



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 37 OF 2015

SIMON WAHOMÉ WACHIHI.....APPELLANT

VERSUS

IRIAINI TEA FACTORY LTD.....1ST RESPONDENT

EPHANTUS WAMBUGU KARIUKI.....2ND RESPONDENT

RUGONGO TEA BUYING CENTRE.....3RD RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon.W.A. Juma (CM) Nyeri delivered on 19th August, 2015 in CMCC No.193 OF 2014 (formerly HCCC No.150 of 2012); the appellant sued the respondents and had sought a mandatory injunction to compel the respondents to accept and receive deliveries of green tea leaves from the appellant; he also sought compensation for wasted tea due to non-deliveries at the rate of 900 kgs per month until resumption; the appellants claim was dismissed by the trial court;

2. The appellant being dissatisfied with the trial court's decision filed this appeal and listed ten (10) grounds of appeal which are as summarized hereunder;

3. The trial court erred in lifting the mandatory injunction instead of confirming it; the respondent had made out a prima facie case as he would suffer uncalled for loss and damage from the refusal by the respondent to accept the deliveries; whereas the respondent stood to suffer no loss from the continued deliveries; and erred in finding that the appellant did not specify the loss he was claiming;

4. The trial court erred in holding that due process was followed in suspension of the appellant's tea deliveries; there was no by-law that mandated the farmers to form a disciplinary committee; there was no tribunal that had been set up and therefore there was no decision that the appellant could appeal from;

5. The trial court erred in finding that the appellant owed the sum of Kshs.37,415/- to Rugongo Tea Buying Centre;

6. The learned magistrate erred in finding that the appellant had used his brother's number to deliver green leaf which allegation was never proved as no audit report was conducted;

7. The trial court erred in failing to uphold the appellant's constitutional rights which had been violated;

8. The appellant prayed that the judgment of the lower court be set aside; the appeal be allowed and the respondents be condemned to pay costs.

9. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of their respective case;

APPELLANT'S CASE

10. The appellant relied on the written submissions dated and filed on 12/11/2019; he submitted that he had properly and specifically pleaded and prayed for a mandatory injunction in his Plaint to compel the respondents to accept his deliveries of green leaf tea and for compensation for the wasted green leaf due to non-acceptance of deliveries; and a mandatory order was granted in this instant appeal;

11. Stoppage of delivery was not done in accordance with the law and the appellant relied on By-Law 43 which were set out in paras 6 and 7; no disciplinary process as provided by the By-Law was set up; the appellant did not willfully absent himself from the disciplinary process;

that no communication or summons was issued to him to attend any disciplinary process; the respondent failed to follow the laid down law when disciplining the appellant and he was not accorded an opportunity to be heard and that his fundamental rights were therefore violated;

12. The factory manager did not communicate the decision of the disciplinary tribunal to the appellant; which the appellant contends was never constituted in the first place;

13. The 2nd respondent had stated that the commission of inquiry had been formed on 14/02/2012 and that the members of Rugongo Tea Buying Centre had resolved to suspend the appellant; this was despite the fact that there was no commission to be established under the by-laws governing the running of the tea buying centres; no explanation was provided as to why the committee formed a commission of inquiry; no audit was carried out after which the financial disclosures ought to have been presented to the members by the factory accountant of the 1st respondent as per the mandatory requirement of by-law 35;

14. When rendering its judgment the trial court failed to uphold or take into consideration the four (4) issues that the High Court had considered in its ruling compelling the respondents to accept the appellant's deliveries of green tea leaf; the respondents stopped accepting the deliveries without any court order; the respondents motives were designed to frustrate the appellant's ability to settle his financial obligations;

15. No evidence was availed to court on how the sum of Kshs.37,415/- was arrived at; there was evidence of the substantial loss earnings of tea and income which the trial court ought to have awarded damages for the loss;

16. The appellant prayed for the setting aside of the trial court's judgment; and that the appeal be allowed.

RESPONDENT'S CASE

17. In response the respondents opposed the appeal and submitted that the appellant was a previous chairman of the 3rd respondent; in the election held on 9/01/2012 he lost the position of Chairman and was supposed to hand over the sum of Kshs.37,415/- to the new committee which he failed to do; which failure amounted to a breach of the by-laws No 34 and 43 of the 3rd respondent; and the penalty for such breach was suspension from delivery of tea until the party complies;

18. To circumvent the penalty imposed the appellant started delivering green tea leaf through his brother's account which led to the suspension of his brothers number;

19. The trial court found that the appellant was lawfully suspended from delivering his green tea leaf until he paid the respondents the sum owed in the sum of Kshs.37,415/-; and the appellant had not come to court with clean hands that would entitle him to the mandatory injunction sought;

20. The reliefs sought by the appellant had not been adequately pleaded and that he did not provide any evidence of the loss which was not also specifically pleaded; the appellant had failed to prove his claim and the trial court rightfully dismissed his case;

21. The appellant had also not exhausted the appeal process contained in the 3rd respondent's by-laws before he filed his claim in court; the respondent prayed for the appeal to be dismissed and that the trial courts decision be upheld.

