**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 36 OF 2015**

***(Being an appeal against the whole of the judgment in Maua SPMCC No. 43 of 2011)***

**M'MUCHEKE M'MUBWIKA……....……1ST APPELLANT**

**MESHACK MURUNGI..……..……2ND APPELLANT**

**STEPHEN MEEME……..3RD APPELLANT**

**JULIUS KARI MUCHEKE……..4TH APPELLANT**

**VERSUS**

**JANET KAUNANKU ……...…….. 1ST RESPONDENT**

**SIMON MAORE ……....……..2ND RESPONDENT**

**JUDGMENT**

**The Appellants' Case**

1. The respondents filed a plaint dated **25/3/2011** in the ***Senior Principal Magistrate's Court in Maua in Civil Suit No. 43 of 2011*** in which they sought the following orders against the defendants therein (who are now named as the appellants herein):

> **(i) An order of injunction restraining the defendant, his agent, employee or anybody acting on his behalf from entering, plucking and or interfering with the plaintiffs 22 plucking periods of miraa plants situated in defendant land parcel No. ITHIMA/ANTUAMBUI/891.**
>
> **(ii) An order against the defendant to pay liquidated damages for breach of the contract.**
>
> **(iii) Costs of this suit.**
>
> **(iv) Interest on the above 2 and 3**
>
> **(v) Any other damages that the honourable court may deem fit and just to grant.**

2. The appellants filed a Memorandum of Appeal on **6/8/2015** in which they listed **15** grounds which grounds are replicated herein below as follows:

> **(1) That the learned Magistrate erred in law and fact in ignoring and/or dismissing direct provisions of Section 6 and 7 of Cap. 302.**
>
> **(2) That the learned Magistrate erred in law and fact in attempting to amend Section 6 and 7 of Cap. 302.**
>
> **(3) That the learned Magistrate erred in law and in failing to appreciate that the only remedy in law available for a void contract as per Section 6 and 7 of Cap. 302 is refund of consideration**
>
> **(4) That the learned Magistrate erred in law and fact by misguiding himself that the respondents herein were entitled to any**

**proceeds from the 1st appellants' Miraa crop.**

**(5) That the learned Magistrate erred in law and fact in condemning the 1st appellant for breaching an agreement while conceding that the court could not determine whether and/or when such breach of agreement occurred.**

**(6) That the learned Magistrate erred in law and fact in attempting to establish breach in an agreement that is void ab initio for lack of compliance with Section 6 and 7 of Cap. 302.**

**(7) That the learned Magistrate erred in attempting to create a decree in favour of the respondents within the judgment itself.**

**(8) That the learned Magistrate erred in law and fact declaring the 1st appellant is vicariously liable for the torts and/or conversions by/of the respondents**

**(9) That the learned Magistrate erred in law and fact by ordering the proceeds of the appellant's Miraa to be used to pay for the respondent's misadventure of getting the 1st appellant Miraa Crops proceeds deposited in court.**

**(10) That the learned Magistrate erred in law and fact in failing and/or refusing to order for respondents to pay the 1st appellant uncalled for expenses of hiring guards for his Miraa.**

**(11) That the learned Magistrate erred in law and fact in delivering a judgement lacking any legal foundation or basis and failing to apply any known legal principals.**

**(12) That the learned Magistrate erred in law and fact in ignoring the 2nd, 3rd and 4th appellants evidence as to how the respondents converted the Miraa which evidence was not controverted but rather was conceded by the respondents and the 1st appellant**

**(13) That the learned Magistrate erred in law and fact in granting the respondents' reliefs not prayed for.**

**(14) That the learned Magistrate erred in law and fact in attempting to legitimize a void agreement that even lacked a commencement or determinate dates.**

**(15) That the learned Magistrate erred in law and fact in making a finding in favour of the respondents**

3. The appellant have sought in their prayers that the appeal be allowed; that the respondents' suit in the lower court be dismissed; the appellant counter-claim in the lower court be allowed; that the respondents do reimburse the appellant for all moneys paid for guarding the 1st appellant Miraa plantation and that the respondent do pay the costs of both the suit and this appeal.

