



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cherop t/a Crater Center v Postal Corporation of Kenya (Civil Case  
2 of 2019) [2025] KEHC 11272 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11272 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 2 OF 2019  
HI ONG'UDI, J  
JULY 31, 2025**

**BETWEEN**

**MOSES BARTO CHEROP T/A CRATER CENTER ..... PLAINTIFF**

**AND**

**POSTAL CORPORATION OF KENYA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in his plaint dated 16<sup>th</sup> January 2019 prays for judgment against the defendant for orders including;
  - i. Kshs.4,171,383/= as set out in paragraph 15 of the plaint.
  - ii. Kshs. 88,306,373/50 as set out in paragraph 16 of the plaint.
  - iii. General damages for breach of the agreement.
  - iv. Cost of the suit and Interest thereon at Court rates.
  - v. Any other relief that this honourable Court may deem fit to grant.
2. The plaintiff stated that he entered into a lease agreement in June 2017 with the defendant for the property identified as Title No. 5/9 Nakuru for a period of ten (10) years. He stated further that the defendant's representatives made representations to him that he could occupy and develop the subject plot and establish a branch of its already existing restaurant plus commercial shops. He added that upon commencement of the lease period he made periodic payments for rent and submitted plans for development to the county government of Nakuru which rejected the said plans and refused to approve them.
3. He asserted that the rejection was due to the existence of prior arrangement between the county government of Nakuru and the defendant and apparently the said plot was not available for



development. For the said reasons the plaintiff was denied access to the plot by the county government of Nakuru. He further stated that numerous visits to the county office had not borne any fruits as the county insisted that the said plot was not available.

4. Additionally, that the defendant had refused to make the space available to him in line with the lease agreement. Thus, he suffered loss due to the false misrepresentations and breach of agreement by the defendant particulars of which are listed under paragraphs 14, 15 and 16 of the plaint. Moreover, that the defendant adamantly refused to admit liability despite him issuing it with a demand and notice of intention to sue.
5. The defendant filed its amended statement of defence on 16<sup>th</sup> March 2021 where it denied the claim.
6. The plaintiff filed a reply to the defendant's statement of defence and the same is dated 21<sup>st</sup> March 2019, where he reiterated the contents of his plaint.
7. During the hearing, the plaintiff testified as PW1. He adopted his statement dated 17<sup>th</sup> January 2019 as evidence and stated that he filed his bundle of documents dated 16<sup>th</sup> January 2019 and a further list of documents dated 9<sup>th</sup> April 2024. He further stated that he applied for the empty space on Title Nakuru/Municipality Block 5/9 using the name Crater Center which is his registered business name. He added that he received a response via a letter dated 23<sup>rd</sup> February 2018 which forwarded an offer letter.
8. He further testified that he paid kshs. Ksh 1,695,000/= upon signing of the lease and was issued with a receipt and certificate of lease. He paid Githiru & Co. Advocates kshs. 195,000/= and paid rent for August, 2017 to January 2018 in the sum of Ksh 1,500,000/= through KCB. He stated that he was stopped by the county government of Nakuru when he was preparing to move into the subject plot. That upon visiting the county secretary he was informed that there existed an agreement between the county government and the defendant for them not to lease the plot.
9. He stated that the plot was being used as a parking for the county but he was never informed of the same. He raised the issue with the defendant but the same was not addressed and the defendant took over the premises and the old post office boxes were again placed there. He further stated that the defendant had not refunded the money he had paid and were even asking for more rent. He added that besides the refunds, he was claiming kshs. 88,306,373/50 which was the projected amounts, damages for breach of contract and costs of the suit plus interest from the first date of payment. He produced exhibits PEXB 1 to 16 in support of his case.
10. On cross-examination, he confirmed that the plot belonged to the defendant, the lease was between him and the defendant and the same was to commence from 1<sup>st</sup> May 2017 for ten (10) years. He stated that he paid kshs. 750,000/= rent for 3 months and kshs 1, 500,000/= after the 3 months had lapsed. He further stated that the lease was registered after he paid stamp duty and he submitted his documents to the county government of Nakuru as per the lease. He confirmed that the county government was not a party in this case and that he had never sought to have them forced to comply. He stated that his dispute was with the defendant and not Nakuru county government.
11. He admitted that the amount he sought in his demand letter and in the plaint slightly differed. He stated that the defendant falsely declared that the place was free for occupation. He confirmed that the defendant was in occupation of the subject plot and that he had never refused to occupy the plot.
12. Upon re-examination, he stated that there was no clause indicating what would happen to the payments in the event of a failure. He further stated that he never sued the county government of Nakuru since he was not party to the issue between it and the defendant. He added that the letter from



