REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CIVIL APPEAL NO. 76 OF 2019

JADIEL GIKUNDA AMBUTU...APPELLANT

VERSUS

NYAKI FARMERS CO-OPERATIVE COSIETY..RESPONDENT

(Being an appeal from the Judgment of Hon. E. Mbicha (S.R.M.)

delivered on 30th May, 2018, in MERU CMCC No.595 of 2007)

JUDGMENT

A. PLEADINGS

1. The appellants had sue the respondent in the lower court for breach of a tenancy agreement and fraud over **L.R Meru/Block II/673**. He sought for special and general damages.

2. The respondent denied the claim and averred that it had no control over the Municipal Council of Meru or any other relevant authority who had allegedly denied the appellant the requisite trading licenses and permits and or stopped the works hence were not answerable for the alleged loss and damage.

B. TESTIMONY

3. The appellant told the court he entered a lease/tenancy agreement dated 23.3.2020 with the respondent in 2003 for a period of 5 years and 3 months for an open ground measuring 19 ½ meters by 10 meters with an intention of building temporary commercial rental structures. He produced the lease agreement as **P exh 1**.

4. After taking over the premises, PW1 testified that he constructed six houses at the front and started a foundation for another two at the rear side only for the Meru Municipal Council to stop his works alleging he was encroaching on a road reserve.

5. PW1 stated he enquired from the respondent over the alleged encroachment of the rented premises and while awaiting the issue to be resolved, he fell into rent arrears. The respondent gave him a grace period of 6 months to settle in the premises and embark on payments. He averred he also noted the size of the rented land was smaller than reflected in the lease agreement.

6. Further, PW1 testified in December 2004, he visited his tenants only to be told that they had allegedly entered into a separate tenancy agreements with the respondent for **Kshs. 1,800/=** instead of **Kshs. 2,800/=** per month initially agreed with him. According to him, this was without his knowledge, consent or notification by the respondent.

7. PW1 testified that he wrote several letters to the respondent dated 22.7.2004, 22.9,2003, 18.2.2004, 31.5.2004, 9.12.2004, 13.5.2006, 6.3.3006 and 30.9.2017. He produced them as **P exh 1 – 13** respectively.

8. PW1 stated as a consequence of the above, he had not enjoyed the suit premises at all and that the respondent had not given him a notice to terminate the tenancy.

9. In cross-examination, PW1 admitted he had not conducted a search to confirm the measurements of the leased premises through a land surveyor before signing the agreement since he trusted the respondent since he was a member of the respondent society. He denied he had breached any clause of the tenancy agreement on boundaries by non-payment of rent and or subletting the premises.

10. PW1 admitted however receiving letters dated 6.3.2006, 13.8.2007 and 11.10.2004 seeking for the rent arrears. Further, PW1 clarified that the respondents took over the leased premises in 2004 and put in new tenants.

11. Regarding the letter dated 23.7.2002, PW1 admitted the Municipal Council of Meru was trying to recover part of the leased property from the road reserve though he had followed the boundary as fixed by the respondent hence his letter dated 22.9.2003 raising the issue of the plot size but the respondent declined to respond to it.

12. Even though he admitted owing the respondent **Kshs. 55,000/=** rent arrears, PW1 stated he did not clear the amount after their relationship deteriorated. Asked why he had not filed a suit at the Business Premises Rent Tribunal, PW1 testified after he was removed from the premises, he had no option but to seek for special and general damages.

13. PW1 denied that he was the one who had breached the tenancy agreement by not paying rent on time and also failing to secure the requisite licences/permits from the Municipal Council of Meru.

14. In re-examination, PW1 admitted the boundaries of the plot had been fixed by the respondent through erection of wooden posts. Similarly, PW1 admitted his construction had the approval of the Municipal Council of Meru for a temporary commercial structure during the lease period which was to expire in 2007.

15. PW1 admitted he suspended the payment of the rent arrears because of the dispute and especially after the respondent allegedly refused to go for arbitration. He insisted the suit property together with his structures was allegedly leased to third parties hence his claim for damages.

