



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO. 94 OF 2007**

**ORIOKO JOSEPH NDEGE & 234 OTHERS.....PLAINTIFFS**

**VERSUS**

**NYANKOBA TEA FACTORY LIMITED.....DEFENDANT**

**JUDGMENT**

1. The plaintiffs (235 in number) filed suit on the 17<sup>th</sup> August 2007, seeking judgment against the defendant for special damages, a declaration that the defendant's act of suspending green leaf collection from the plaintiff's Bonyunyu Tea Buying Centre is a nullity and an order compelling the defendant to resume collection of green leaves, costs and interests. This plaint was amended. On the 24<sup>th</sup> August 2017 the plaintiff's filed a further amended plaint. The plaintiffs describe themselves as small scale tea farmers who cultivate and sell green tea to the Defendant Company for processing and marketing. That as shareholders of the defendant company they established a Tea Buying and Collection Centre called Bonyunyu which they own and control from where he defendant weighs and collects green tea in return for payment. The defendant is statutory company established under the Tea Act and Regulations to specifically weigh, buy, transport, and process and market green tea from small scale tea farmers in Kenya under the provisions of the Companies Act.

2. It is pleaded that on the 13<sup>th</sup> of August 2007 the defendant its agents, employees suspended collection of green tea leaves from the Tea Buying centre and as a result close to 1625 kilograms of green tea harvested and delivered at the centre went to waste for six five days and that the plaintiff could not deliver the produce which was highly perishable to the centre. That in a bit to mitigate the losses the plaintiff's tried to deliver tea to neighbouring centre but were barred by the defendant. It is averred that the defendant's action were arbitrary, illegal and in total disregard of the principles of natural justice and resulted into loss and damage for the plaintiffs. The plaintiffs seek special damages as follows;

- a. *Loss of approximately 1,625 kilograms of green tea daily for five days at Kshs. 10.50 per kg earnings inclusive*
- b. *Loss of end year bonus payment at Kshs. 11 per kg for the five days*

3. It is averred that the suspension was without ground, reason or justification and the defendant was malicious and negligent in the manner in which it handled the issues. At paragraphs 5 the plaintiffs particularise the alleged malice and at paragraph 6 the plaintiffs particularise the rights violated. 4. The plaintiffs seek for judgment against the defendant for;

- i. *Special damages of Kshs. 179,087.50*
- ii. *A declaration that the Defendant's act of suspending green leaf collection from the plaintiffs Bonyunyu Tea Buying Centre was illegal, unlawful and in contravention of the principles of natural justice.*
- iii. *General damages for loss incurred by the plaintiffs during the 5 days of suspension of collection of teas from Bonyunyu.*
- iv. *Special damages for the loss incurred during the 5 days of suspension of collection of green tea from Bonyunyu.*
- v. *Costs and interests from the date of filing suit till payment in full.*

4. The defendants filed an amended defence on the 19<sup>th</sup> October 2010 dated the 18<sup>th</sup> October 2010. In its defence the defendant denies the plaintiffs every allegation and put the plaintiffs to strict proof. It avers that if any loss or damages occurred as alleged then the plaintiffs were to solely blame. It claims that it was justified in its actions.

5. At the hearing the plaintiff called one witness Antony Mahanadi Nyanyuki. He adopted his written statement filed in court on the 9<sup>th</sup> July 2018 as his evidence. This is his evidence. He makes the statement on behalf of the other 296 plaintiffs. He is a member of Bonyunyu tea Buying Centre (no.NY028) with my station number being 293. That over time there has been a long standing dispute between the plaintiffs

herein and the defendant (Nyankoba tea Factory Company Limited) over mismanagement and bad practice involving the defendant's employee and/or agent who are posted at Bonyunyu Tea Buying Centre leading to loss of thousands of Kilograms of green tea, the property of the plaintiffs herein. On or about the 22<sup>nd</sup> June 2006 there was a zonal meeting organized by the defendant and was attended by all the plaintiffs, zonal plaintiffs, zonal director, the factor unity manager and other employees of the defendant. It was decided that the collection clerk should not interfere with the weighing machine. It was also agreed in the meeting that suspect shareholder number used for stealing of tea leaves be investigated and deleted from the register of shareholders. On 5<sup>th</sup> July the plaintiffs herein approached the collection clerk asked him not to interfere with the weighing machine since the issue had been resolved in the 22<sup>nd</sup> June 2006 meeting but the clerk refused saying that he had no instructions from the defendant. He later picked up the weighing machine and walked away leaving behind 5000kgs of green tea leaves going to waste. This led to serious loss on the side of the plaintiffs. On 13<sup>th</sup> August 2007 the plaintiffs resolved that unless the clerk stopped the bad practice they would not allow him to continue weighing their green tea leaves resulting into a standoff between the plaintiffs and the defendant's clerk leading to the suspension of collection at the centre. The suspension of Bonyunyu Buying Centre was communicated to the Plaintiffs through letter dated 14<sup>th</sup> August 2007 that was signed by the defendant's manager. The said suspension has cost them a daily loss of about 5,000kg of green tea leaves which translated to approximately Kshs.120000 per day for the six day a week. The suspension of the tea buying centre was done maliciously without following the due procedure since they were not given a sufficient notice or given a chance to be heard before any board, committee or tribunal. This makes it illegal and unlawful. Despite serving the defendant with our demand letter and making several visits to the relevant offices the defendant has refused to compensate us. They pray that the court declares the defendant's action of suspending the green tea leaves collection from the plaintiff's Bonyunyu tea buying centre a nullity and issue an order compelling the defendant to resume collection. That the court awards special damages for the loss incurred during the six days of suspension plus interests and costs of the suit.

