

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCA NO. E005 OF 2023

KHAMIS SAID NASSOR
GLADYS T/A TROPHY AUCTIONEERS
APPELLANTS

VERSUS

LEONARD OTIENO ABONYO T/A
RURUMA RISING STAR ACADEMY
.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N. CHEPCHIRCHIR Principal Magistrate
Mariakani in SPMCC ELC E021 of 2021 delivered on 1st August, 2023)

JUDGMENT

The Appeal.

1. The present appeal is premised on the following grounds contained in the Memorandum of Appeal dated **17th August 2023**, namely, that the Learned Trial Magistrate erred in law and in fact:
 - a. In holding that she had jurisdiction entertain the suit before her;***
 - b. In failing to note that the respondent had no authority to put up permanent structures on the suit premises;***
 - c. In dismissing the appellant's valuation report and making reliance on the respondent's report without any basis;***
 - d. In failing to note that the respondent had not specifically pleaded for the amounts awarded in the impugned judgment;***
 - e. In holding that the appellant had terminated the agreement without notice to the respondent;***
 - f. In failing to appreciate the magnitude of the dispute and the evidence referred to in The appellant's witness statements and documents on record;***
 - g. In holding that the respondent had proved his case on a balance of probability;***
 - h. In holding that the respondent had proved having carried out any constructions or developments on the suit property;***

- i. In failing to note that the respondent had come to court with unclean hands having confirmed to be in arrears of several months and was a perennial defaulter;*
 - j. In failing to note that the respondent had sublet the premises contrary to the terms of the lease agreement;*
 - k. In failing to consider the strong and weighty submissions filed by the appellants.*
2. It is proposed that the appeal be allowed with costs by setting aside the judgment of the lower Court and dismissing the respondents' suit in the lower Court with costs.

The Lower Court Case.

Plaint

3. The genesis of this litigation is the case **Mariakani ELC CASE NO E021 of 2021** lodged on **27th July 2021** by way of plaint filed by the respondent against the appellants seeking the following orders:
 - a. A declaration that the appellant whether by themselves or their servants or agents or otherwise howsoever have wrongfully proclaimed the plaintiff's school and are in wrongful occupation thereof;*
 - b. Alternatively, the 2nd respondent to compensate and pay the respondent at current market the value of all structures currently on the school premises after professional valuation;*
 - c. A mandatory injunction compelling the 1st and 2nd appellants whether by themselves or the other servants or agents or otherwise howsoever to restore to the respondent his school in the way it was before;*
 - d. General damages for the loss of reputation build over 10 years;*

- e. Loss of earning (sic) at a rate to be determined after audit of school accounts;***
- f. Costs of the suit;***
- g. Any other relief the court deems appropriate to grant.***

Defence and Counterclaim

4. The appellants herein filed their defence and counterclaim dated **21st February 2022** on the same date. In the defence, they denied the respondent's claim. The stated that the parties had agreed that the respondent should only put up temporary structures on the land as per the terms of their agreement and pay rent at the rate of **15,000** shillings per month which the respondent adhered to and put up **7** temporary structures; that the lease agreement expired in the year **2016** and the respondent never approached the appellants with a view to renewing the agreement; the respondent went ahead and sublet the school to someone else who is a stranger to the 1st appellant without his consent and proceeded to collect rent from him; that the respondent then traveled up country to his home county and it was difficult for the 1st appellant herein to reach him and also to correct rent; that at one time the stranger brought in by the respondent brought in some more strangers on the land with the intention of selling the same to them and some neighbors alerted the 1st appellant of their presence and he approached them, intending to find out what was going on; that the stranger was very aggressive towards the 1st appellant and threatened to use his connections to revoke the 1st appellant's title and take over the suit land; that the 2nd appellant was only involved in distraint for rent and even after the first and second notice for distress were issued, the respondent did not respond from Migori County and only

responded after the 2nd appellant had done his work; that the respondent had been and continued to be in arrears rent for **23** months amounting to Kenya shillings **345,000/-** thus depriving the 1st Appellant of income from his property; that the entire suit and application had been filed in bad faith and the respondent had misled the court.

