



**Lelei v Lelei & 4 others (Environment and Land Appeal E007 of 2023)  
[2024] KEELC 479 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 479 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT AND LAND APPEAL E007 OF 2023  
MN MWANYALE, J  
JANUARY 29, 2024**

**BETWEEN**

**EZEKIEL LELEI ..... APPELLANT**

**AND**

**WILLIAM CHESILUT LELEI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN LELEI ..... 2<sup>ND</sup> RESPONDENT**

**TIMOTHY MAIYO ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH LELEI ..... 4<sup>TH</sup> RESPONDENT**

**EDWIN CHESILUT ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Vide his Memorandum of Appeal dated 6<sup>th</sup> June 2023 drawn and filed by Omongo Gatune and Company Advocates the Appellant Mr. Ezekiel Lelei appealed wholly against the Ruling of Hon. S. M. Mokua (C.M.) issued on 9<sup>th</sup> April 2023 on 4 grounds as follows;
  - a) The Learned Magistrate erred in law and fact by allowing the Respondent’s application dated 6<sup>th</sup> September, 2022 which was without merit.
  - b) That the Learned Magistrate erred in holding that the issues raised by the interlocutory application could summarily determine the suit.
  - c) Failing to consider the Applicant’s submissions.
  - d) Allowing the Respondent’s application as a whole and thus dealing a blow to the Appellant’s right to access to justice.



2. On the strength of the above grounds raised in the Memorandum of Appeal, the Appellant urges the Court to allow the Appeal he had filed against William Chesilut Lelei; John Lelei, Timothy Maiyo, Joseph Lelei and Edwin Chesilut and proposed that the orders to be issued as follows;
  - a) The appeal herein be allowed and an order be made setting aside the subordinates Courts decision/order striking out the Appellant's suit against the Respondents and substitute the same with an order dismissing the Respondent's interlocutory application seeking vacant possession dated 6<sup>th</sup> February 2022.
  - b) The Appellant's case against the Respondents be reinstated and the matter be ordered to proceed on its merits before another Magistrate.
  - c) The costs of this appeal be met by the Respondents.
3. Simultaneous with filing of the Memorandum of Appeal, the Appellant filed an application for stay of execution under a Certificate of Urgency. In opposition to which the 1<sup>st</sup> Respondent filed a Replying Affidavit as well as a Notice of Preliminary Objection on the application.
4. On 19/6/2023, this Court issued directions on the hearing of the stay of execution application granting the Applicant 2 weeks to file and serve written submissions and the Respondent was granted 2 weeks to file their submissions; no follow up date was given but the matter was fixed for mention before the Deputy Registrar on 7/9/2023 where Mr. Mbeche appeared for the Appellant and matter was fixed for directions before me on 3/10/2023.
5. On 3/10/2023, the matter was mentioned and slated for oral hearing of the application on 11/10/2023, on this date Mr. Orenge appeared for the Appellant.
6. On 11/10/2023 when the matter was slated for the oral application, a new Counsel Ms. Wanjala appeared for the Appellant but was not ready to proceed. Upon strenuous opposition from the Respondents Advocate the application dated 6/6/2023 having been slated for hearing and counsel being not ready to proceed was dismissed for want of prosecution and Appellant was granted 10 days to file the record of appeal since the lower Court proceedings were ready, and the Lower Court file had been filed.
7. The matter was mentioned twice again since the record of appeal had not been filed and on 8/11/2023 the record of appeal having been filed was admitted for hearing and directions issued for parties to file submissions and the matter was mentioned for 6<sup>th</sup> December 2023 to take a judgment date.
8. On the 8/11/2023, when the Appeal was admitted, the Court noted that the Record of Appeal had not been paginate and had no line indent which the Court directed the same to be done before 6/12/2023.
9. Both parties filed their submissions as directed but the Record of Appeal remained unpaginated with no line indent as is required and the Court observes that the Record of Appeal must have been hurriedly prepared since the Memorandum of Appel was a totally different Memo of Appeal from the one alluded to at paragraph 1 of this judgment. This particular Memo of Appeal was not dated and had 13 grounds, was not singed but was drawn by the new Counsels now on record to wit Wavinya Wanjala and Company Advocates.
10. This new Memorandum of Appeal having been filed without leave and out of time on 2/11/2023 shall not be considered by the Court, but the Court shall consider the original memorandum of appeal dated 6/6/2023 and filed on 9/6/2023, which sadly did not form part of the Record of Appeal but was part of the court Record together with the application dated 9/6/2023 for stay of execution which the Court had dismissed.



11. The history of the matter had to be set out above, for the parties to be aware which Memorandum of Appeal the Court considered.

**APPELLANT’S SUBMISSION: -**

12. The Appellant’s submission were ‘titled’ Plaintiffs submissions but the Court deemed the same to be the Appellants submissions having been filed in this Appeal file.
13. The Appellant framed and submitted on 2 issues for determination as here follows;
  - a) whether or not the lower Court erred in its decision to summarily dismiss the matter
  - b) whether or not the lower Court erred n relying on an ambiguous lease agreement.
14. On the first issue the Appellants places reliance on the decision in the case of Yooshin Engineering Corporation vs Ala Artitechs Limited (Civil) Appeal E 074 of 2022) (2023 KECA 872.  
Where the Court held, interalia, “a Lower Court must exercise its discretion judiciously and that the Learned Magistrate erred in summarily resolving the entire suit based on matters raised in the interlocutory application.”
15. On issue number 2, the Appellant submits that the Court failed to consider the lease agreement as a whole and that the Court neglected to address ambiguity and potential vitiation of the lease agreement. The Appellant submits that there was failure on the part of the Court to acknowledge vitiation or requirements for rectification of a lease agreement with a view to rectifying a defective contract.

