

KENYA / JUDGMENT

Rimber v Unifresh Exotics (K) Limited [2025] KEELC 4917 (KLR)

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COURT

Environment and Land Court

BEFORE

SM Kibunja

CASE / FILE NUMBER

Environment & Land Case 427 of 2017

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Rimber v Unifresh Exotics (K) Limited (Environment & Land Case 427 of 2017) [2025] KEELC 4917 (KLR) (2 July 2025) (Judgment)

Neutral citation:

[2025] KEELC 4917 (KLR)

Republic of Kenya

In the Environment and Land Court at Mombasa

Environment & Land Case 427 of 2017

SM Kibunja, J

July 2, 2025

Between

Cecilia Mumbi Rimber

Plaintiff

and

Unifresh Exotics (K) Limited

Defendant

Judgment

1. Through the amended plaint dated 5th March 2021, the plaintiff sued the defendant seeking for orders that:
a. “A declaration that the contract of sale between the plaintiff’s husband (now deceased) and defendant stands rescinded and that the defendant is in wrongful possession

of land described as Title No. Kwale/kikoneni/mrima/663 situated within Kwale County measuring approximately 29 hectares (71. 63 acres), registered in the name of the plaintiff.b.An order be and is hereby issued granting the plaintiff the right to take immediate possession of the parcel of land described as Title No. Kwale/kikoneni/mrima/663 situated within Kwale County measuring approximately 29 hectares (71. 63 acres) together with all the crops and all improvements of whatsoever nature standing on the suit land.c.Mesne profits actually receivable, or that would with ordinary diligence have been received by the Plaintiff on account of wrongful possession of land described as Title No. Kwale/kikoneni/mrima/663 situated within Kwale County, with effect from the 15th August 2014 up to the time the plaintiff regains possession of the said parcel of land.d.An order be and is hereby issued that all monies paid pursuant to the sale of the suit property stand forfeited.e.Damages for breach of the contract of sale of the land described as Title No. Kwale/kikoneni/mrima/663 situated within Kwale County measuring approximately 29 hectares (71. 63 acres).f.Costs of the suit and interest at court rates.”The plaintiff averred that her late husband, Dennis Matano Gona Rimber, entered into an agreement of sale on 14th May 2015 with the defendant for sale of a parcel of land known as Kwale/Kikoneni/Mrima/663, the suit property, situated in Msambweni within Kwale County, at an agreed purchase price of Kshs.10,744,500. The defendant was to pay a deposit of Kshs.900,000 and clear the balance in seven successive instalments ending on 30th November 2015, being the completion date. That before execution of the said agreement, the defendant had taken possession and planted sugarcane for commercial purpose. The defendant failed in making the necessary payments and the parties entered into a Supplemental Agreement on 30th April 2016, with a completion date of 31st December 2016. That despite the extension of the payment period, the defendant failed to pay, which prompted the plaintiff to apply the provisions in both agreements to issue a 30 days’ notice requiring the defendant to make payment failure to which the contract of sale would be deemed rescinded, all instalments forfeited, possession relinquished and land reverted back to the plaintiff. That after the defendant declined to comply, this suit was filed.

2. The defendant opposed the plaintiff’s claim through the statement of defence dated 14th February 2022, inter alia averring that clause 8. 2 of the principal agreement allowed it to take possession of the suit property and that it had made payments of up to Kshs.6,250,000. Furthermore, it denied that the said agreement had been rescinded and instead placed fault with the plaintiff for frustrating the contract by not obtaining a consent from the Land Control Board and making fresh demands to increase purchase price. It further claimed that the plaintiff registered a caution and refused to collect cheques from the defendant’s office. The defendant stated that the plaintiff is seeking to unjustly enrich himself by retaining and forfeiting the deposit and all other instalments paid. It thus seeks a dismissal of the plaintiff’s suit.