6. During cross-examination he testified that; the company made the payslips showing the monies each farmers was amount paid. Each farmer had different weights and kilograms. Some plaintiffs have since died. 139 are alive and are still weighing tea. The centre has a committee, board of directors and regulations. He denied that the company incurred a loss. The payslips show what each farmer lost. The tea was not taken by the company. He denied that the clerk at the centre was locked up or held for 6 hours. The tea was not weighed so no receipt was given. They could not go to other tea centres as they are not members. He admitted that they had issues before. There was an issue of theft, there was falsification. This was between the farmers and the clerk. In re-examination he stated that the plaint was amended and he is testifying on behalf of the plaintiffs who are alive. That the clerk was not held hostage. They asked the clerk to sit and weigh the tea. He refused to do so.

7. DW1 was John Mwega a factory manager with the defendant company too adopted his written statement as his evidence. He averred as follows; He is the Factory Unit Manager of Nyankoba Tea Factory. That on 13<sup>th</sup> August 2007, a leaf collection and driver were held hostage by the growers of Bonyunyu buying centre NYO 28 for six hours. The growers held the collection clerk and driver as a way of forcing Nyankoba Tea factory to send another vehicle to collect tea leaves which could not be accommodated by the vehicle at the buying centre. The six hour delay caused by the growers caused some of tea leaves weighing 204 kg which had been weighed to turn red and as a result the same was spoiled. That this caused the company (Nyankoba Tea factory) to incur losses as a result of the spoilt tea leaves. The management of Nyankoba Tea Factory held a meeting and concluded that the growers posed a threat to its employees and they decided to close down the buying centre pending investigations on who amongst the growers held the collection clerk and driver hostage. That the buying centre is governed by the Buying Centre By-laws, the Memorandum of Understanding and the Articles of Association of the company. That the board and management of the factory being the highest organ is the decision making of the factory acted within its mandate in closing down the buying centre pending investigations in order to protect its employees. That the actions of the plaintiffs on 13<sup>th</sup> August 2007 caused the defendant to incur loss and damages. The plaintiff's violated the by-laws governing the buying centre and that necessitated the closing of the buying centre. That the money claimed by the plaintiffs is not based on any material documents as not all the tea leaves had been weighed. That it is the defendant and not the plaintiffs who incurred losses as a result of the plaintiffs' actions. The defendant should not be compelled to compensate the plaintiffs when they caused the buying centre to be closed down. The suit against the defendant be dismissed with costs.

8. During cross-examination he stated that; the farmers held the staff hostage for 6 hours and that is the reason for the suspension. At that time the process was manual, the tea was weighed and then a receipt issued. That the farmers demanded a 2<sup>nd</sup> truck but the clerk informed them that what he purchased had filled the truck. The farmers were not to pluck if there was a suspension.

9. Parties filed written submissions. The plaintiffs submitted that the issues for determination were as follows;

- i. Whether the plaintiffs suffered loss?*
- ii. Whether the defendant's employee was held hostage?*
- iii. Whether the due process was followed in suspension of the buying centre?*
- iv. Whether the defendant's had received complaints from the plaintiffs concerning interference of the weighing machine?*
- v. Whether the plaintiffs should be compensated?*

On whether the plaintiffs suffered loss, it was submitted that the plaintiffs suffered loss as they had nowhere to deliver the green leaves a commodity which is perishable. The farmers did not pick tea during the suspension period which resulted into loss.

On whether the defendant's employee was held hostage it was submitted that he who alleges must prove (See Section 107 of the Evidence Act). That though the defendants insist that their staff was held hostage there was no evidence adduced to support the said allegation. That the defence witness was not at the tea buying centre on the 13<sup>th</sup> August 2007.