5. In the counterclaim, the following orders were sought:

- a. An order that the respondent's suit be dismissed with costs;***
- b. An order of eviction against the respondent be issued;***
- c. Any other relief the court deems fit to grant.***

Reply to Defence and Defence to Counterclaim

6. The respondent filed a Reply to Defence and Defence To Counterclaim dated **26th February 2022** on 4th March 2022 reiterating the contents of his plaint and stating as follows: that he and the 1st appellant and the 1st appellant's brother, Suleiman (now deceased) spoke and agreed to build semi-permanent structures which ran from 2011 to 2013. When the government directed that all schools needed to have standard buildings in order to be registered, and that by virtue of that meeting and agreement, the respondent was allowed to build permanent structures; that the last agreement of **2013** superseded all previous agreements and did not put a limit as to expiry; that between 2011 and 2013, the plaintiff operated on two plots, but in 2013 he got a third plot and the rent became **15,000/-** shillings with the deposit being Kenya shillings **20,000** for each plot; further, that the respondent traveled up country in **2021** when his parents were sick and left his head teacher one Madam Lucy to run the institution with the help of the board, and there was no subletting. While away, he instructed Madam Lucy to collect rent and pay the 2nd appellant who refused

- to receive the rent. The 2nd appellant also returned the April 2021 rent which had been paid by way of mobile money.
7. It is stated that the respondent engaged the local Chief of Ruvuma, one Elijah, to intervene and the 2nd appellant was called to the negotiations table but he declined to attend. That the 2nd Appellant and its goons disrupted running on the opening day of July 2021 and chased parents and students away, effectively making it impossible for the school to open and consequently the respondent could not collect fees, and it was there after financially crippled by the actions of the appellants.

Defence To Counterclaim

8. The respondent opposed the counterclaim, stating that the eviction emanating from the appellants' own unlawful action would be unlawful, and denying the claim that he owed the appellants Kenya shillings **345,000/-** or at all and sought that the defendant's Statement of Defence and Counterclaim be dismissed with costs and judgment be entered against the defendant as prayed in the plaint.
9. Documents filed in the Record of Appeal show that the matter went for mediation, but the process yielded no resolution to the dispute.
10. Hearing took place **18th of October 2022** when both the respondent and the 1st appellant testified. A site visit was conducted on **11th November 2022** by the Trial Magistrate and the notes of her findings at the site are in the record. Proceedings at the site show that the court ordered parties to conduct separate valuations on the property to inform the court on the value of the buildings thereon and those valuations were conducted and the matter scheduled for delivery of judgment.
11. The present appeal was disposed of by way of written submissions.

ANALYSIS AND DETERMINATION.

12. The issues arising for determination in the present appeal are as follows:

- a. *Whether the learned trial magistrate had jurisdiction entertain the suit before her;*
- b. *Whether the trial magistrate erred in failing to note that the respondent had no authority to put up permanent structures on the suit premises;*
- c. *Whether the trial magistrate erred in holding that the respondent had proved that he had carried out constructions or developments on the suit property;*
- d. *Whether the trial magistrate erred in dismissing the appellant's valuation report and making reliance on the respondent's report without any basis;*
- e. *Whether the trial magistrate erred in failing to note that the respondent had not specifically pleaded for the amounts awarded in the impugned judgment;*
- f. *Whether the trial magistrate erred in holding that the appellant had terminated the agreement without notice to the respondent;*
- g. *In failing to note that the respondent had sublet the premises contrary to the terms of the lease agreement;*
- h. *In failing to note that the respondent had come to court with unclean hands having confirmed to be in arrears of several months and was a perennial defaulter;*
- i. *In failing to consider the strong and weighty submissions filed by the appellants.*
- j. *In holding that the respondent had proved his case on a balance of probability;*

13. In this first appeal, though from the magistrate's court, this court is guided by the principles enunciated in *Selle vs Associated Motor Boat Company Limited [1968] EA 123* where it was stated as follows: -

"An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate

the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270)."

