



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 3 OF 2018**

1. SOLOMON NG'ANG'A.....1<sup>ST</sup> APPELLANT
2. STANLEY NDUGI.....2<sup>ND</sup> APPELLANT
3. DAVID GITAU.....3<sup>RD</sup> APPELLANT
4. KAMIRU KARIUKI.....4<sup>TH</sup> APPELLANT
5. KIANGIGI TEA BUYING CENTRE.....5<sup>TH</sup> APPELLANT

- VRS-

BEDAN MUIGAI NJUGUNA.....RESPONDENT

{Being an appeal against the Ruling of Hon. B. J. Ndeda – SRM Thika dated and delivered on the 21<sup>st</sup> day of February 2011 in the original Thika Chief Magistrate's Court Civil Case No. 1090 of 2009}

**JUDGEMENT**

By a plaint dated 26<sup>th</sup> September 2009 filed in the Thika CM's court on 18<sup>th</sup> December 2009 the respondent sued the appellants for orders: -

- “(a) An order lifting the unlawful ban imposed on the plaintiff from delivering his tea to the 5<sup>th</sup> defendant's centre.
- (b) Special damages as provided at the hearing.
- (c) General damages against the defendants for all the period the plaintiff has been unlawfully barred from delivering his tea to the tea buying centre.
- (d) Costs of this suit with interest.”

Simultaneously with the plaint the respondent filed a chamber summons under Order XXXIV Rule 1, 2, 3, 5 & 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and sought the following orders: -

- “1. THAT this application be certified as urgent and service of the Application be dispensed with and the same be heard *ex parte* in the first instance.
2. THAT there be an order restraining the 1<sup>st</sup> – 4<sup>th</sup> Defendants/Respondents by themselves and/or through their authorized servants and/or agents from interfering with the plaintiff/applicant's delivery of his green tea leaves to the 5<sup>th</sup> defendant/Respondent tea Factory.
3. THAT the 1<sup>st</sup> – 4<sup>th</sup> Defendants/Respondents by themselves and/or their authorized servants or agents be restrained from harassing, intimidating and/or interfering with the plaintiff/Applicants employees and/or tea farm in any way whatsoever.

**4. THAT the costs of this application be paid by the defendants/Respondents.”**

The application passed through the hands of several Magistrates and the record indicates that at one point the advocates for the parties unsuccessfully proposed to settle the dispute out of court. Eventually on 18<sup>th</sup> October 2010 Counsel for both sides agreed to canvass the application through written submissions. After submissions were filed by both sides parties requested for a date for ruling and were given 15<sup>th</sup> December 2010. Subsequently on 21<sup>st</sup> February 2011 the trial Magistrate delivered a ruling as follows: -

**“RULING**

**I have considered the submission filed by plaintiff on 29/10/10 with regard to application dated 26/9/09. Clearly the defendant/respondents 1-4 overlapped their mandate having considered all the affidavits filed. I hereby grant the plaintiff the order sought in the chamber summon dated 26/9/09.**

**B. J. NDEDA**

**S.R.M.**

**21.2.11**

**.....”**

It is that ruling that triggered this appeal. The grounds of appeal are that: -

**“1. The Learned Trial Magistrate erred in law and in fact in disregarding in totally the submissions tendered by the Defendants.**

**2. The Learned Trial Magistrate erred in law and in fact in finding that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants acted outside their mandate or at all.**

**3. The Learned Trial Magistrate erred in law and in fact in finding that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants acted in any way against the Plaintiff.**

**4. The Learned Trial Magistrate erred in law and in fact in granting Orders sought in an application and suit that were fatally defective.**

**5. The Learned Trial Magistrate erred in law and in fact in his application of the law to the facts of the Application dated 26<sup>th</sup> September 2009.**

**6. The Learned Trial Magistrate erred in law and in fact in delivering a Ruling that was backed by no reasons at all.”**

The appeal was canvassed by way of written submissions with the appellants filing theirs on 24<sup>th</sup> October 2018 and the respondent on 18<sup>th</sup> September 2018.

I have considered the record of the trial court, the rival submissions and the law and I am persuaded that I should allow this appeal and shall do so for the following reasons. First, it is clear from the ruling that whereas both sides had filed their submissions the trial Magistrate considered only the submissions of the respondent in violation of the rule of natural justice that no party should be condemned unheard. Secondly, the trial Magistrate did not give reasons for his decision and it is therefore difficult to decipher why he came to the conclusion he did that the appellants 1 – 4 overlapped their mandate hence creating doubt as to whether he considered the merits of the application. Thirdly, the trial Magistrate erred by granting a permanent injunction when what was expected was a temporary injunction pending hearing and determination of the suit on its merit. **Section 78 (1) (e) of the Civil Procedure Act and Order 42 Rule 26 of the Civil Procedure Rules** give power to this court to order a new trial which is the order that would have commended itself to me but for the fact that the orders granted have already lapsed by dint of **Order 40 Rule 6 of the Civil Procedure Rules** which states: -

**“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”**

The interlocutory orders granted by the trial Magistrate have never been extended and this court having allowed the appeal cannot extend the same. In the upshot the appeal is allowed with costs to the appellant. It is so ordered.

**Signed and dated in Nyamira this 16<sup>th</sup> day of December 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement dated and delivered Electronically via Microsoft Teams on this 18<sup>th</sup> day of December 2020.**

**MARY KASANGO**

**JUDGE**