



Sitiency v Ngetich (For and on Behalf of Kapyator Self Help Group) & 2 others (Environment & Land Case E007 of 2023) [2024] KEELC 6333 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E007 OF 2023
MN MWANYALE, J
SEPTEMBER 30, 2024**

BETWEEN

ALEXANDER K SITIENEY PLAINTIFF

AND

WILLIAM NGETICH (FOR AND ON BEHALF OF KAPYATOR SELF HELP GROUP) 1ST DEFENDANT

MARY CHEPNGETICH (FOR AND ON BEHALF OF KAPYATOR SELD HELP GROUP) 2ND DEFENDANT

JONAH KIPSANG TUWEI (FOR AND ON BEHALF OF KAPYATOR SELF HELP GROUP) 3RD DEFENDANT

JUDGMENT

1. Vide his plaint dated August 4, 2023 the Plaintiff, Alexander K. Sitiency, sued the 3 Defendants being the officials of Kapyator Self Help Group.
2. In his plaint, the Plaintiff sought for judgment against the Defendants for;
 - i. A declaration that the Defendants are in breach of the terms of the lease agreement dated 4th July 2022 between the Defendants and the Plaintiff.
 - ii. Damages for breach of the lease agreement dated 4th July 2022.
 - iii. An order for cancellation of the Lease Agreement dated the 4th day of July 2022.
 - iv. Damages for trespass of the remainder from the lease aforesaid otherwise measuring 20 acres out of L.R. No. 21959/14.



- v. A mandatory injunction against the Defendants to compel them to give vacant possession to the Plaintiff herein of land parcel otherwise known as L.R. No. 21959/14 within a period of 90 days from the date of judgment, in default eviction to issue.
 - vi. Upon grant of prayer (v) above a permanent injunction to issue restraining the Defendants by themselves, their agents or anybody claiming from them from trespassing, remaining upon, utilizing or dealing in whatsoever way with the subject matter of the Lease Agreement dated 4/7/2022 otherwise known as L.R. NO. 21959/14.
 - vii. Costs and interests of the suit to be awarded to the Plaintiff
 - viii. Any such further and/or other relief as the Honourable Court may deem first, and expedient so to grant.
3. The Plaintiff also took out a Notice of Motion seeking injunctive orders against the Defendants/ Respondents. On 31/10/2023, the Court issued orders of maintenance of status quo pending determination of this suit; in terms that the
- a. Defendants were to utilize the leased 30 acres and not to trespass on the 20 acres,
 - b. The Plaintiff was at liberty to apply for joinder of any party who was in occupation of the 20 acres,
 - c. The 20 acres not leased by the Plaintiff to the Defendants were to remain in the possession and control of the Plaintiff.

Plaintiff's Case: -

4. It is the Plaintiff's case that he is the registered owner of parcel number L.R. No. 21959/14 Muhoroni Township which he leased to the Defendants vide a Lease Agreement dated 4/7/2022 whose terms included interalia,
- i. That the lessee were during the period of the lease to preserve and maintain the suit property
 - ii. That the lessees were not to assign sublet or part with possession of the parcel leased without the written consent of the lessor.
5. The Plaintiff case is that the leased property was 30 acres but the Defendants, either by themselves, through their servants, agents. Assigns and/or relatives had encroached and/or trespassed on the remaining parcel of land measuring 20 acres.
6. The Plaintiff pleaded particular of trespass as well as particulars of breach of contract on the part of the Defendants which included;
- i. Forcefully entering the Plaintiffs land and/or without his express consent
 - ii. Putting the Plaintiffs said portion into use and by extension remaining thereon without any lawful justification
 - iii. Failing to preserve and maintain the suit property as agreed in the agreement dated 4th July 2022.
 - iv. Assigning subletting and parting with possession of the parcel leased without the written consent of the lessor.
 - v. Failing to obtain written consent if the lessor before parting with possession of the parcel leased.



- vi. Reneging on the terms of the contract frustrating the contract conscientiously and/or intentionally.
- vii. It is against the above claim that the Plaintiff sought for judgment against the Defendants as set out at paragraph 2 of this judgment.