4. According to that plaint the respondent's case was that the 1st respondent entered into agreements dated **18th June 2008** and **6th January 2009** with the 1st appellant for a lease of miraa for **23** plucking periods for a consideration of **Kshs 60,000** and **Kshs 78,000** respectively. The 2nd respondent entered into agreements dated **7th October 2008,** and **18th November 2009** with the 1st appellant for lease of miraa for **11** plucking periods at a consideration of **Kshs 30,000** and **Kshs 36,000** respectively. Further, it was stated that as at the time the respondents entered into their agreements with the 1st appellant he was already in agreement with another person. It was pleaded that the 1st appellant had by the time of the filing of the suit allowed the 1st and 2nd respondent six plucking periods each. However on **14th March 2011**, the 1st appellant served the respondents with the eviction notice alleging that both had completed their plucking periods hence causing the respondents loss and damage. The respondents sought orders of the trial court to enable them complete their remaining plucking periods.

**The Appellants' Defence in the Trials Court**

5. The 1st appellant filed his statement of defense on **1st April 2011** denying the claim and stating that the plaintiffs had since exhausted their plucking periods and that the suit property had already been leased to third parties after the 1st appellant refused to extend the respondents' leases. It was also pleaded that the third parties are already in occupation.

6. The 2nd, the 3rd and the 4th appellants filed their defense in counterclaim on **4th May 2011**, denying the respondents claim. They denied that there was any valid or current lease between the respondents and the appellants.

In the counter claim, they averred that on **29/3/11** and **21/4/11** the respondents invaded the leased land and on each occasion they illegally and unjustifiably plucked the appellants' miraa valued at **Kshs 150,000.** They sought compensation for the miraa the respondents had allegedly unjustifiably plucked or may pluck during the pendency of the suit, costs and interest.

The Magistrate's court's judgment was delivered on 10/7/2015.

**Submissions of the Parties**

The appellants filed their submissions on the **18/7/18**. They confined their submissions to four main points

The respondents filed their submissions on this appeal on the **7/11/18.**

**Determination**

7. The **15** grounds of appeal presented by the appellants may be congealed into fewer grounds as follows:

> ***(a) Whether the learned trial magistrate erred in his interpretation of sections 6 and 7 of the Land Control Act cap 302.***
>
> ***(b) Whether the learned trial magistrate erred in finding that the 1st appellant had breached the agreements.***
>
> ***(c) Whether the learned trial magistrate erred in framing his judgment in the manner that he did;***
>
> ***(d) Whether the learned magistrate erred in holding the 1st appellant vicariously liable for the acts or omissions of the respondents;***
>
> ***(e) Whether the learned Magistrate erred in law and fact and granted the respondents' reliefs not prayed for;***

8. Regarding the first issue the magistrate at **page 17** of his judgment addressed the issue of whether the consent of the land control board was necessary in respect of the leases entered into by the parties. He noted that though the plaintiff had addressed the same, the issue arose for the first time only in the submissions of the defendants. He agreed that the suit land is agricultural in user. He dismissed Mr. H. Gitonga's submission that the leases were in respect of the product, miraa, and not the land on the basis that the miraa trees are attached to the land. He found that the subject leases are not an exception and the transactions were void for want of that consent. He however stated that nevertheless, the particular circumstances of this case in which the 1st appellant had received the respondents' lease monies required to be considered in a special way to ensure that justice is not defeated by use of technicalities. He found that the raising of the argument on nullity of the leases for want of consent was an unfair practice on the part of the 1st appellant while he had already received the proceeds of the leases. He also stated that nowhere in the Act is the responsibility for obtaining the consent for the leases is incumbent solely on the lessees. He applied equity to prevent the appellant from running away from *"a bad bargain which he himself had created."* He concluded in an interesting tone thus:

> ***"He is to be stopped from denying a thing which he himself created without fraud deceit under the influence of cocaine, thus even though their transaction is void for want of consent 1st (sic) defendant would still be bound to the end".***

9. Quite a bold statement, I must observe. However, the magistrate's position above is not new or an isolated case. There are instances in which the Court of Appeal has upheld transactions involving agricultural land devoid of land control board consent. A case in point is **Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR.** another one is **Joseph Mathenge Kamutu -vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others -vs- Davidson Kagiri (2014) eKLR.**

10. Fraud where proved, is not to be countenanced by a court of law to which the public looks for justice. A party to a land transaction who received the proceeds from a transaction and fails to deliver on his part of the bargain citing illegality of the transaction for want of compliance with statutory provisions is to be viewed with suspicion from inception of that argument to the end such that if it appears that he is merely taking advantage to unjustly enrich himself at the expense of another trusting and innocent party the court may deny him that pleasure for the sake of justice. In this case I find no need to interfere with the reasoning of the leaned magistrate on the issue on the interpretation of **Sections 6** and **7** of the **Land Control Act** as it appears to me to be quite sound.