14. This court has perused the evidence adduced by the parties in the court below and addresses the issues arising as hereunder.

Whether the learned trial magistrate had jurisdiction entertain the suit before her;

15. On jurisdiction, the appellant cited the case of *Munaver N Alibhai T/A Diani Boutique V South Coast Fitness & Sports Centre Ltd 1995 Keca 166 KLR* and the Landlord And Tenants (Shops Hotels And Catering Establishments) Act Cap 301, and the Controlled Tenancy Regulations. The appellant's contention is that the suit before the court involved a "controlled tenancy" as defined by Section 2 of, and regulated by, the Landlord And Tenants (Shops Hotels And Catering Establishments) Act Cap 301 and that it was the Business Premises Rent Tribunal that had jurisdiction to handle the matter.
16. In response, the respondent avers that the appellant never specified which between territorial or pecuniary jurisdiction was being raised, but nevertheless submitted that the magistrate had both pecuniary and territorial jurisdiction.
17. Jurisdiction must be raised at the earliest point in proceedings. The appellant never raised it in the pleadings, evidence of submissions. Besides, he conceded to jurisdiction by lodging his own counterclaim for eviction orders. Concession by a party can not however confer jurisdiction and the issue can however be raised for the first time on appeal even when it was not raised in the trial court.
18. Nevertheless, this court has noted that the respondent's claim in the lower court was that the appellant had terminated the

respondent's lease, evicted it from the suit premises, taken over the school and proclaimed the same by the time of the lodging of the suit. The appellant's actions were irreversible given the nature of the respondent's business. The respondent never accessed the school after that date. The trial magistrate started as follows in a ruling dated 5/10/21:

“The damage suffered by the applicant cannot be quantified if a school had to be closed and children sent away from the school.”

19. In view of the above finding, it appears that the issue of restoration of the respondent to possession was a remote possibility. The magistrate also ordered the rents outstanding to be paid into court and barred the appellant from auction of any of the school.
20. To this court, the respondent's business was *not the structures* but the *clientele* that he had built over 10 years and the pupils having migrated to other schools, courtesy of the appellant's action, all that remained was the issue as to compensation for the structures on suit land, general damages and loss of earnings and costs and not restoration to the suit premises.
21. It would appear that the trial magistrate warned herself about this fact early enough in the proceedings hence her orders in the cited ruling of 5/10/21. Consequently, it is clear that the matter before the trial court was not merely confined to the issue of restoration to the premises but also involved a main cause of action of breach of the parties' agreement, and the alternative prayer for damages and compensation for the school structures. In this court's view, these issues were the more dominant cause of action in the respondent's suit, and the trial magistrate had jurisdiction to handle them. The upshot of the foregoing is that the appellate ground of want of jurisdiction is hereby dismissed.

Whether the trial magistrate erred in failing to note that the respondent had no authority to put up permanent structures on the suit premises

And

Whether the trial magistrate erred in holding that the respondent had proved that he had carried out constructions or developments on the suit property;

And

Whether the trial magistrate erred in dismissing the appellant's valuation report and making reliance on the respondent's report without any basis;

And

Whether the trial magistrate erred in failing to note that the respondent had not specifically pleaded for the amounts awarded in the impugned judgment;

22. The above issues are best discussed together as they are inextricably interlinked.
23. Judgment having been entered for the respondent, it is clear that the trial court thought that the construction of the permanent structures on the suit premises was proper and in accordance with the parties' agreement. It is however the terms of the agreement between the parties that should be allowed to speak on this issue.
24. The first agreement entered into was not a sale agreement granting the respondent absolute rights to the land but a lease dated 1/12/2012 whose terms were that the structures the respondent would construct were to be of temporary nature. (See *Clause 2 at page 43 of ROA*). In the judgment (*para 13*) the trial court referred to the evidence of the appellant regarding that fact.
25. On his part, the respondent avers that when the government directed that all schools needed to have standard buildings in order to be registered, and that by virtue of a meeting and agreement entered into between the respondent the appellant and the appellant's brother, the respondent was allowed to build permanent structures; that the last agreement of 2013 superseded all previous

agreements. This court finds no clause expressly granting such consent in either the agreement dated 1/12/2012 or in that dated 15/9/2013.