Defendants Case: -

7. The Defendant's filed a statement of Defence, in which they admitted ownership of the suit property to the Plaintiff at the time of signing the lease and admitted to the existence of a lease agreement dated 4th of July 2022 between themselves and the Plaintiff.
8. The Defendants alluded to the terms of the Lease Agreement to be;
 - a) A lease of 30.0 acres in L.R. No. 21959/14
 - b) the lessee had paid kshs 750,000/= for 32 months
9. The Defendants denied trespass into the remainder of the 20 acres in the suit property by themselves and/or their agents, servants and employees pleaded their lawful occupation of the leased 30 acres, where they had restricted themselves as per the lease agreement and pleaded that they were total strangers to their allegations of assigning, subletting and/or loss of possession of the of the leased premises.
10. The Defendants pleaded that their occupation was peaceable and within the terms of the lease agreement.
11. It is further the Defendant's defence that the Plaintiff's suit did not disclose a just cause and that the Plaintiff's was not entitled to the remedies sought.

Plaintiff's Evidence: -

12. The Plaintiff testified as P.W.1. He adopted his witness statement as part of his evidence in chief; and further testified that he was the registered owner of L.R. No. 21959/14 and he produced a copy of the title thereof as P Exhibit 1. He produced as P Exhibit 2, a demand letter which he sought the Defendants to observe the terms of the lease failure to which the lease would stand revoked as P Exhibit 3.
13. It was his testimony that the Defendant's did not maintain the property of the lease, as there was encroachment on the 20 acres of the remainder of the suit property, yet he had only leased to the Defendants 30 acres. He produced 16 photographs as P Exhibit 4 (a – p) showing the destruction of the property which included an access road that the Defendants has created through his farm, with sugarcane planted on either side of the road.
14. The photographs showed destruction of the fence as well as uprooting of beacons and he blamed the lessees for the same, he produced the registration certificate of the Defendant self help group as P Exhibit 5 and the certificates on contents of photography dated 5/11/2023 as P Exhibit 6.
15. The Plaintiff further testified that he had reported the issue of encroachment to the police station and he produced the O.B. No. as P Exhibit 7. It was his further testimony that his servant quarter on the 20 acres had been demolished too, and he blamed the Defendants since they were supposed to protect the property.



16. On cross – examination, the witness said he had leased 30 acres to the Defendant as officials of the self-help group who had paid kshs 750,000/= for the whole period of 36 months and that the issue before Court was that the Defendants had failed to maintain their property and lost possession of the lease and were thus in breach of the contract as particularized at paragraph 13 of the plaint.
17. The witness said that the Defendants were in possession of the 30 acres while the Servant Quarters that was destroyed was in the 20 acres and not in the 30 acres. He explained that the destruction as exhibited by photographs 4a, b, c, d, e, and 4 (g) were perpetuated on the 30 acres and not in the 20 acres, but the Court is not able to tell whether the destruction was in the 30 acres or the 20 acres.
18. The witness stated that the obligations of the leases was in respect to the leased portion of i.e. 30 acres which he stated that he had the Defendants had not parted possession with. It was the witness further answer in cross – examination that he become the registered owner of the parcel on 5th April 2022, there were no people residing on the parcel but there were activities thereon. He stated that he was not aware of any ongoing Court cases, involving the suit property. It was his testimony that the balance of the lease was 13 months but the witness urged the Court to terminate the lease for failure by the lessee to protect the land and further that destruction of the fence and uprooting of beacons constituted a breach with provisions of the and creation of an access road was made without his involvement as there was no public road, hitherto.
19. On re-examination, the witness stated that the second harvest of the sugarcane was underway. On the photographs the witness stated that the photographs P Exhibit 4 (a – p) and represents the suit property, and that the destruction was on the both 20 acres and 30 acres including, the uprooting of beacons. He emphasized on the termination of the lease as there was non-compliance with terms of the lease agreement.
20. PW2 Mr. John Arap Koech adopted his witness statement as part of his evidence in chief and it was his testimony when shown P Exhibit 4a, and 4c that the photographs she showed the boundary of the portion that was leased out to the Defendants. He indicated that he was present when the photographs were taken and he saw the uprooted beacons and the destroyed fence and the access road that had been created in the farm with sugar cane on either side. He stated that there had been no recent invasion on the property and the Defendants were on their second harvests on the 30 acres.
21. On cross examination, the witness stated he did not know the date when the lease was prepared but the Defendants took possession of the suit property in 2022, and the suit property was fenced later on. It was his testimony that only 30 acres were under the lease and the beacons had been uprooted from the said acres.