ISSUES FOR DETERMINATION

22. From the grounds of appeal and the respective submissions filed by the parties, this court has framed the following issues for determination which are as follows:-

(i) Whether the trial court erred in finding that the appellant had failed to follow the laid down appellate procedures after his suspension;

(ii) Whether the appellant was deserving of the mandatory injunction sought;

(iii) Whether the appellant is entitled to compensation arising from the suspension and the wasted teas due to non-acceptance of his green tea leaf.

ANALYSIS

23. In considering these issues, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123** therein the court held that the duty of an appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent conclusion; in addition, this court as an appellate court, will not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law;

Whether the trial court erred in finding that the appellant had failed to follow the laid down appellate procedures after his suspension;

24. The appellant denied being indebted to the respondents in the sum claimed and contends that no proper audit was conducted in accordance with By-law 35; and argued that the respondents did not follow the proper disciplinary procedure and never accorded him a hearing; the respondents in response stated that the appellant was supposed to hand over to the new committee who were the new office

bearers and pay the sum owed which he failed to do;

25. The trial court after considering all the evidence adduced and the written submissions found as a fact that it was ‘... **clear that there were by-laws that governed the management of affairs of the respondents and its members**’; and it made the following observation ‘...**It is a fact that the plaintiff has never handed over to the new office bearers. It is also a fact that the plaintiff was aware that the Rugongo Tea Buying Centre was claiming some monies from him. The defendant has addressed evidence that the plaintiff was made aware of the claim and even proposed to pay what he owed and has refused.**’

26. The trial court went further to state ‘...**if a body is governed by laws, procedure is of utmost importance to ensure smooth operations and the governing of relationships within the establishments. The plaintiff had cause to be aggrieved if he feels proper procedure was not followed. The plaintiff was also governed by the same by-laws and failed to use procedure to appeal the decisions made against him in accordance with the by-laws.**’

27. The gist of the appellant’s grievance is the suspension from delivery of green tea leaf; it is not in dispute that the appellant was formerly a committee member as he had failed to recapture his place in the committee; the evidence tendered by **DW1** who is the 2nd respondent is captured on the court record as set out hereunder;

‘The farmers at Ruguongo met and agreed that Simon be suspended this was at the meeting of 1/05/2012. The management was therefore endorsing the decision of the members.’

28. DW1 went on to state that all the other former committee members had complied and that it was only the appellant who had failed to do so; the farmers then slapped the appellant with the suspension as provided by By-Law 34 of The Buying Centre By-Laws entitled ‘**Record Keeping**’ which reads as follows;

34. Record keeping

The committee shall cause and keep proper books of accounts; members register and avail all the required reports and documents to the members during the meetings.

Proper handing over of all records of the buying centre in the event of committee membership should be effected. A suspension of non-delivery of leaf to a maximum of one year may be stepped on a committee member (s) who do not comply with the handing over requirements.

In the event of non-compliance, the suspension may be extended for a further period until they have complied.

29. The appellant did not disprove this fact that the farmers at the buying centres managed their own affairs and that the work of the factory management was to only endorse the farmers’ decisions;

30. The respondents contend that if the appellant felt aggrieved by the decision made against him he should have appealed the decision in accordance with By-Law 44; the By-Law reads as follows;

44 Appeals Tribunal

The Board of Directors shall sit as the Appeals Tribunal.

Any grower/members may lodge an appeal against a decision of the disciplinary tribunal.

The Tribunal shall be chaired by the Chairman of the Board of Directors.

All Appeals must be lodged with the office of the Fum addressed to the Chairman Appeals Tribunal not later than fourteen (14) days after the decision. The Appeal should be in writing.

31. The appellant in this instant first rushed to the High Court and filed this matter; the High Court after granting an interim order directed that the matter be transferred to the lower court for hearing and determination;

32. There is a plethora of authorities on the issue of the ‘**exhaustion doctrine**’ which provides that the courts ought not to be the first port of call the moment a storm brews; though the instant matter is not an election petition the most renowned authority is that of **Njenga Karume The speaker of the national Assembly vs Njenga Karume (2008) 1 KLR 425**

33. No where in his evidence does the appellant admit that being aggrieved by the suspension he initiated or utilized the internal dispute resolution procedure for appealing as prescribed by By-Law 44; and the trial court correctly observed that the appellant had cause to be aggrieved and being governed by the same by-laws failed to use the proper procedure to appeal the decisions made against him in accordance with the by-laws;

34. This court finds no good reason to interfere with the trial court’s above finding; this ground of appeal is found lacking and merit and it is hereby disallowed.