26. Ordinarily, the developments on leased premises have to be guided by the original intent of the parties since the lessee is not the absolute owner thereof. It is the view of this court that if the first agreement stated that structures would be temporary, then it could be deemed by court, save for extenuating factors demonstrating contract variation, that the nature of structures on the land was of essence to the contracting parties, and that if that condition were to change in any subsequent agreement, the same had to be mutually agreed on by the parties.
27. The court can not imply a contractual term that was not agreed by the parties as that would amount to rewriting the contract for them. The Court of Appeal in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another, Civil Appeal No. 35 of 1999* held that a court of law cannot re-write a contract between the parties as they are bound by terms of their contract unless coercion, fraud and/or undue influence are pleaded and proved. Coercion, fraud and/or undue influence are not pleaded or proved in the court below. However, to this court, the fact that the agreement dated 15/9/2013 was silent on the nature of the structures did not automatically grant the respondent the right to develop permanent structures. In that regard, this court agrees that the respondent was not permitted by the written agreement to erect permanent structures on the suit land.
28. It is the case however that parties can however vary the terms of their agreement by conduct. Where for example, goods are delivered and they are not of the proper quality specified, or they are delivered to a different site and they are nevertheless accepted and are paid for and applied to use without demur, then the buyer

accepting them is deemed to have conceded to the alteration of the terms of the contract and is bound to pay for them. See *Bamburi Special Products Limited Vs Remax Construction Limited, Milimani Law Courts Commercial & Admiralty Division Civil Suit No. 431 Of 2014. (KLR)* The question arising therefore is whether in the present case, the conduct of the parties varied the terms of the contract between them.

29. It is clear that the law expects some kind of action on the part of the party not in breach in reaction to whatever can be considered as breach by the other party. Where the breach is a major and obvious action that drags through time such as the building of permanent classrooms in the present case lack of any such action, the appellant can not look the other way and later on claim that he never acquiesced in the same to the extent it varied the contract. In the case of *William Kazungu Karisa V Cosmus Angore Chanzera [2006] KEHC 1974 (KLR)*, it was stated as follows with regard to the contractual term of time being of essence:

“The original time having expired, and the plaintiff having failed to terminate the contract on that ground, he was deemed to have waived the provision as to time and engaged the defendant in a totally new agreement where time was not, in their own intention to be of the essence. Of course, the plaintiff was at liberty to serve a notice on the defendant if he thought the delay was unreasonable.”

30. In the present dispute, it is the case that the construction on the suit premises occurred under the acquiescent watch of the appellant who could have halted the construction had he been of the view that it went against the terms of the agreement between the parties. He did nothing of the kind.
31. In the circumstances set out herein above, this court is persuaded that beyond the express written terms of the agreement, there was a tacit agreement whose terms were sealed by the

parties' conduct, and clearly confirmed by the appellant's acquiescence, that it was in order for the respondent to construct permanent structures on the premises for school purposes. The ground that the trial magistrate erred in failing to note that the respondent had no authority to put up permanent structures on the suit premises must thus fail.

32. As to whether the trial magistrate erred in holding that the respondent had proved that he had carried out constructions or developments on the suit property, the trial magistrate appears to have relied on the visual aspect, having visited the suit premises and seen for herself the structures erected thereon. Owing to the fact that the trial magistrate visited the premises in the company of the parties and witnessed the structures thereon firsthand, and also by the concession by the appellant that there were such structures, then it can not be denied that the respondent had raised some structures were on the suit land and that they were capable of hosting some measure of utility, though their legality in terms of development permission by appropriate authorities had not been established. The ground that the trial magistrate erred in holding that the respondent had proved that he had carried out constructions or developments on the suit property must therefore fail.

