for failing to remit payment due in September 2007, just as the appellant also breached the agreement by leasing the premises to a third party notwithstanding the fact that the appellant had already made part payment for the year 2008, even though both sides were in breach, the breach by the respondent left the appellant with no financial or other dents. To the contrary, the breach by the appellant not only spirited away the expectation to carry out the desired activity but also left him short of Kshs 100,000/-.

42. If not for the default clause, the respondent would be conveniently and appropriately restituted with an order for refund with interests under the principle of contract law expressed as *restitutio integrum*. Because of the parties prescribed remedy and its formula for calculation, the court takes the Kshs.100,000/- to have been annual rent for 20 acres. It is the twenty acres that must be multiplied by 20 bags of maize. The calculation yields 400 bags. Because the parties had prescribed own remedy, the trial court erred in ordering refund of money against the contract of the parties. In doing so it went out of its way to write the contract for the parties. That the law frowns upon. Being erroneous, the order for refund of Kshs 155,000, is set aside and in its place substituted a judgment for the respondent against the appellant for 400 bags of maize. It is

ordered that the appellant delivers to the respondent the said property within 30 days from today and in default he shall pay to the respondent the monetary equivalent value of the maize set at kshs 4,000 per bag. The payment for the sum be done not later than 45 days from the date of this judgment.

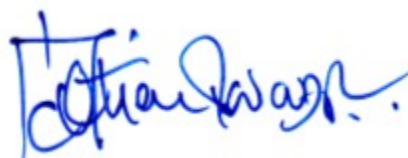
43. In coming to that figure, the court has taken judicial notice that it is harvesting season in Kitale and what National Cereals and Produce board pays per bag.

44. Consequently, the 1st appellant is directed to deliver to the respondent 400 bags of maize withing 30 days from the date of this judgment.

45. In the alternative, the appellant shall pay to the respondent the value of the maize calculated at 4,000 per bag. That be done within 45 days from the date hereof.

46. In light of the Court's finding that both parties were at fault, I make an order that each party bears own costs.

Dated, signed and delivered Virtually, at Lodwar this 27th day of October, 2025



Patrick J O Otieno

Judge