On whether due process was followed in suspension of the buying centre. It was submitted that the plaintiffs' evidence was the process was

not followed in suspension of the tea buying centre and therefore the process was illegal, irregular and unlawful. That under Article 50 (1) of the Constitution every person has the right to have any dispute resolved by application of the law decided in a fair and public hearing before a court or if appropriate before another independent and impartial tribunal or body. That the defendant suspended the buying centre without giving the plaintiffs a chance to be heard by a competent tribunal, Board or Committee. That the defendant was in blatant violation of the rules of natural justice and in particular the principle that no person should be condemned unheard and there was in breach of Article 50 (1) of the Constitution (see *Mbaki and others vs. Macharia and another* (2005) 2 EA 206. No adequate notice was given to the plaintiffs before the suspension as the incident happened on the 13<sup>th</sup> August 2007 and on 14<sup>th</sup> the next day the notice was issued.

On whether the defendant had received any prior complaints it was submitted the defendant had received complaints from the plaintiffs concerning the weighing machines and the defendants opted not to address the issues.

On whether the plaintiffs should be compensated for the loss suffered it was submitted that there was suspension of the plaintiffs buying centre without following the due process and therefore the plaintiff incurred loss which the defendants should be made to pay in terms of the special and general damages sought.

10. The defendant in its submissions reiterated the evidence and submitted as follows; there are three issues for determination as follows;

- i. *Whether the plaintiff have proved their case on a balance of probabilities?*
- ii. *Whether the court can interfere with the internal management of the company?*
- iii. *Who bears the costs of the suit?*

The defendant too relied on Section 107 of the Evidence Act and submitted that the plaintiffs had not adduced evidence on their claim that they lost 1625 kilograms of green tea for 5 days at Kshs. 10/- per kg. There was no evidence adduced on the kilograms each plaintiff lost. Reliance was made on the case of **Douglas Odhiambo Apel and another vs Telkom Kenya Ltd CA 115 of 2006 and Sande vs Kenya Cooperative Creameries [1992] eKLR** where it was held that it is trite law that special damages must not only be specifically pleaded but specifically proved.

On whether the court can interfere with the company's laid down mechanism it was submitted that the Companies Act has a free hand in developing their own rules of engagement. Reliance was made on 2 cases; In the case of **Paolo Murri vs Gian Battista Mrri and another [2000] eKLR**, it was held that the elementary principle is that a court does not interfere with internal management of companies acting with their powers. In **FOS vs. Harbottle [1843] 2 Here 261** it was stated that courts will interfere only where the act of complained of is ultra vires or is fraudulent character not rectifiable by ordinary resolution. That in the instance case the company directors acted within their mandate and scope and their acts of closing the Bonyunyu buying centre were for the benefit of the company.

On costs it was submitted that the suit should be dismissed with cost.

11. I have considered the pleadings, evidence and submissions I find that the following are the issues are for determination ;

- i. Whether the plaintiffs have proved their case on balance of probabilities?**
- ii. Who should bear costs of the suit?**

12. After considering the evidence, the submissions and the law. The plaintiffs claim is for special damages for a loss they allege that they incurred on the 13<sup>th</sup> August 2007 as a result of the defendant's action to suspend tea collection at Bonyunyu. By a letter dated the 14.8.2007 the defendant suspended green leaf collections stating that their staff was held hostage for 6 hours. It's the plaintiffs' case that they suffered loss to the tune of Kshs. 179,087.50. The plaintiffs claim is one of special damages. There are a number of court decisions that state that special damages must not only to pleaded but proved. The further amended plaint has about 178 plaintiff as per the list attached to PW1's statement. In the plaint the loss is stated as Kshs. 179,087. 50. The particulars of what makes the said sum is said to be 1625 kilograms of green tea daily at the rate of 5 days at the rate of Kshs. 10.50. I have looked at what the plaintiff has produced to support this claim and its just 3 advance pay advice marked "OJN3 to 6". These slips do not prove the plaintiffs claim, there was no evidence led to show the plaintiff's arrived at the sum claimed. It is evident that each plaintiff had a contract with the defendant to deliver the green tea. What was expected of the plaintiffs was to individually state their claim of the amount of green tea they had on the 13.8.2008 and what they were expected to deliver in the 5 days they claim they incurred a loss. In the case of **Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991**, it was held that:

*"Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved."*

Therefore a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof depends on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. I find that the plaintiffs have failed to prove their claim. Being a special damage claim I am of the view that the plaintiffs are not entitled to general damages. I therefore dismiss the plaintiffs claim. Let each party bear its own costs.

**Dated signed and delivered at Kisii this 30<sup>th</sup> day of April 2019.**

**R. E. OUGO**

**JUDGE**

In the presence of;

**Mr. Ochwangi h/b Mr. Ochoki For the Plaintiffs**

**Mr. Okenye h/b Mr. Nyachiro For the Defendant**

**Rael Court clerk**