33. It is submitted that the respondent never pleaded any proper particulars of loss and damage; that at **paragraph 13** of the plaint at **page 19** of the record of appeal no sum was claimed; that there is no indication that the plaint was ever amended to reflect the amount claimed; that parties are bound by their pleadings and the court had not been moved appropriately to grant the said compensation.

34. At **paragraph 24** of her judgment, the trial magistrate noted that the court had visited the site and seen permanent buildings

and that each party had filed their valuation report, with the respondent's showing a valuation of Kshs 3,500,000/= while that of the appellant reflected a valuation of Kshs 1,200,000/=. These reports did not come out of thin air. In the prayers in the respondent's plaint, a prayer had been expressed as follows regarding compensation:

“(b) Alternatively, the 2nd respondent to compensate and pay the respondent at current market the value of all structures currently on the school premises after professional valuation;”

35. Compensation at current market value demanded valuation and that is exactly what the court ordered. It is noteworthy that no objection was raised by the appellant at the hearing regarding that issue, and when valuation reports were ordered, he also complied without demur.
36. Therefore, despite the fact that the respondent had not pleaded the specific sum that he was awarded, he brought a valuation report to court, and so did the appellant, each trying to persuade the court regarding the value of the developments of the premises. This was not in the form of general damages at large for assessment by the court based on evidence adduced but special damages which were capable of being quantified by way of valuation reports and the parties complied without demur when they were ordered by the court to file such reports. The reports could only have been for one purpose and that is the placing of a value on the developments on the suit land. Having pleaded in advance that *“...alternatively, the 2nd respondent to compensate and pay the respondent at current market the value of all structures currently on the school premises after professional valuation,”* the act of placing the report before the court was tantamount to saying: *“These are the damages I am seeking.”* Of course, there was other evidence supporting the fact that the respondent had incurred expenses in construction of

permanent and temporary structures on the suit land. The situation would have been different had the magistrate not had any valuation report before her despite the nature of the pleading.

37. After she saw the valuation reports, the magistrate did not just adopt the respondent's valuation. A valuation is expert evidence. A court is not compelled to accept wholesale all expert evidence of any nature brought before it simply because it is expert evidence. In the case of *Parvin Singh Dhalay Versus Republic 1997 ECLR 1995 To 1998 1 EA 29*, the court held as follows:

"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo V George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: - "Because this is the evidence of an expert, I believe it. "..."

38. There was of course a difference of opinion between the two valuations but the magistrate considered both of them. It must also be recalled that though she was no expert at valuation, she had gone to the site and seen for herself the nature of the developments standing thereon and this must have been an additional factor that influenced her decision as to which valuation was more likely to be correct. She did not pick a figure from the air; she was not in an *"extremely unsatisfactory position"* as was Lord Goddard, C.J. in *Bonham Carter V Hyde Park Hotel Ltd; (1948) 64 TLR 177 (as cited*

in David Bagine Vs Martin Bundi [1997] KECA 201 (KLR); she scrutinized the two valuations and rationalized her acceptance of the respondent's report. Both parties having accepted to avail their respective valuations, the magistrate did not err in law and in fact in awarding the compensation sum stated in one of those valuation reports which she found justified.

Whether the trial magistrate erred in holding that the appellant had terminated the agreement without notice to the respondent;

And

Whether the trial magistrate erred in failing to note that the respondent had sublet the premises contrary to the terms of the lease agreement;

And

Whether the trial magistrate erred in failing to note that the respondent had come to court with unclean hands having confirmed to be in arrears of several months and was a perennial defaulter;

And

Whether the trial magistrate erred in failing to consider the strong and weighty submissions filed by the appellants.

And

Whether the trial magistrate erred in holding that the respondent had proved his case on a balance of probability;

39. In her judgment, the Magistrate stated as follows:

"The court finds that the plaintiff proved that there was indeed a contract between him and the 2nd defendant and that the 2nd defendant had terminated the same without notice to the plaintiff."