- the county referred to the lease between the two of them and therefore, the defendant knew that the space was not available yet he leased it to him.
13. In answering the questions by the court, he confirmed that he realized that the lease was not viable on 11<sup>th</sup> June 2018.
  14. The defendant called one witness, Mr. Horace Avedi its assistant manager who adopted his witness statement executed on 16<sup>th</sup> February 2023 as his evidence in chief. He produced as exhibits (D EXB 1-5) his defence statement and list of documents dated 8<sup>th</sup> February 2019. He stated that he knew the plaintiff with whom he had a landlord/tenant relationship. He further stated that the property was given “as was” and the offer was accepted by signing the offer letter on 8<sup>th</sup> March 2017. Thereafter, the plaintiff paid kshs 1,695,000/= and a receipt (PEXB 6) dated 9<sup>th</sup> March 2017 was issued by their Nakuru office.
  15. He further testified that the lease was dated 27<sup>th</sup> June 2017, both parties executed it and the same was registered on 4<sup>th</sup> October 2017. He stated that the plaintiff was to erect temporary structures on the space which was handed over to him in March 2017 as it was and a certificate of Lease was issued on 11/6/2017. He further stated that it was Nakuru county government which stopped the plaintiff from proceeding with development yet they had already handed the property to him. He added that the Letter dated 27<sup>th</sup> February 2018 was done by Benjamin of county government Nakuru and the same was in reference to a completely different premises to what they had leased to the plaintiff.
  16. He testified that the plaintiff vacated the premises about 6 years ago when he was not able to receive authority from the county government. He confirmed that there was no prior arrangement between the Nakuru county government and the said property belonged to the defendant yet it denied the plaintiff approval.
  17. On cross-examination, he confirmed that the plaintiff complied with their terms and that the lease would be still running had it not been for the problem by the county government Nakuru. He further confirmed that when Tower One was being constructed there was need to remove the postal rental boxes and they were taken to county government Nakuru premises and there was a lease to that effect. He stated that they wrote to the plaintiff explaining the position. Thereafter, they had several meetings with the plaintiff at their Nakuru and Nairobi offices to try and resolve the issue but they had not made a refund of any payments.
  18. Upon re-examination, he confirmed receipt of kshs. 1, 695,000/= and 1,500,000/= by the defendant. He stated that that they did not take over the premises by force and that the plaintiff left by himself. Further, that they told the county it could not deny the plaintiff approvals. He confirmed that they were in occupation of the premises
  19. Parties were directed to file their written submissions which they did.

### **Plaintiff’s submissions**

20. These were filed by the firm of Mirugi Kariuki & Company Advocates and are dated 13<sup>th</sup> March 2025. Counsel gave a brief background of the case identifying four (4) issues for determination by this court.
21. On the first issue whether the defendant breached the lease agreement, counsel submitted that it was beyond contention that the plaintiff and the defendant entered into a legally binding lease agreement on 27<sup>th</sup> June 2017 and the same was unequivocally confirmed by DW1 in his examination-in-chief. He asserted that the terms of the lease agreement were clear and unambiguous and the fact that the same was executed made it was legally binding. He further submitted that despite the full compliance with



- the lease terms, the defendant not only misrepresented the premises' suitability for development but also failed to secure the plaintiff's lawful possession.
22. Additionally, that the defendant neglected to address the regulatory obstacles impeding the plaintiff and remained entirely unresponsive to all attempts at resolution demonstrating a blatant disregard for its fundamental contractual obligations. Thus, the plaintiff incurred significant financial losses in reliance on a contract that, in reality, was incapable of being performed through no fault of his own.
  23. The second issue is whether the defendant knowingly or negligently made false misrepresentations concerning the leased property. On this counsel submitted that the defendant either knew or ought to have known that it lacked the authority to lease out the premises for development. Therefore, by failing to disclose this material fact, the defendant misled the plaintiff into entering into the agreement and he suffered substantial financial loss.
  24. He placed reliance on the decision in *Roskar Travels Ltd v Basic Needs Kenya (Civil Case 154 of 2017) [2021] KEHC 425 (KLR) (Commercial and Tax) (17 December 2021)* where the court held:

“In General Principles of the law of Contract by K. I. Laibuta at Pg 81 on Misrepresentation, negligent misrepresentation is founded on equity; where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In this Case, the representation in equity is equivalent to a contract and very nearly coincides with a warranty in law. In order that a person may avail himself or relief founded on it, he must show that there was such proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other.”
  25. On the third issue as to whether the plaintiff is entitled to compensation for losses sustained as a direct consequence of the defendant's misrepresentation, counsel submitted that where a party suffered loss due a misrepresentation, the measure of damages should place the innocent party in the position they would have been in had the misrepresentation not occurred. He relied on the decision in *Caparo Industries Pic v Dickman [1990] 2 AC 605*, where the House of Lords established that liability for economic loss arises where a statement is made to a known recipient for a specific purpose of which the maker is aware, and where the recipient relies on the statement to their detriment.
  26. Lastly, on who should bear costs of the suit counsel submitted that costs follow the event. He urged the court to uphold the principle of fairness and direct that the defendant bears the full costs of the suit. He cited on the decision in *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 Others*, where the court while citing two leading decisions on the subject held inter alia that:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded for the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
  27. In conclusion, he urged the court to find in favour of the plaintiff and hold the defendant liable for breach of contract.



## Defendant's submissions

28. These were filed by the firm of Kipkenda & Company Advocates and are dated 16<sup>th</sup> May 2025. Counsel gave a brief background of the case identifying three (3) issues for determination.
29. The first issue is whether the defendant was in breach of the lease agreement. On this counsel submitted that by virtue of having granted the plaintiff a lease over the property he was obligated to comply with the terms of the lease. She stated that the said terms required him to comply with the county by laws and to obtain necessary licenses and approvals of building plans prior to development. He relied on clause 2 of the lease agreement and the decision in *Mohamed v Kenol Kobil PLC* (Environment & Land Case 26 of 2021) [2022] KEELC 12594 (16 August 2022) (Judgment) where the court relied fully on the terms of the lease agreement signed by the parties to resolve the dispute and held that the defendant, who was the developer, was the party responsible for compliance and obtaining the authorization to carry out the works and not the registered proprietor as alleged.
30. Counsel further submitted that the plaintiff ought to have challenged the county government's decision through judicial review instead of seeking to hold the defendant liable for a third-party's decision which it had no control of. He stated that the defendant gave full and vacant possession of the leased property to the plaintiff. Thus, it was not its obligation to follow up when the county government of Nakuru denied the plaintiff approvals and as such, it was not in breach of the lease agreement. He added that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the courts to rewrite such contracts. In *National Bank of Ken Ltd vs. PipePlastic Samkolit K Ltd* 200 eKLR the Court stated as follows:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

See also:

*Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR.

31. On whether the plaintiff is entitled to the remedies sought, counsel submitted that the plaintiff by refusing to follow up with the county government of Nakuru, it could not be said he took all reasonable steps to mitigate its losses. Thus, he was not entitled to the claim for loss as pleaded. Counsel further submitted that the defendant was wrongly sued in these proceedings as the plaintiff's evidence revealed that his dispute was with the county government of Nakuru. Additionally, the alleged loss amounting to Kshs. 88,306,373.50 as compensation for loss of business income for nine (9) years is not supported by any credible evidence. He referred to the decision in *African Highlands & Produce Ltd vs John Kisorio* [2001] eKLR where the court held thus;

“The guiding principle; It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect...”

See also:

- i. *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd* [2015] eKLR.
- ii. *David Irungu Mwangi v Attorney General* [2018] eKLR.
- iii. *Hudani v Mukunya & 5 Others (Civil Appeal 353 of 2018)* [2018] KECA 93.



- iv. *Consolata Anyango Ouma v South Nyanza Sugar Company Ltd* [2015] eKLR.

32. Lastly, on who should bear the costs counsel submitted that the defendant had demonstrated that there was no cause of action against it and the plaintiff had not discharged his burden of proving his case on a balance of probabilities. He urged the court to award the defendant costs of the suit. He placed reliance on section 27 of the *Civil Procedure Act* and the decision in *Stanley Kaunga Nkarichia v Meru Teachers College & Another* [2016] eKLR where the court held at paragraph 8 that;

“As a matter of general principle, costs follow the event and the successful party will always have the cost of his success unless the court has good reason to order otherwise.”