**Respondent’s Submission: -**

16. The Respondent submit that lease which gave rise to the suit before the Magistrates Court now subject of this appeal provided for a maximum period of 1 year from 1<sup>st</sup> July 2021 and lapsed on 1/7/2022 unless it was renewed by both parties.
17. That there was no other lease in existence and the Appellant had alluded to the existence of one lease agreement and had vide paragraph 9 of his plaint before the lower Court pleaded that he was willing to surrender vacant possession of the suit land to the Respondent once the lease lapsed.
18. Placing reliance on the decision in Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mule & 3 others (2014) eKLR submits that parties are bound by the pleadings and that the Court was equally bound by the pleadings of the parties.
19. The Respondent further submits that the Parties were bound by the terms and conditions of the contract and that it is not the business of the Courts to rewrite such contracts, in this regard the Respondent has cited the decision in the case of National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) 2002 (EA 503 (2011) eKLR;- where the Court held interalia that;  
  
“A Court of law cannot rewrite a contract between the parties the parties are bound by the terms of the contract unless coercion, fraud and undue influence are pleaded and proved....”



20. The Respondent has further cited the Court of Appeal decision in the Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR where the Court observed as follows; -

“we are alive to the hallowed legal maxim that it is not the business of the Courts to rewrite contracts between parties, they are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved.”

21. On the strength of the above the Respondent urges the court to allow the Appeal with costs

**Issues for Determination: -**

22. The following shall be the issues for determination.

- i) whether the lease was ambiguous and defective to warrant the Court to rectify the same
- ii) whether the Appeal is merited
- iii) Who bears the costs of the appeal?

23. As noted elsewhere in the judgment the Record of Appeal was poorly done as it omitted crucial documents including the original Memorandum of Appeal, as well as the plaint and defence, in the lower Court file. The Court has had to look at the lower Court file to discern what were the pleadings before the Lower Court.

**ANALYSIS AND DETERMINATION: -**

24. The main issue before the Lower Court involved an alleged trespass by the Defendants on the demised property. The Plaintiff alluded to leasing a portion of the suit property and he prayed to be allowed to continued with construction on the portion of the suit land.

25. No lease agreement was filed by the Plaintiffs in their list of documents but the Plaintiff did exhibit a Notice to vacate the suit property.

26. In the defence and counterclaim dated 30/12/2021, the lease agreement alluded thereto was the one dated 1/7/2021 between the 1<sup>st</sup> Respondent and the Appellant. That lease agreement was also filed by the Defendant, and in the counterclaim the Defendant sought a number of prayers including an eviction order; against the Plaintiff.

27. A review of the plaint and the documents filed in support as well as the defence and the counterclaim and the list of documents reveal that the lease in contention is the lease dated 1/7/2021; as this was the lease pleaded by the Respondents and it was alluded to in the Notice to vacate filed by the Plaintiff. The lease expired after 1 year on or before 1/7/2022.

28. Was this lease ambiguous as claimed by the Appellant. This lease provided for the demised area being a portion of plot No. 34 Mosoriot Center, at a consideration of kshs6,000/= monthly to be paid quarterly kshs 18,000/=.

29. At clause 1, the said lease was for a period of 1 year and the lessee was to erect temporary structures. This lease was signed on 1/7/2021.

30. From the provision of the lease cited above, there is no ambiguity as the demised premises, consideration and duration of the lease are all clear. Upon expiry of the lease, parties were to renew the lease on fresh terms, and the area leased was 55 ft by 24ft. the above provisions were clear and the



Court declines the invitation by the Appellant to treat the lease as ambiguous and to rectify the same as submitted by the Appellant's Counsel.

31. The Learned Magistrate in finding that the terms were clear as to the duration and that the need for renewal did not thus fall into any error and having found that the lease had expired, the Court was right to find the Plaintiff now Appellant had trespassed. On issue number 1 the Court finds that the lease was not ambiguous.

32. At paragraph 9 of the plaint the Plaintiff had pleaded as follows;

“ the Plaintiff avers that he is willing to surrender vacant possession to the 1<sup>st</sup> Defendant once the lease period lapses.”

33. This plaint was dated at 14/12/2021 but was filed on 17/12/2021, and as observed at paragraph the lease was to lapse on 1/7/2022.

The impugned Ruling giving rise to this Appeal was delivered on 9/5/2023. At the time the impugned ruling was delivered the lease had expired, as it expired on 1/7/2022 and noting that the Plaintiff had vide paragraph 9 of his plaint pleaded of his willingness to surrender vacant possession upon lapse of the lease, I find no fault in the decision of the learned Magistrate if finding that there was nothing else to determine in the suit and to dismiss the same.

34. Accordingly the Court finds no merit in the Appeal before it as the lease was not ambiguous and the same lapsed on 11/7/2022 and the Appellant had no otherwise than to surrender the same or negotiate a new lease.

35. The appeal thus lacks merit and it is dismissed with costs to the Respondent.

**JUDGMENT READ AND DELIVERED THIS 29<sup>TH</sup> DAY OF JANUARY, 2024.**

**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

1. Mr. Ngangar for the Respondent

2. No appearance for Ms. Wavinya Wanjala for the Appellant