3. The plaintiff called Fentus Chigogo Mng'ong'o, an agricultural economist, who testified as PW1. He produced his report of October 2017, and his evidence spoke of the sugarcane that had been planted, and the estimated profits made by the defendant from the time he first visited the suit property to the time the sugar cane was harvested. The current plaintiff, who is the widow to the original plaintiff, the late Dennis Matano Gona Rimber, testified as PW2. She relied on her statement dated 5th March 2021 and the list of documents dated 21st November 2017, and further list of documents dated 27th November 2022. She reiterated the averments in the amended plaint by stating that there was a sale agreement dated 14th May 2015 for purchase of the suit property at Kshs.10,744,500, and that the defendant did not pay as agreed and hence a supplemental agreement dated 30th April 2016 was executed to extend time for payment and still no payment was made by the defendant. She admitted that the Defendant had paid only Kshs.6,250,000 out of the purchase price. She states that they wrote to the Defendant to vacate the suit property in 2017, but they did not vacate until August 2022. She denied making fresh demands to increase the purchase price and refusing collect cheques from the defendant's office. She narrated that the defendant had initially given their advocates five cheques, which all bounced. The plaintiff testified that clause 3 of the supplemental agreement provided that, if the defendant breached the agreement, it would forfeit the purchase price paid. She alleged that the defendant invested colossal amounts of money on the sugarcane they had planted on the suit property and had been harvesting annually. During cross-examination, she admitted that she had gone to the defendant's office with her advocates to demand payments after the aforementioned cheques bounced. She is aware that a surveyor visited the suit property in September 2022 and his report showed that farming was carried out on 21 hectares. She stated that harvesting of sugarcane needed tractors and that she does not reside on the suit property and did not investigate whether Defendant had contracts with others to grow sugarcane on the suit property. Evans Onyango Onginjo, a senior research officer with KARLO in charge Sugarcane Breeding Centre Mtwapa, testified as PW3. It was his testimony that he visited the suit property on 19th November 2018 and prepared his November 2018 report. He told of the mature and healthy sugar cane that was ready for harvesting, did some tests and found per hectare yield was 93 tonnes but added that due to other factors on the land and uneven distribution in swampy areas they narrowed the yield down to 70 tonnes per hectare. On cross-examination PW3 admitted he made the report as a private job to which he charged fees but was adamant that the report be deemed as official as it came from his office. However, he stated that it was only a preliminary report and not a final report. He admitted that there was a disclaimer for a reader to use their own data and that he did not bear any responsibility in case of variance in data. That according to the information he had received from the deceased, the suit property was 236 acres and therefore was not aware that it was only 71 acres. He also admitted that the document dated 13th April 2017 and in the defendants list of documents was for forwarding soil plant tissue and that it indicated that soil fertility was low. However, he did not see the need for soil analysis test for the suit property. He stated that the rainfall was good in 2018 and took four representative stocks out of thousands of stools on the land. Further, he stated that he was conducting a qualitative

analysis.