Whether the appellant was deserving of the mandatory injunction sought:

35. The appellant had sought for orders to compel the respondents to accept his deliveries of green leaf tea; and submitted that he had properly and specifically pleaded and prayed for a mandatory injunction in his Plaintiff; and the prayer sought reads as follows;

‘(a) A mandatory injunction to compel the Defendants to accept/receive deliveries of green tea leaves from the plaintiff forthwith’

36. The trial court in denying the appellant the orders sought applied the equitable principle and posed the question “***...Does the plaintiff have clean hands? He wants the court to give him orders against an organisation which claims that he is indebted to them and after suspension failed to appeal in accordance with the by-laws and bent the same by-laws by using his brother’s number.***”

37. As was held in the case of **Bir Singh vs Parmar (1971) EA 209** the equitable principle that ‘***a person must come to court of equity with clean hands***’ means that he who approaches a court of equity must fulfill all or substantially all his outstanding obligations before insisting on their rights; the obligation to be fulfilled by the plaintiff must be owed to the defendant and it must be related to the obligation sought to be enforced; the conduct of the plaintiff is judged in relation to the relief;

38. In this instance the respondents’ contention was that the appellant having lost his place in the committee had an obligation to hand over, to pay any outstanding monies and to explain why he used his brother’s number to deliver green tea leaf;

39. The appellants contention was that he did not lose his seat but had boycotted the elections; but under cross-examination admitted that he was defeated in the elections; with regard to handing over he admitted that on 25/04/2012 he received the letter that he hands over but his excuse was that he did not do so because he did not know whom to hand over to; as for the outstanding monies in the sum of Kshs.37,415/- and his explanation was that he had written a letter to say that he would repay the money if told what it was for and confirmed that he had not repaid the money; he denied ever having used his brother’s number for tea delivery;

40. Having been a committee member, it is this court’s considered view that the appellant, particularly being the outgoing chairman, knew that he had an outstanding obligation to hand over before insisting on his rights; the reasons given for failing to hand over because he did not know who to hand over to is found to be inexcusable; the failure to hand over is also found to be indeed a breach of the by-laws which govern the operations of the parties herein; lastly the obligation is found to be pegged to or directly related to the mandatory order that the appellant was seeking;

41. In the circumstances this court is unable to fault the trial court for taking the view that the appellant had approached the court seeking equitable remedies with unclean hands and correctly found the appellant was not deserving of the mandatory injunction sought;

42. This ground of appeal is found to be lacking in merit and is hereby disallowed.

Whether the appellant is entitled to compensation arising from suspension and the wasted tea due to non-acceptance of his green tea leaf.

43. The appellant had also sought for compensation in his Plaintiff and his claim reads as follows;

‘(a)and for compensation of the wasted tea due to non-deliveries of at least 900kgs per month till resumption.’

44. The trial courts finding was that the appellant had not proved the case of loss for non-deliveries and the extract from the judgment reads as follows;

‘The loss suffered by the plaintiff was supposed to be specified and proved. The plaintiff has not brought out that evidence of loss. This court cannot make compensatory orders over a claim that is not specified and not proved.’

45. It is trite law that such damages must be specifically pleaded and thereafter strictly proved with a degree of certainty and particularity before they are awarded; the court record reflects that the appellant did not particularize his losses in the Plaintiff nor did he call any expert witnesses at the trial to support his claim;

46. Instead the precise monetary quantification of the appellants losses were set out in paragraph 14 of his Amended Written Submissions dated 7/11/2019 and filed on the 31/01/2020; these submissions were filed on appeal and not in the lower court; and the said quantification of his claim is set out hereunder;

a) Tea lost =37,000kgs with market value of Kshs.2,182,140/=

b) Bonus for the period = Kshs.1,630,440/=

c) Average price per kg =57.70

d) Interest at the bank rate.

47. This court reiterates that the above details were introduced on appeal and this action can only be described as an introduction of fresh

evidence and an appellate court will generally not consider fresh evidence that was not before the lower court; unless with leave of court also a court of law can only award special damages that have been actually incurred and proved;

48. Apart from failing to include these details of losses namely, the market value, the bonuses for the period and the prices per kilogram in his Plaint, the court record reflects that there was no compelling evidence adduced by the appellant in the lower court nor were any expert witnesses called to support any of the above losses claimed;

49. Therefore, in the absence of any supporting or compelling evidence on the losses stated to have been sustained the claim was not only speculative but was also unproven; this court finds no reason to interfere with or fault the trial court's finding that the appellant failed to prove the losses sustained through the respondents' actions.

50. This ground of appeal is disallowed for want of merit.

FINDINGS AND DETERMINATION

51. For the forgoing reasons this court makes the following findings and determinations;

- (i) This court finds that the appellant failed to follow the laid down appellate procedures;
- (ii) The appellant is found not to be deserving of the mandatory injunction;
- (iii) This court finds that the appellant failed to prove his claim for the losses for his green tea leaf;
- (iv) The appeal is found lacking in merit and it is hereby dismissed.
- (v) Each party to pay their own costs.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 31st day of March, 2021.

HON.A.MSHILA

JUDGE