The witness stated that he did not see the Defendants destroy the fences, he had recorded statements at the police station but no one had been arrested. The Defendants did not report to him on any difficulties. He stated that an access road that was created was is in the 20 acres and not the 30 acres, and the road did not separate the 20 acres from the 30 acres leased to the Defendants.
22. On re-examination, the witness stated that the access road created by the Defendants cuts across the 20 and 30 acres, but did not exist before the Defendants took the lease, the Defendants have not reported any interferences on the suit property. He blamed the Defendants since they did not report any destruction to him. The witness stated that the Defendants were in full control of the 30 acres that they had leased.
23. The last Plaintiff witness was Mr. Joash Kipkorir Kemboi who adopted his witness statement dated 5/11/2023 as part of his evidence in chief and thereafter was cross – examined, he stated that he could



not testify as to how the property was before his employment but he knew whether the fences were erected and thereafter destroyed.

24. On re-examination, the witness stated that he had started working on the suit property this year (2024) and had fenced the suit property this year (2024) and was not there when the Defendants took possession.

With the testimony of the 3 witness the Plaintiff's closed his case.

Defence Evidence: -

25. DW1 William Ngetich, the Chairman of Kapyator Self Help Group adopted his witness statement dated 15/11/2023 as part of his evidence in chief. It was his testimony that their self-help group which was registered vide the certificate produced as P Exhibit 5 with 8 members, they had leased 30 acres out of the 50 acres in L.R. NO. 21959/14, and the Plaintiff retained 20 acres. He had executed a lease agreement together with the other officials and had paid kshs 750,000/= for the lease period. The property had not been fenced at the commencement of the lease and there was a path dividing the 20 acres from the 30 acres; with a shortcut that was passable.

26. The witness stated that after the lease had been signed they ploughed and took possession of the 30 acres. The destruction was not in the leased property but in the 20 acres, he denied subletting the property and trespassing on the 20 acres and that he had not been summoned to any police station over the invasion of the 20 acres. He prayed that the suit be dismissed and for them to finalize their term of the lease.

27. On cross – examination, the witness stated that the lease was for 32 months and not 36 months. On being shown P Exhibit 4 (a), the witness stated that they did not create a road of access within the 30 acres. The demolition of the servant quarter within the 20 acres and not the 30 acres.

28. The witness stated that they were shown the property by the Plaintiff's agent. On photograph 4c, he stated that he had not seen beacons but they were outer beacons on the 50 acres and 3 beacons on the 30 acres were insitu.

The witness stated that he was aware of sugarcane planted on the 20 acres but the said sugarcane did not belong to the self-group and that he did not encroached the remaining 20 acres.

29. On re-examination the witness stated that the self-help group had only leased 30 acres, which were in their hands with their beacons in situ.

The witness stated that he had no doubts about the ownership of Alexander Sitienny, he said they had leased only 30 acres and not encroached on the remaining 20 acres.

30. DW1 was the only defence witness and after his testimony the defence case closed.

31. Parties were directed to file submissions within 21 days.

Plaintiff's Submission: -

32. In his submissions before Court the Plaintiff has framed and submitted on 3 issues to wit,
- i. Whether the Defendants failed to pressure and maintain the suit property and if so was their failure in breach of the lease agreement dated 4th July 2022.
 - ii. What remedies are available and how to the Plaintiff as a consequence of the breach aforesaid?
 - iii. Who should bear the costs of the suit?



33. On issue 1, the Plaintiff submits that it was a term of the lease agreement dated 4th July 2022, that the lessees were at all times during the period of the lease, preserve and maintain the suit property, and not to assign, sublet or part with possession of the parcel leased without the written consent of the lessor.
34. The Plaintiff submits that the Defendant were denying his ownership of the suit property and places reliance on Section 121 of the *Evidence Act*; and further places reliance on the decision in *Mariakani Estate Welfare Association vs Local Authority Provident Fund* on the proposition that a tenant cannot challenge the ownership of the land lord.
35. The Plaintiff submits that there was destruction within 30 acres leased to the Defendants, which destruction included uprooting of beacons and creation of an access road, as well as destruction of fences.
36. With regard to the creation of the access road the Plaintiff submits that the usage of the access road would overtime create an easement under the provisions of Section 32 of the Limitation of Action Act which shall be deemed as an overriding interest as per section 28 of the *Land Registration Act* No. 3 of 2012. The Plaintiff thus urge the Court to find that the Defendants failed to maintain the suit property as per the lease agreement.
37. On issue No. 2 the Plaintiff submits that a violation of a contractual obligation entitles the agreed party to repudiate the contract. The Plaintiff places reliance on the decision in the case of *Dormakana Limited vs Architectural Supplies Kenya Limited* 2021 KEHC. In this regard the Plaintiff further submits that damages for breach of contract are compensatory in nature and the Plaintiff would need the restoration of beacons uprooted and the damages would assist in that regard.
38. The Plaintiff urged the Court to award kshs 100, 000/= as damages for trespass.
39. On costs the Plaintiff submits that he be awarded costs of the suit.

Defendants Submission: -

40. The Defendants did not file their submission in the matter.
41. Before framing the issue for determination, the Court notes the following uncontested issues; -
 - i. It is common ground between the Plaintiff and the Defendants that the Plaintiff is the registered owner of all that parcel of land known as 21959/14 Muhoroni Township measuring approximately 19.89 hectares, or about 50 acres.
 - ii. It is common ground that the relationship between the Plaintiff and the Defendants is governed by the lease agreement dated 4th July 2022, hence the Plaintiff is the lessor and the Defendants are officials of Kipyator Self Help Group (the lessee), over a portion measuring 30 acres within L.R. 21959/14 Muhoroni Township.

Issues for Determination: -

42. Having analyzed the pleadings, the evidence as adduced by the parties and the submissions and considered the application law, the Court frames the following as issues for determination; -
 - i. Was there a breach of terms of the lease agreements by the Defendants as claimed by the Plaintiff?
 - ii. If so, what remedies are available to the Plaintiff?
 - iii. Who bears the costs of the suit?



Analysis and Determination: -

43. The Lease Agreement (P Exhibit 3) provided for interalia;
 - i. Lease over 30 acres of land reference number 21959/14 Muhoroni Township
 - ii. The lease was from 32 months from 4th July 2022 to 3rd March 2025
 - iii. The amount payable and paid was kshs 750,000/= for the entire duration of the lease
44. The lease provided that lessee had been shown the boundaries thereof. The lessee was required to preserve and maintain the said property, and not to assign, sublet or part with possession of the parcel with possession of the parcel leased without the written consent. The purposes of the lease were for farming or any other agricultural activity.
45. Three special conditions were provided for in the said lease, which included that;
 - i. The lease was binding on the parties
 - ii. The Advocates costs were to be shared by the lessor and the lessee
 - iii. Any notice by any party was to be in writing and was to be deemed to be delivered after 7 posting
46. In his plaint before Court, the Plaintiff at paragraph 8 thereof pleaded some of the express terms of the lease to have included;
 - i. That the lessees were to maintain and preserve the suit property, as well as
 - ii. were not to assign, sublet, or part with possession of the parcels leased without the written consent of the lessor.
47. At paragraph 9, the Plaintiff pleaded that the lease was still in force having not been varied, altered nor rescinded by either party.
48. Paragraph 10 of the plaint the Plaintiff pleaded that the Defendants had trespassed on the remainder of the suit property measuring 20 acres and had been using the same.
49. The Plaintiff pleaded particulars of the trespass at paragraph 10 (I – ii) as well as particulars of the breach of contract at paragraph 13 of the plaint and sought for the remedies set out at paragraph 2 of this judgment. Even though the lease agreement did not define the terms. The 30 acres leased by the Defendants must be deemed to be the demised premises, and shall be referred to as such in this judgment. Thus, in the lease subject of the proceedings herein, the demised premises are the 30 acres within L.R. 21959/14 and the obligations created under the lease agreements, would only be in relation to this demised premises, and not the remainder 20 acres.
50. To put this into perspective, when a Tenant leases one apartment, situated in a block of about ten apartments, their lease and/or tenancy will relate only to the leased apartment and not the entire block, save for common areas.
51. The Court shall now consider whether the breach pleaded by the Plaintiff;
 - i. Relates to breach in demised premises and
 - ii. Whether the same has been proven



52. In his testimony before Court PW1 produced photographs as P Exhibit 4a – p that he explained were the breaches that were perpetrated by the Defendants on the demised property. The photographs show uprooted beacons as well as fallen posts near the boundary of the leased property. There was also an access road which cut across the entire land suit property L.R. 21959/14. PW2 stated that the Defendants were still on the demised premises, having harvested their second harvest, and that no one had been using the 20 acres. In cross-examination, he stated that he did not see the Defendants destroy the demised premises and the access road was in both the 20 acres and the 30 acres.
53. From the evidence of the witnesses, the Court finds that there were breaches on the demised property which included the uprooting of beacons and destruction of the fences.
54. The Court finds that the creation of an access road for purposes of harvesting of sugarcane in the demised premises as incidental to the purpose of the lease, which was farming, hence the creation of the access road does not necessary constitute a breach as harvesting is an incidental extension and activity to farming.
55. Both PW1 and PW2 testified that the Defendants were in possession of the demised premises and had harvested their second harvest, it follows therefrom that the pleaded issue of assigning subletting and/or parting with possession has not been proven. Since the Defendants had no obligations on the remaining 20 acres and since there no evidence was adduced of their trespass on the said 20 acres, the Court finds no fault on the Defendants in relation to the 20 acres, the duty to maintain and preserve the 20 acres squarely fell on the Plaintiff and not the Defendants.
56. The Court thus finds that the Plaintiff has proven breach of the term which required the Defendants to maintain and preserve the demised property, but the plaintiff has not proven that the Defendants parted with possession, sublet or assigned the demised premises. Thus, in answer to issue number 1, there was a breach of the lease agreement by the Defendants in relation only to the failure to maintain and preserve the demised premises by way of felling of the fences and uprooting of the beacons.
57. The Court shall now consider what reliefs are available to the Plaintiff herein issues number 2 herein.
58. The lease agreement is silent on the consequences of a breach and is further silent on termination, the lease agreement provides for a fixed term without any other option to terminate and/or rescind the lease. It follows therefrom that the parties only envisaged the effluxion of time as the only way to terminate the lease.
59. The Plaintiff's intention to terminate the lease agreement communicated to the Defendants vide P Exhibit 2 the letter dated 13th October 2022 cannot be ascertained from the lease agreement itself which did not provide for any other way of termination of the lease other than by effluxion of time. The Plaintiff could not therefore unilaterally invoke the revocation of the lease as he did not vide P Exhibit No. 2.
60. In arriving at the said finding, I am guided by the Court of Appeal decision in the case of Twiga Chemicals Limited vs Allan Stephen Reynolds, where the Court held inter alia, that the “general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement.”
61. The above excerpt of the decision is quoted in the decision in the case of Jadiel Gikunda Ambutu vs Nyaki Farmers' Co-operative Society (2022) eKLR.



62. The Plaintiff as the lessor could terminate the lease under the statute, to wit the provision of the Land Act. Specifically, under Section 65 (2) (b) (ii); the said Section provides,

“.....(2) there shall be implied in every lease covenants by the lessee empowering the lessor to.....”