4. In their defence, the defendant called Otienda Oganda Morris, a surveyor with Kwale International Sugarcane Ltd, who testified as DW1. He relied on his statement dated 26th September 2022 and his technical report of even date. He stated that he visited the suit property on 15th September 2022 to establish the status, location, acreage and development of the suit property and that he used the survey plans from the Mombasa Survey office. He stated that he found maize, water melon and cow peas on 21.49 hectares out of 29 hectares which is the total acreage. He testified that he did not find any sugarcane growing on the land. He admitted that he was not informed that the defendant had destroyed the sugarcane and left the farm. He also admitted that the report produced by the plaintiff indicated that sugarcane was growing as at January 2021. Matthan Pesa Ochieng, an agronomist working with Kwale Sugarcane International testified as DW2 and relied on his statement in his report dated 26th September 2022. He testified that sugarcane farming included activities which take time, and that his company is the only one dealing with sugarcane farming and processing in Kwale. He did not agree with the report produced by the Plaintiff as it was not factual. He specifically mentioned that rainfall was lower than 1500MM from 2015 to 2018 and it would have affected the yield. He also stated that the company has sugarcane farms in the neighbourhood of the suit property and that they normally send soil samples for tests to KARLO, who give back the results. He added that he had attached soil test results for a land near the suit property and it shows that soil fertility was poor and would require additional fertilizer. He did not agree with the plaintiff's report when it comes to production per hectare. He also stated that there was no irrigation on the land. On cross-examination, he stated that he would not know if the defendant grew and harvested sugarcane from the suit property. He also did not know where the defendant was taking the sugarcane it harvested and whether it was making losses or profits. He admitted he was not qualified to give the market value and profit receivable from land as that is the work of an agricultural economist. That he was not aware that the defendant had been on the land from 2014 to early 2022, and that to the best of his knowledge there was no outgrower contract between the company and the defendant, but added that it was not part of his duties to know such information. He further testified that though the report by PW1 could be true, he did not agree with it. that the national formula of the sugarcane directorate is about 45 tonnes per hectare and the figures given by the plaintiff would mean that the defendant would not have made any profit. Patricia Onyango Ngutu, the director of legal services at KALRO, testified as DW3. She told the court that she had been briefed about the case by PW3 who is his colleague at KALRO. Her evidence was that the reconnaissance report is a preliminary report. After the testimony of DW3 on 6th November 2024, the court marked the defence case as closed as the defendant's counsel was not in court on that day. The defendant later moved the court through an application dated 7th November 2024 seeking for inter alia orders to set aside proceedings of 6th November 2024 and re-open the defence case. The application was opposed by the plaintiff and after inter parties hearing it was dismissed vide the ruling dated 12th February 2025. The defendant then filed a notice of appeal. However,

as no stay of proceedings order was issued under Order 42 Rule 6 of the Civil Procedure Rules, the court has proceeded with the remaining court processes leading to this judgment.

5. The learned counsel for the plaintiff and the defendant have filed their submissions which the court has considered.
6. The issues apparent for the court's determinations are as follows:
 - a. Whether the defendant was in breach of the agreement for sale dated 14th May 2015 and the supplemental agreement dated 30th April 2016.
 - b. Whether there was frustration of contract by the plaintiff.
 - c. What orders is the plaintiff entitled to, if any.
 - a. Who bears the costs?
7. The court has meticulously considered the pleadings, oral and documentary evidence tendered by both sides, submissions by the learned counsel, superior courts decisions cited and come to the following determinations:
 - a. The court has noted that most of the evidence provided by the witnesses were to the effect of whether or not there was sugarcane planted and the profits made. The reports produced were mostly touching on that issue. As a matter of fact, the defendant did a disservice to itself as it did not produce any evidence of all the allegations it made. In a recap to the claims made, PW1 produced the aforesaid two agreements in court which were executed by her deceased husband; the late Dennis Matano Gona Rimber and two directors of the Defendant; Rajesh Pabari and Kaushik Pabari.
 - b. The principal agreement dated 14th May 2015 shows that the purchase price was Kshs.10,744,500 and the Defence stated that they had paid Kshs.6,250,000 which PW1 admitted during evidence. There are two limbs of a contract, an offer and acceptance. The deceased offered the sale of the suit property for Kshs.10,744,500 and the defendant accepted the said offer. The principal agreement is binding on the defendant meaning that they had to pay the full amount above stated and the fact that a supplemental agreement was made portrays that the defendant failed to pay the agreed sum before the completion date. In the supplemental agreement the completion date was moved from 30th November 2015 to 31st December 2016. The defendant has not denied that it has not paid but rather that it had paid some amount as afore stated. This is therefore clearly a breach of both agreements.
 - c. The defendant had claimed that there was frustration of contract by the plaintiff but no evidence was produced to that effect. Lord Radcliff in the case of Davis Contractors Ltd versus Fareham U.D.C. (1956) AC 696 stated as follows: "...frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "Non haec in foederi veni" It was not what I promised to do...There... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for." And, in the same case the court held: "The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced."
 - d. The defendant claimed that the plaintiff refused to obtain a consent form from the Land Control Board and that the plaintiff

refused to come for cheques from the defendant's office. This however remains to be allegations as the rules of evidence state that he who alleges must prove. In the case of Rono versus Lomsons Enterprises (Civil Case 5 of 2019) [2024] KEHC 6249 (KLR) (31 May 2024) (Judgment) the court held: "The Defendant having failed to call any witness, the contents of the Statement of Defence and the Defendant's Witness Statement remain mere allegations which have not been proved. The Plaintiff's testimony and the documents produced by the Plaintiff also remain uncontroverted. This principle has been reiterated in many cases. One such case is North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited Vs. City Council of Nairobi [2019] eKLR in which J.A. Makau J held as follows: 18. In *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter* Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence. 19. In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No.834 of 2002, Lesiit, J. citing the case of *Autar Singh Bahra And Another vs. Raju Govindji*, HCCC No. 548 of 1998 appreciated that: "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail." 20. In the case of *Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri* HCCC No. 95 of 1988, Makhandia, J held that: "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon." The denials and allegations of frustrations therefore remain just mere allegations as the defence failed to produce any witness who testified to the alleged frustration. e. On the third issue of the orders the plaintiff is entitled to, the court refers to *Idi Ayub Omar Shabani versus City Council of Nairobi and Another* Civil Appeal 52 of 1984, where the following passage from Lord Goddard, LCJ's judgment in *Bohham-Carter versus Hyde Park Hotel Ltd* (1948) 64 Times Law Reports, 117 at p 178 was approved: "Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages.' They have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory." The court also refers to *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (ur). where the Court of Appeal was emphatic that: "... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...". f. Hence, it was the duty of the Plaintiff to plead for special damages and not general damages for breach of contract, which it did not. The claim for damages is therefore denied. On the prayer for immediate possession of the suit property and mesne profits the court refers to

Order 21 Rule 13 of the Civil Procedure rules which provide as follows: “Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—*a.* for the possession of the property; *b.* for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; *c.* directing an inquiry as to rent or mesne profits from the institution of such suit until—*i.* the delivery of possession to the decree-holder; *ii.* the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or...” The court having been satisfied that there was a breach of contract and pursuant to the allegation that the defendant had abandoned the suit property in early January 2022 though not proved, the court grants immediate vacant possession of the suit property to the plaintiff. *g.* On mesne profits, the said technical report by PW1 demonstrated that the net revenue per hectare was a total sum of Kshs. 405,774 per hectare. However, the report is not dependable as it estimated the suit property at 200 acres, which is not the correct position. It is not discernible from the report what was the total acreage covered by the sugarcane and this ties the court’s hands. It also serves no purpose directing an inquiry now as the sugarcane has already been harvested, and disposed off. The claim for mesne profits fails. *h.* Prayer (d) is with regard to forfeiture of the total alleged sum paid of Kshs. 6,250,000. Clause 7. 1 of the principal agreement demands that a 14 day notice has to be issued to the purchaser to pay any sums due failure to which the Vendor shall only retain the deposit amount only and refund any amount on top of the deposit. In the said supplemental agreement, a new sub clause 3. 4 was inserted, stating that if payment was not made in full by the completion date, the money paid by the purchaser shall stand forfeited. This therefore means that sub clause 7. 1 was deleted and did not apply any more. The court is therefore inclined to grant prayer (d). *i.* Section 27 of the Civil Procedure Act provides that costs follow the event unless where there is a good reason to depart from that edict. That as the plaintiff has substantially succeeded in her claim against the defendant, she is entitled to the costs. *1.* From the foregoing conclusions, I find the plaintiff has partially proved her claim against the defendant to the standard required of balance of probabilities. The court therefore, enters judgement for the plaintiff and against the defendant and orders as follows: *a.* That prayers (a), (b), (d) and (f) of the amended plaint dated 5th March 2021 are granted. *b.* The rest of the prayers are dismissed.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF JULY 2025. S. M. KIBUNJA, J.ELC MOMBASA. In The Presence Of: Plaintiff : Mr Ngonyi for Katasi Defendant : M/s Maina for Njiru Shitemi-court Assistant. S. M. Kibunja, J.ELC MOMBASA.

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