33. In conclusion, he urged the court to dismiss the plaintiff’s suit with costs.

### **Analysis and determination**

34. Upon analyzing the facts, evidence and submissions tendered by the parties herein, it is my view that the main issue arising for determination is whether the plaintiff is entitled to the orders sought in the plaint.
35. The plaintiff in his plaint seeks for judgment against the defendant for Kshs.4,171,383/=, Kshs. 88,306,373.50/= and general damages for breach of the agreement among other orders. It is the plaintiff’s case that he entered into a lease agreement in June 2017 with the defendant for the property identified as Nakuru/Municipality Block 5/9 for a period of ten (10) years. Thereafter, he made all the requisite payments to the defendant but he was denied access to the plot by the county government of Nakuru. The reasons advanced to him were that there existed a prior agreement between the county government and the defendant in respect of the said plot. Thus, the said plot was not available for development as initially agreed.
36. The defendant on its part did not deny the existence of a lease agreement between it and the plaintiff and it also acknowledged that the plaintiff made all the necessary payments entitling him to occupying the said plot. However, they argued that they gave full and vacant possession of the leased property to the plaintiff. Further, that it was not its obligation to follow up when the county government of Nakuru denied the plaintiff approvals and as such, it was not in breach of the lease agreement.
37. Upon perusal of the plaintiff’s list of documents, this court notes that indeed there existed a lease agreement between him and the defendant and he complied with all the requirements to enable him take up the subject plot. In his evidence in chief, he produced exhibits PEXB 1 to 16 and the same are a clear proof of his engagements with the defendant and his full compliance. On the defendant’s part it does not dispute that it entered into a lease agreement with the plaintiff who complied with all the requirements and he was granted vacant possession of plot title No. Nakuru/ Municipality Block 5/9. However, it blames the county government of Nakuru which is not a party in this case, for denying the plaintiff access to the said plot. DW1 testified that the plaintiff and defendant entered into a lease agreement and the same was registered after the plaintiff had made all the necessary payments. Thereafter, the space was handed over to the plaintiff in March 2017 and a certificate of lease issued. He stated that it was Nakuru county government which stopped the plaintiff from proceeding with development.



38. In Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, the court in relying on the supreme court decision of Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR held as follows;

“

“22. The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.

On the standard of proof, the Black’s Law Dictionary, (9 th Edition, 2009) at page 1535 defines ‘the standard of proof’ as ‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’”

39. Perusal of the lease document shows that the terms were clear on what was expected of the parties therein. Further, the documents produced as evidence by the plaintiff attest to the same. Additionally, none of the evidence or documents relied on by the plaintiff was ever challenged by the defendant and its witness (DW1) acknowledged their existence.

40. In view of the above, it is my opinion that the evidential burden of proof shifted to the defendant to clearly show that it was indeed the plaintiff’s non-compliance with the lease agreement or fault that led to him not occupying the subject plot. It was the defendant’s responsibility to ensure that the plaintiff occupied the said plot since they had entered into a landlord-tenant agreement. Further, its claim that the plaintiff did not comply with the county by Laws was not backed by any evidence. Additionally, it did not adduce any evidence showing that it had no prior agreement with the county government of Nakuru in respect of the said plot. It was its duty to ensure that the plaintiff properly settled on the property. What steps did it do to ensure that the issues that were being raised by the county government were sorted?

41. The upshot is that the plaintiff proved its case on a balance of probabilities on special damages for the sum of Kshs.4,171,383/= which was specifically pleaded and proved as required in law.

See Mbaka Nguru & Another -v- James George Rakwar [Civil Appeal No. 133 of 1998 (UR) where the Court cited with approval Lord Goddard, C.J. in Bonham Carter -v- Park [1948] 647 T.L.R. 177.

42. For the claim of kshs. 88,306,373.50/=, no scintilla of evidence was adduced to prove the alleged special damage as required in law.

43. It is also clear that, the defendant failed to ensure that the plaintiff occupied the leased plot without any interference as per the terms of the lease. Thus, he must have suffered some inconvenience which entitles him to general damages. Unfortunately, upon perusal of the pleadings and the evidence I have not been able to see anything on the extent of the inconvenience suffered, making it difficult for the court to assess the extent of the award for general damages. For that reason, I will give a global award of Kshs 2,000,000/= as general damages.

44. The upshot is that the plaintiff is successful in his plaint and Judgment is entered in his favour in the following terms:

i. General damages – Kshs 2,000,000/= (two million shillings)



- ii. Special damages – Kshs 4,171,383/- (four Million, one hundred and seventy-one thousand three hundred and eighty-three shillings).
- iii. Costs plus interest at court rates from the dated of Judgment.

45. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 31<sup>ST</sup> DAY OF JULY, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