16. PW2 adopted his witness statement dated 18.7.2013 and testified that he had been engaged by PW1 with effect from 2002 as a carpenter to put up wooden structures on the leased premises and upon completion, PW1 paid him **Kshs. 12,000/=**.

17. PW3 adopted his witness statement and confirmed making some doors and counters for the appellant for his rental houses on the suit premises following which he was the one collecting rent from the tenants on behalf of the appellant up to 2007 when he left the employment.

18. DW1 adopted his witness statement dated 9.10.20123 and produced a tenancy agreement dated 23.3.2002 as **D exh (1),** a certificate of lease as **D exh (2),** a letter from the council to the appellant as **D exh (3),** a letter dated 22.9.2003 enquiring for an arbitration as **D exh (4),** a letter dated 18.2.2004 by the appellant offering to clear rent arrears as **D exh (5),** a letter dated 23.3.2004 as **D exh (6),** a demand letter dated 9.12.2004 as **D exh (7),** a response to the demand letter of 5.10.2004 as **D exh (8),** a complaint letter over the breach **D exh (9),** demand for rent arrears **D exh (10)** and letters dated 3.10.2005 and 7.11.2005 as **D exh (II)** and **(12)** respectively.

19. DW1 testified it was the appellant who had failed to fulfil the terms and conditions of the lease agreement by subletting the premises to one Martin Mutia and falling into rent arrears.

20. In cross examination, DW1 admitted the appellant was leased the premises to do whatever he wished on the land so long as it was legal with effect from 2003 to 30.9.2007.

21. DW1 was emphatic it was the appellant who had breached the terms and conditions of the lease hence the reason the tenancy agreement was terminated before the expiry date for non-payment of rent for 22 months and for subletting the premises without prior consent.

22. Regarding complaints raised by the appellant in **P exhs 2, 3 and 5**, DW1 stated a response was made through **P exh 5** but parties were unable to agree on an arbitrator.

23. DW1 admitted that the appellant's structures and materials were still on the rented premises at the time of testifying and that the appellant must have incurred some costs and expenses to erect the structures though even at the termination of the lease agreement, the appellant was supposed to have removed them.

24. As regards arbitration, DW1 testified that it was the appellant who was not willing to pay rent causing the lease to be lawfully terminated. Further, he stated there could not have been an arbitration when there was no subsisting lease due to termination.

25. DW2 confirmed he was signatory to the lease agreement as the chairman of the respondent.

C. GROUNDS OF APPEAL

26. The appellant complains the trial court failed to consider his evidence and erroneously made a finding that he had not proved his case to the required standards and secondly that it relied on extraneous factors whereas his evidence was uncontroverted.

D. WRITTEN SUBMISSIONS

27. With leave of court, parties opted to dispose of the appeal through written submissions dated 121.11.2021 and 15.12.2021 respectively.

28. The appellant submitted that the tenancy agreement was frustrated after he was served with a stop further construction notice dated 23.7.2002 by the Meru Municipal Council on account of an alleged encroachment on a road reserve to which he reverted to the respondent for intervention but in vain.

29. As a result, the appellant submitted that the respondent instead demanded for rent arrears yet the size of the plot had been reduced after the Municipal Council of Meru ordered he vacated the plot as it was alleged to be on a road reserve.

30. Further, it was submitted that instead of addressing his issues, the respondent forcefully took over the premises on 1.12.2004 together with his structures and let it out to third parties without considering his rights.

31. It was submitted the appellant had not breached any clause given clause (I) (c) of the lease agreement allowed for the letting of shops which was a commercial activity.

32. Further, the appellant submitted that the respondent allegedly leased out his premises to third parties without compensating him for the developments.

33. Lastly, it was submitted justice was denied after the trial court failed to order for his compensation for the structures on the rented premises.