11. As to whether the appellant had breached the agreements, this is closely tied to the issue of whether the plaintiffs had exhausted their plucking periods.

12. The trial magistrate found that the plaintiffs had not exhausted their plucking periods. He did this after considering the evidence of **PW6** and **DW4** who had both claimed to be keeping the plucking record. He found the evidence of both witnesses to be untrustworthy and gave reasons for that finding.

13. He found, and I agree with his reasoning, that the only agreements that were in issue concerning the aborted plucking periods were those entered into on 6/1/2009 (for 13 plucking periods for the 1st respondent) and 18/11/2009 (for 6 plucking periods for the 2nd respondent). His conclusion that lease periods were never consistent and depended on a number of factors is supported by the evidence of PW1, PW2, DW1, DW2 and DW4. Both sides in the dispute were therefore in agreement on that point. However he stated expressly that the demeanour of the 1st appellant at the trial showed that he had breached the agreement. He even analysed a few statements that the 1st appellant had to say at the hearing for example,

> ***"… the defendants had a good offer and that is why I accepted it…"***
>
> ***"… they were to add more money to me and when they refused I ordered them out…"***
>
> ***"… if plaintiffs had given me the school fees money I had demanded for I would not have removed them from the shamba…"***

14. Though it must be remembered that the trial court must be credited with having been capable of observing the demeanour of the witnesses giving evidence, there are instances in appeals where the demeanour does not even have to come from what the trial court states it

noted at the hearing; it may come through from the contents of the witness only when it is construed against the general background of the case details.

15. In this case the 1st appellant's attitude to the respondents appears to be that of a despotic feudal lord imperiously mishandling servants on his vast property rather than that of a party to a contract who appreciates the opposite parties' rights under a written agreement.

16. In the circumstances set out above, I can say without any element of doubt that the trial magistrate rightly found that though it could not be determined at what stage the 1st appellant had evicted the respondents, he had by all means frustrated their leased agreement with the appellants.

**17. Ground Number 5** of the appeal is wrongly framed in that the only issue the magistrate was unable to determine was *when* the agreement was breached. However, it is not difficult to place the time of breach within the time frame during which the appellant threw out the respondents and began to deal with the 2nd to 4th appellants.

18. In their submissions the appellants aver that the magistrate was wrong in attempting to establish a breach in respect of an agreement that he had found to be void by virtue of **Section 6** of **CAP 302**. However, it must be noted that the agreement is not void *ab initio*. Parties have a chance, in fitting circumstances to apply for extension of the statutory period within which to apply for the consent under **Section 8** of the Act.

19. **Section 8** of the same Land Control Act which is relied on by the 1st appellant states as follows:

> ***(1)An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:***
>
> ***Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.***

20. In the case of **Nyeri ELC No. 102 of 2014 Joseph Mathenge Kamutu Versus Joseph Wainaina Karanja Nancy Wanjiru Wainaina eKLR** the court stated as follows:

> ***"27. In determining what renders a dealing void under the Land Control Act, I begin by pointing out that the proviso to Section 8(1) gives parties to a controlled dealing a window to apply for extension of the time within which they ought to apply for consent under the Act. It is noteworthy that the section allows parties to apply for extension of time within which they ought to have applied for the consent notwithstanding that the period of six months may have expired. Section 9 (2), on the other hand, makes it clear when a controlled transaction shall become void. In this regard the section Provides:-***
>
> > ***"Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void-***
> >
> > ***(a) On the expiry of the time limited for appeal under section 11; or***
> >
> > ***(b) Where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or***
> >
> > ***(c) Where a further appeal is entered under Section 13 and dismissed, on that dismissal."***
>
> ***28. A plain reading of the above provisions of the Law makes it clear that it is the not failure to apply for consent within the time stipulated in Section 8(1) which renders a controlled dealing void, but refusal by the Land Control Board to grant the consent.***
>
> ***29. Despite there being many decisions to the effect that lapse of the six months contemplated in Section 8(1) without an application for consent having being applied for renders a controlled dealing under the Act void for all purposes; being of the view that if it was lapse of the period of six months which makes a controlled dealing void, parliament would not have provided for a window to apply for the consent after the lapse of the six months, I decline to follow those authorities and instead follow the decision in the case of Gatere Njamunyu vs. Joseck Njue; Nairobi Civil Appeal No. 20 of 1992 where the Court of Appeal held:-***
>
> > ***"The agreement does not become binding because consent is given, and there is no appeal against it. The agreement is binding between the parties who make it though it is not enforceable until consent has been given. If consent is refused the dealing in agricultural land becomes void for all purposes under section 6 of the Act. Specific performance cannot be claimed in respect of a dealing which becomes void, only recovery of the consideration paid under the agreement is allowed under section 7". (emphasis mine).***

21. In this case no consent of the land control board is shown to have been applied for by either party. In my view, having regard to the passage cited above which I agree with entirely, the agreement can only be presumed to be voidable.

22. This court has already observed that jurisprudence revolving around the issue of consent has in recent times turned out to favour the

innocent party especially where the voidance of the contract for want of consent is relied upon by a party in breach.

23. It would be quite contrary to that jurisprudence to hold that a party can not be held to be in breach where he clearly is in respect of a transaction such as that between the 1st appellant and the respondents.

24. I therefore find it unnecessary to disturb this finding as it was based on real facts that were before the trial court.

25. The next issue is whether the learned trial magistrate erred in holding the 1st appellant vicariously liable for the acts or omissions of the respondents.

26. In regard to this issue the learned magistrate found that there was nothing in the agreements between the 2nd to 5th defendants in the suit and the 1st appellant that bound the respondents in this appeal to any duty to the lessees under that agreement. He found that there was a remedy against the 1st appellant contained in that agreement and the lessees should therefore have followed the matter up with the 1st appellant. I find merit in this approach as the existence of unexhausted plucking periods, as found by the trial court and confirmed by this court earlier herein meant that the third clause in their agreement would kick in to enable them penalize the 1st appellant without any qualms for engaging a different party into the said miraa during the lifetime of their tenancy. The finding of the trial court on this issue should also not be faulted as it is supported by concrete evidence and logic.

27. Regarding the issue whether the learned Magistrate erred in law and fact and granted the respondents' reliefs not prayed for, it is noteworthy that the respondents sought an order of injunction against the respondents, an order of liquidated damages for breach of contract, costs of the suit and interest on damages and costs as well as any other relief that the court may deem fit and just to grant.

28. The decree extracted which is at **page 271-272** of the record of appeal includes the following orders:

> **1. That the plaintiffs be refunded the costs of guarding miraa so far incurred.**
>
> **2. That the damages and costs of guarding the miraa be deducted from the amount deposited in court;**
>
> **3. That the 1st defendant be paid the balance of the amount deposited in court.**

29. These no doubt are the orders that the appellants complain about when they allude to the magistrate granting relief's not prayed for. Is there anything wrong with those orders? Absolutely not, as I will justify quite soon.

30. The relevant ground of appeal on this point is ground **number 13** and it does not concern itself with whether the amount of costs of guarding the miraa had been established or not.

31. The particulars of damages are contained in order **number 3** of the decree. The costs of guarding the miraa mentioned in order **number 4** in the decree were blamed upon the 1st appellant since the respondents had proved their case at the hearing.

32. In my view the learned trial magistrate was convinced that those were costs so incurred and that the same were occasioned by the conduct of the 1st appellant.

33. I only note that though the same had not been specifically sought, the plaint sought *"… any other damages that the honourable court may deem fit and just to grant…"* and in my view those costs, having been occasioned by the 1st appellant fall into that category. The magistrate cannot be faulted for granting the respondents herein the costs of guarding the *miraa*.

34. The upshot of the above analysis is that the appellants' appeal has no merits and it is dismissed with costs to the respondents.

**Dated, signed and delivered at Meru this 1st day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**