



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.110 OF 2016**

**BARNABAS K. MUTAI.....PLAINTIFF**

**VERSUS**

**ANN KIRUI.....1<sup>ST</sup> DEFENDANT**

**ALFRED KORIR.....2<sup>ND</sup> DEFENDANT**

**KENNETH KORIR.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**(Suit seeking to enforce a lease, and damages for compensation; lease cannot be enforced for want of capacity; the damages sought cannot be awarded for failure to plead and prove the same; only award made is for refund of the money paid for a lease that did not materialize).**

1. This suit was commenced through a plaint which was filed on 8 April 2016. In his plaint, the plaintiff pleaded that in the years 2014 and 2015, the 1st defendant leased to him, 2 acres of land within the land parcel Nakuru Likia/754. It is pleaded that before the end of the two years, the 1st defendant approached the plaintiff for a loan of Kshs. 30,000/=, and in return, lease to the plaintiff the whole of the 5 acres comprised in the suit land, for the years 2016 and 2017. This land is said to be registered in the name of the 1st defendant's deceased husband whereas the 2nd and 3rd defendant are sons to the 1st defendant. It is pleaded that in the year 2015, the plaintiff discovered that the 2nd and 3rd defendants had leased out more land than could accommodate all the lessees and a meeting was thus held at the Chief's office between the lessors and lessees. It is pleaded that it was agreed that since the land was over leased, there was not sufficient land for all to plough, and thus the plaintiff would use 2 1/2 acres for the years 2016 and 2017. It is pleaded that sometimes in January 2016, the 2nd and 3rd defendants in the company of others, entered the 2 1/2 acres assigned to the plaintiff and demolished the houses therein. This action, it is said, has rendered the plaintiff with no place to cultivate and has rendered him homeless. In the suit, the plaintiff has asked for the following orders :-

*(a) An order of injunction to issue restraining the defendants by themselves their servants or agents from leasing out the 2 1/2 acres the 1st defendant had leased to the plaintiff for the year 2016 and 2017.*

*(b) An order that the defendants, their servants or agents do keep away from 2 1/2 acres leased by the plaintiff in LR Nakuru / Likia/754.*

(c) Damages for the plaintiff's destroyed houses.

(d) Costs of the suit.

2. Despite being served, the defendants did not enter appearance nor file defence. They also did not participate at the hearing of the suit although they were duly served.

3. In support of his case, the plaintiff testified as the sole witness. He stated inter alia that the defendants are his relatives, with the 1st defendant being wife of his deceased cousin, and the two other defendants being her sons. He testified that on 30 October 2013, he was residing on the suit land which was then about 1 1/2 acres but which acreage was increased to 5 acres. Out of this 5 acres, 2 acres was leased to him in the years 2013/2014 by the 2nd defendant for Kshs.20,000/=. They had a written agreement which he produced. He testified that for the years 2015 and 2016, the 1st defendant leased to him 2 1/2 acres. However the land had also been leased by her sons to other people which culminated in a meeting called by the Chief to resolve the matter. Two meetings were held on 22 April 2015 and another in May 2015 . The meeting of 22 April 2015 did not make resolutions since the 1st defendant was not in attendance. She attended the second meeting, although the 3rd defendant did not. In this latter meeting, it was resolved, that given what he had paid, he should be allowed to cultivate the whole land, but since another portion had already been leased out, his money should be spread out to cover the years 2016 and 2017 and he ploughs his usual 2 1/2 acres. He testified that the 1st defendant agreed to this and signed the minutes of the meeting. Despite this, the 2nd and 3rd defendants, on 11 January 2016, destroyed his house, kitchen and store, where he had been resident since the year 2007 and chased him away. He testified that he had developed these structures with the consent of the 1st defendant. He mentioned that he wants to be compensated in damages for the structures that were destroyed which he stated cost him Kshs. 76,480/= to put up. Upon being chased away, he put up new structures at the cost of Kshs. 68,620/= and a fence of Kshs. 49,500/=.

4. In total, he claimed Kshs. 2,636,100/= quantified as follows :-

(a) Hire of 2 1/2 acres - Kshs. 25,000/=

(b) Cultivation - Kshs. 16,500/=

(c) Income per acre - Kshs. 2,400,000/=

(d) Damage to buildings - 76,480/=

(e) Damage to fence - Kss. 49,500/=

(f) Family displacement (construction of new structures) - Kshs. 68,680/=.

5. I have considered the matter. From what I can see, the plaintiff had leased out two acres of the suit land for the years 2014 and 2015 which was in writing and had no problem. In his pleadings he has averred that the 1st defendant then leased the whole of the 5 acres for Kshs. 30,000/= for him to cultivate for the years 2016 and 2017. For this one, there is no written agreement, although I have seen that in the meeting of May 2015, the 1st defendant did admit receiving this sum of money. It however appears that the 2nd and 3rd defendant had also leased the land and this brought a conflict between them and their mother, which was resolved by the Chief and a panel of elders, that the plaintiff do cultivate 2 1/2 acres of the land for the years 2015 and 2016. This however does not seem to have been agreed by the 2nd and 3rd defendants who then moved to evict the plaintiff.

6. Firstly, from the plaintiff's own pleadings, this land is registered in the name of his deceased cousin. None of the defendants have been shown to hold letters of administration for his estate and therefore none had capacity to enter into any dispositions in relation to the suit land. The plaintiff cannot therefore succeed in his claim for orders of injunction against the defendants. Neither can he succeed in his claim for loss of user, as this was not pleaded and also not proved. The mere statement that the plaintiff would

have made Kshs. 2,400,000/= per acre has no support whatsoever, but even if it was proven, I would still not have awarded it, for as I have mentioned, it is not pleaded.

7. That leaves only the claim for damages for the destroyed houses. The plaintiff quantified the same at Kshs. 76,480 for the structures and Kshs. 49,500/= for the fence. I would have awarded this, but this is a special damage which needed to be specifically pleaded. There is no specific pleading for this sum and I regret that I cannot grant it for want of specific pleadings. That also eliminates any award for the new structures that he made, but of course, even if I was persuaded, I would not have granted damage for what has been destroyed and what he has used to put up a new structure, for an award for both would be double compensation. But it does not matter, for as I have said, these are special damages which needed to be specifically pleaded and they fail for want of pleadings. Apart from that, they have also not been proved by way of receipts or a valuation report. The mere statement from the plaintiff, that they cost so much, in the circumstances of this case, is not enough.

8. What I choose to award in my discretion, and in the interests of justice, and in lieu of the order of injunction which I cannot grant, is an order for refund of Kshs. 30,000/=, which the plaintiff paid to the 1st defendant, for a lease that did not materialize. I also award the plaintiff the costs of this suit only against the 1st defendant.

9. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 12<sup>th</sup> day of April 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Kairu present for plaintiff.

No appearance for defendants.

Court Assistant : Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**