34. On the other hand, the respondent submitted that the appellant was unable to produce any verifiable evidence in support of his claim for special damages as held in ***Capital Fish Kenya Limited –vs- The Kenya Power & Lighting Company Limited [2016] Ltd eKLR & David Bagine –vs- Martin Bundi [1997] eKLR***

35. The respondent submitted the issue of the existence of the tenancy agreement was not in dispute but what was in issue was who had breached the same.

36. This being a first appeal, the court is mandated to rehearse and reassess the lower court record and come up with its independent findings and conclusion while mindful that the trial court had the opportunity to hear and see the demeanor of the witnesses. **See *Peters –vs- Sunday Post Ltd (1958) EA 424.***

E. ISSUES FOR DETERMINATION

37. The issues for determination are:

> **I. If the lease/tenancy agreement was frustrated by the stop construction notice issued by Meru Municipal Council on 23.7.2002.**
>
> **II. If there was any breach of the lease agreement between the parties herein.**
>
> **III. What were the consequences of the breach if any.**
>
> **IV. If the appellant was entitled to any remedies upon termination of the lease agreement and re-leasing of the premises to third parties.**

38. There is no dispute parties herein entered into a tenancy agreement dated 23.3.2002 over a piece of land measuring 19 ½ meters by 10 meters being part of Meru Municipality Block II/673 next to Gakoromone market for a period of 5 years and 3 months at **Kshs. 2,500/=** per month payable quarterly in advance with effect from 1.6.2002.

39. The duties on the part of the appellant were inter alia to pay rent, keep physical markings and or beacons, erect temporary structures for purposes of carrying out any lawful enterprise or commercial activity; apply for and secure licences or permits; and not to sublet, assign or part with the possession without prior consent. On the part of the respondent, it was obligated that it would allow the tenant to peacefully hold and enjoy the premises without interruption and to pay ground rent and property rates and charges payable to the County Council of Meru or any other authority.

40. As regards rent, clause 4 of the tenancy agreement stated if the appellant fell due in arrears for 21 days, the same shall amount to breach of the tenancy giving the landlord the right for re-entry and termination of the tenancy agreement.

41. Further, clause 5 of the tenancy provided that in case of any dispute or claim, parties were to go for arbitration.

42. The appellant has averred and testified that after he took vacant possession and commenced construction of temporary structures to establish a business enterprises, he was unable to fully utilize or put good use of his structures since he was denied trade licences or permits by the Municipal Council of Meru on account of an error on the ownership of the said plot and secondly after a stop order was issued preventing him from any further construction(s) or erection of more structures on the said property.

43. The appellant testified and produced letters in which he notified the respondent about the new developments which it ignored, refused and or neglected to remedy or address. Instead, the respondent allegedly continued to demand rent arrears following which it violated the tenancy agreement by entering into the suit premises and rented it out to third party(s) together with his structures, materials and developments thereon.

44. As a consequence, the appellant suffered loss for the breach of the tenancy agreement, costs of his structures, materials, rental income all totaling at **Kshs. 667,000/=.** He therefore prayed for special damages of **Kshs. 667,000/=** and general damage for breach of the tenancy.

45. In its defence, the respondent at paragraph 4 averred it had no control over the Municipal Council of Meru. At paragraph 7 of the defence, it averred that the appellant left the premises on his own free will and or accord after breaching the tenancy agreement hence his claim was an afterthought. At paragraph 8 of the defence, the respondent denied acting in bad faith and or fraudulent.

46. In his evidence, the appellant backed his averments regarding the breach of the tenancy agreement as particularized under paragraph 8 (a) of the amended plaint on the five key aspects of lack of an opportunity to utilize the premises; lack of a conducive environment; unilateral termination of the tenancy; placing a third party into possession and lastly failing to put in place measures to enable the appellant to process and be issued with licences and permits by the Council.

47. The appellant produced **P exh 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11** in which as early as 9.7.2002 he had raised the issue of the size of the plot, sought for an adjustment of the rent and clarification of ownership of the plot by the respondent from the Council.