(b) terminate the lease by serving a notice of intention to terminate the lease on the lease where

(i)

(ii) the lessee has failed for a period of one month to observe or perform any condition, covenant or other term, the observation or performance of which has been assumed by the lessee expressly or impliedly by the lease.”

63. Further Section 66 of the Land Act provides for conditions implied on leases and at Section 66 (i) (d) there is an implied condition to keep all boundary marks in repair. Boundary marks would in this context include fences and beacons.

64. Having found that there was destruction of the fences and beacons uprooted, the Defendants are clearly in breach of this implied condition as provided for under Section 66 (i) (d) and the Plaintiff thus has a recourse under Section 65 (2) (b) (ii) to issue a notice requiring the rectification of the breached implied conditions.

65. Having found that there were breaches of both express terms of the lease agreement and the implied terms, under Section 65 (i) (d) of the Land Act, the Defendants are required under Section 66 (i) (c) of the Land Act to return the demised premises in the same conditions as was at the commencement of the lease.

66. Since P Exhibit 2, the revocation notice was issued pursuant to the Lease Agreement which did not provide for termination and since it was not issued as a Statutory Notice under Section 65 (2) (d)(ii), the relief of termination of the lease prayed for the Plaintiff is not available to him, both under the lease and having not invoked the statute, under the statute. Thus, the prayer for termination of the lease is not available to the Plaintiff as prayed for in the plaint.

Having also not found evidence of trespass by the Defendants on the 20 acres, prayers (iv) (v) (iv) of the plaint are not tenable and are hereby denied.

67. On the prayer of general damages for breach of lease agreement. The Court declines the same, as there can be no general damages for breach of contract as has been held by various dicta, including James Maranya Mwita vs South Nyanza Company 2017 eKLR, which decision cites the Court of Appeal decision in Joseph Urigadi Kedeva vs Ebby Kangisha Kawai Kisumu Civil Appeal No. 239/1997.

68. The Court thus declines prayers (ii) (iii) (iv) (v) and (iv) of the Plaint, but having proven breach of the terms, the relief requiring a lessor to maintain and preserve the suit property as well as keeping boundary marks in repair under the provisions of the Land Act is available to the Plaintiff and accordingly the Court orders the Defendants to reenact the fence, and the beacons that were destroyed and/or uprooted in the demised premises and not to interfere with the Plaintiff's ownership, use and quiet possession of the 20 acres that have not been leased to them.



69. The Defendants shall rectify the breaches under Section 66(i) (c) and (d) of the Land Act within 30 days from today failure to which the lessor shall be at liberty to invoke the provisions of the Section 65 (2) (b) (ii) of the Land Act.
70. The lease shall terminate and/or conclude as provided for in the Lease Agreement, unless the Defendants do not rectify the breaches under Section 66 (i) (c) and (d) and a notice requiring them to do so has been issued in accordance with Section 65 (2) (b) (ii) as stated in the foregoing paragraph, in which case, the lease shall expire upon lapse of the said notice.

Disposition: -

71. Accordingly, judgment be and is hereby entered in favour of the Plaintiff for;
- a. Declaration that the Defendants are in breach of some of the provisions of the Lease Agreement dated 4/7/2022.
 - b. The Defendants, their servants and/or employees are hereby restricted from interference with the Plaintiff's ownership use and quiet possession of the remaining 20 acres in L.R. No. 21959/14.
 - c. The Defendants to rectify the breaches in the 30 acres (demised premises) by re-enacting the destroyed fences and beacons at their own cost within 30 days from the date of this judgment, failure to which the Plaintiff will be at liberty to invoke and issue the Notice for termination of the lease under Section 65 (2) (b) (ii) of the Land Act, and upon expiry of the said Notice the lease shall stand terminated.
 - d. The Plaintiff shall have the cost of this suit.

JUDGMENT, DELIVERED AND DATED AT KAPSABET THIS 30TH DAY OF SEPTEMBER, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. Mbeche holding brief for Mr. Sambu for the Defendant
2. Mr. Kiprono holding brief for Mr. Chumba for the Plaintiffs