40. The evidence of the appellant was that from the time the parties initially contracted in 2011, major problems cropped up only in March 2020 although even before that year there were minor defaults in rent payments by the respondent; that after the

government ordered closure of schools in the covid pandemic, the respondent requested to be granted forbearance in regard to the covid period payments. However, in 2021 the appellant allegedly asked the respondent to return to the negotiating table but the latter neglected to do so.

41. The appellant thereafter locked the premises and the respondent broke the lock and proceeded with business. The appellant reported to the police station and the respondent was compelled to be paying rent through the police, which he did for 4 months - January to April 2021. Subsequent direct payments to the appellant were reversed by the appellant voluntarily.
42. The respondent concurs that he paid rent for January to March 2021 and according to him the appellant rejected the payment for April and demanded his land back. At the same time, according to the appellant, the respondent was continuing with construction on the premises.
43. The appellant was apprehensive that the school would be sold to a third party ostensibly because the respondent had faced difficulties in running it and so the appellant engaged auctioneers who came and valued the goods therein.
44. According to the respondent, it is the appellant who blocked the school gate and the classroom doors and engaged **4** armed men to keep people out of the premises after June 2021 thus making the premises inaccessible and parents sought alternative schools for their children, according to the respondent, the relationship between him and the appellant was good until it was ruined by the *coronavirus* pandemic.
45. This court thinks there is credible evidence that the problems of the respondent commenced with the advent of the covid 19 pandemic. The appellant had no evidence to support the claim that even before 2021 the respondent used to be in perpetual rent

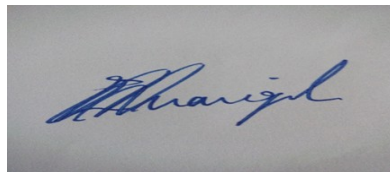
- default. The pandemic affected all sectors of the economy and it can be understood clearly that without enough fee-paying pupils the respondent's ability to pay rent was seriously hampered and it would appear that the appellant never tarried to understand his tenant's serious predicament.
46. The very fact that the appellant, giving sworn evidence, admitted that he used to refund the rents paid by the respondent is evidence of such impatience with the respondent for problems that were, in the midst of the covid19 pandemic, not of his own making. There is uncontroverted oral and pictorial evidence that instead of seeking to apply legal means he applied brute force, an unacceptable means of resolving business disputes in this century, and which does not meet the approval of this court.
47. It appears that the appellant was determined for some reason to remove the respondent from the premises despite the little rent that he was able to pay under the difficult pandemic environment. The appellant had no clear evidence that he could rely on to convince the court that the respondent had tried to obtain title in the name of the school; nor did he have any evidence that the respondent had sold or transferred or sublet the school to third parties contrary to agreement. Those were mere scapegoat reasons which can not assist the appellant.
48. The very purpose that the law has been put in place to ensure that there is civility in the resolution of the dispute surrounding such indebtedness. There is no authority for the proposition that a person indebted in rent payments can not seek the protection of the court against what he alleges to be overbearing and oppressive conduct on that part of his landlord, and the appellant's lame allegation of "*unclean hands*", true to its nature, simply can not stand on its feet. If business matters were regularly conducted in the brusque and extralegal manner that the appellant appears to have adopted,

there may be no business in this country for many businessmen to conduct and anarchy would result.

49. The conclusion of this court is that the trial magistrate did not err in law and in fact in holding that the appellant had terminated the agreement without notice to the respondent.

50. In the circumstances set out above the gallant submissions of the appellant's counsel could not have dislodged the weighty evidence of misdeeds by the appellant in the whole process of abruptly and arbitrarily terminating the lease of the respondent, and this court finds that the respondent had proved his claim against the appellant in the lower court to the required legal standard in civil proceedings and that the present appeal lacks merit and it is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Malindi on this 23rd Day of April 2026.

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**