48. In my view, the five issues raised above touched on clause No. 2 of the tenancy agreement and by extension impacted on the way and the manner in which the appellant was going to perform his obligations as set out in clause No. 1 of the tenancy agreement. Instead of addressing the aforesaid concerns on time or at all, the respondent failed to save the situation even when it knew of the stop order dated 23.7.2002 by the Municipal Council of Meru.

49. Apparently, the written and signed tenancy agreement had no clear provisions on the manner in which parties could alter, vary and or review its terms and conditions save to go for an arbitration in case of a default.

50. It is trite law that parole evidence cannot be used to alter a document. In ***Twiga Chemicals Industries Limited –vs- Allan Stephen Reynolds [2014] eKLR,*** the Court of Appeal held general rule is that 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.

51. Looking at the tenancy agreement herein, the appellant was entitled to enjoy quiet possession of the suit premises if he paid rent as agreed and discharged his obligations thereof. It is not in dispute that the appellant fell into rent arrears as indicated in his exhibits. This however came as a result of changed circumstances to the subject parcel of land.

52. Similarly, it is also not in dispute that the appellant was prevented and or stopped from undertaking developments on the suit premises by the Municipal Council of Meru on the basis that he had allegedly encroached on a road reserve and secondly due to a dispute regarding the ownership of the rented premises between the respondent and Municipal Council of Meru.

53. It was not in dispute that the appellant brought the two issues to the attention of the respondent. However, the respondent failed to address the two issues at all and instead kept on demanding for rent arrears.

54. In his view, the appellant averred the failure to address the key issues frustrated and or interfered with his obligations as to rent payments which reasons or factors were not foreseen at the time the tenancy agreement was executed and were beyond his control.

55. In **Black Law Dictionary 11th Edition at page 813**, the doctrine of frustration operates to excuse a party from further performance where (a) it appears from the nature of the contract and the surrounding circumstances that the parties had contracted on the basis that some fundamental thing or state of affairs will continue to exist or that some particular person will continue to be available or that some future event which found the basis of the contract will take place or (b) before the breach an event in relation to the matter stipulated in No. (a) above renders performance impossible or only possible in a very different way from that contemplated.

56. Frustration is said to occur whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance was called for would render it a thing radically different from that which was undertaken by the contract "**Non haec in foedera veni**" "*it was not what I promised to do*."

57. In this case, parties in my view never contemplated that there was going to be stoppage of the works by the Municipal Council of Meru through an enforcement notice. They never foresaw there was going to concerns on encroachment. Given the objection by the council, the respondent was unable to guarantee the appellant quiet enjoyment of the entire plot size which the appellant had rented from it.

58. Similarly, the appellant was unable to acquire trading licences and permits to undertake any meaningful business or commercial activities since the very body charged with the statutory responsibility to issue such trade licences, permits an approve building plans had stopped the appellant right on its tracts. On the other side, the respondent who would have resolved the issues was ambivalent and equally frustrated the appellant's efforts to make use of the premises. **See *Peter Kamau Kimondo –vs- Beatrice Nthuli T/A Amazing Grace Church [2022].***

59. In my view, the failure by the respondent to resolve the pending issues with the Municipal Council of Meru made it untenable for the appellant to continue enjoying the rented premises. **See *Esther Kanini Mutakha & 3 Others –vs- Mutati Transportation Ltd [2009] eKLR*.**

60. The supervening event was outside or an extraneous change in situation not contemplated by the parties. **See *Charles Mwirigi Miriti –vs- Thananga Tea Growers Sacco Ltd & Another [2014] eKLR***

61. In ***Samuel Chege Gitau & Another –vs- Joseph Gicheru Muthiora [2014] eKLR***, the court held an alleged excision by a third party of part of the defendant's property which was sold to the plaintiff was a supervening event. **See *Lucy Njeri Njoroge –vs- Kaiyabe Njoroge [2015] eKLR*.**

62. In ***Howard & Company (Africa) Ltd –vs- Burton [1964] EA 157***, the court held frustration could not apply where the event that was alleged to have frustrated the contract arose from the act of self-election of the party.

63. Having found that parties herein could not have foreseen the events, the question is whether there was anything the respondent could have done to mitigate the risk and the loss to the appellant? **See** ***Pankaj Transport PVT Ltd –vs- SDV Transami Kenya Ltd [2017] eKLR.***

64. The evidence tendered by the appellant clearly shows the respondent took no action at all while it was within its powers to do so, so as to grant and or guarantee the appellant quiet possession and enjoyment of the rented premises. Given the circumstances, my finding is that it was the respondent who breached the terms and conditions of the tenancy and went on to frustrate the appellant's efforts to make the tenancy work.

65. The respondent also failed to issue a notice to terminate the tenancy. Instead it pushed out the appellant and instead started dealing directly with his subtenants. DW1 failed to produce any letter formally terminating the tenancy on the alleged two grounds of breach. **See** ***Kenya Kenya Commercial Bank Limited –vs- Popatlal Madhavji & another [2019] eKLR***

66. In ***Chimanlal Meghji Naya Shah & Another –vs- Oxford University Press (EA) Limited [2007] eKLR,*** the court held where there was no termination clause and the lease was terminated before its period of expiry, the situation that obtained was a breach of contract.

67. In this case, the respondent blamed the appellant for the breach. Other than the alleged rent arrears, there was nothing to show that there was subletting and that the respondent had raised the issue with the appellant. Again, the respondent opted to gain re-entry and replace the appellant without being mindful of his structures and materials. If at all there were any rent arrears, one would have expected a counterclaim for the same.

68. The appellant has itemized the loss he incurred as a result of the illegal re-entry and premature termination of the tenancy agreement. In ***Kenya Tourism Development Corporation –vs- Sundowner Lodge Ltd [2018] eKLR*** the court held as a general rule that general damages were not recoverable in a case of an alleged breach of a contract in addition to quantifiable damages.

69. In this case, given that I have made a finding it was the respondent who breached the tenancy agreement, the next question is whether the appellant is entitled to damages for breach.

70. In ***Consolata Anyango Ouma –vs- South Nyanza Sugar Co. ltd. [2015] eKLR***, the Court of Appeal held as a general rule the purposes of damages for breach of contract was subject to mitigation of loss, the claimant was to be put as far as possible in the same position he would have been if the breach complained of had not occurred and the measure of damages was such as may fairly and reasonably be considered arising naturally from the breach itself.

71. Further, the court held that such damages were not damages at large or general damages but were in the nature of special damages and that they must be pleaded and proved. **See** ***Nginyo Investment Ltd –vs- Mobile Pay Ltd [2020] eKLR***.

72. The appellant has itemized his loss and produced receipts to back his particulars of special damages. The receipts bore revenue stamps. Dw1 and DW2 testified that the structures put up by the appellant were in the nature of temporary business structures and the appellant must have incurred costs and expenses in putting them up.

73. DW1 and DW2 also confirmed the structures were still in tenantable condition and were sublet to third parties as soon as the appellant was removed from the premises. The respondent has also produced a lease agreement with the third parties which indicate that they are renting the structures at Kshs. 1,800/= per month per tenant. They however failed to produce a valuation report to counter the appellant's quantification of the value of the structures as pleaded and proved through the receipts produced by the appellant.

74. In absence of any contrary evidence, the said receipts remain unchallenged. I also find the figures reasonable given the tenancy agreement produced by the respondent indicate that they have continued to reap income out of the structures as put up by the appellant.

75. In the premises, I find the appeal with merits. The same is allowed with costs. The lower court decision is overturned and substituted by allowing the appellant's claim for special damages of **Kshs. 667,000/=** with interests at court rates with effect from 1st December 2004 when the respondent let out the premises to third parties till payment in full.

76. Costs for the lower court are awarded to the appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF MARCH, 2022

In presence of:

Appellant in person

Mukanguru for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE