



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 185 OF 2010**

**JOHN ALIGULA KEYA.....1<sup>ST</sup> PLAINTIFF**

**ANTHONY ALUMASA MAHANGILU.....2<sup>ND</sup> PLAINTIFF**

**JOTHAM GIVASA AMUFANI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MUDETE TEA FACTORY CO. LIMITED.....DEFENDANT**

**JUDGMENT**

1. According to the plaint herein, the plaintiffs are tea framers, while the defendant is a limited liability company to which they supply their farm produce.

2. The plaintiff's case against the defendant is twofold. Firstly, they accuse the company of arbitrarily paying them through the Mudete Tea Growers Sacco (Sacco) instead of the Kenya Commercial Bank Mbale branch. They aver that some of them are not members of the Sacco and they have not consented to that mode of payment, and that the same has exposed them to unnecessary expense arising from arbitrary rates and deductions by the Sacco. Secondly, they complain that the defendant has supplied them with fertilizers without them having requested for it, with the result that the defendant has made deductions from their accrued produce dues and at times without proof of supply of the alleged fertilizers. They denounce the actions of the defendant as illegal, unlawful, uncalled for and unwarranted. They would like the court to declare the said acts unlawful and that they are entitled to the damages suffered. They also ask for costs of the suit.

3. In its defence the defendant has denies the claims against it. It is denied that the defendant had been paying for the produce through the Kenya Commercial Bank Mbale branch as pleaded. It is also specifically denied that some farmers are and others not affiliated to Mudete Tea Growers Sacco, the defendant had arbitrarily and without consent directed the plaintiffs to be paid through the Sacco and that the Sacco had been charging certain rates on the farmers' dues. The defendant has also denied the allegations in the plaint concerning fertilizer supply.

4. The parties complied with Order 11 of the Civil Procedure Rules by filing their lists and bundles of documents, lists and statements of the witnesses that they proposed to call, pretrial questionnaires, and lists of issues.

5. The oral hearing commenced on 16<sup>th</sup> October 2017. Mr. Manyoni made an opening address in which he stated that the plaintiffs sought declaratory orders against the defendant directing the plaintiffs to be paid their dues through the Sacco and against the deductions made from their dues for fertilizers before the said fertilizers are supplied to them. He stated that the plaintiffs were initially paid directly by, but later the defendant began to pay them through the Sacco, which charged them a commission hence the instant suit against the defendants.

6. The first witness on the plaintiff's side was John Aligula Keya, the first plaintiff. He said he was a tea farmer from Iguhu, Ikolomani, Kakamega. His relationship with the defendant was said to have started in 1980, when he began to supply the company with his tea produce. According to him, at that time he did not have bank account, and he was being paid in cash for his produce. He stated that he harvested and delivered tea every day but was paid monthly by the defendant. He said that Kenya Commercial Bank account referred to in the suit was for the defendant and not his, saying that he had no account with Kenya Commercial Bank. He testified that he also had an account with the Sacco, and was being paid through the Sacco. He also said that he knew the rules and regulations of the Sacco. He stated that the Sacco levied a service charge. He said that his bank, Equity Bank, also levied a service charge. He said that he was aware that the defendant had byelaws, but he had little knowledge about them. He stated that they used to get fertilizer from the defendant. He said that the deductions in respect of the fertilizer came before delivery of the fertilizer. He said that if a farmer complained then the deducted amount he would be refunded. He confirmed that he personally went to the Sacco and opened an account. He said that the reason he decided to move away from the Sacco was after their prices became exorbitant. He stated that he was, at the time he gave evidence, getting paid through his bank account at Equity Bank.

7. The second on the stand was the second plaintiff, Antony Alumasa Mahangilu. He testified that he was not registered with the defendant as a member, but he was using his father's membership. He said that although his father died in 2008, he had been using his number since

1999. He stated that all the payments in the account were paid in his father's name. He said that he was not aware that if any money were to be paid to his father through the father's account he would not be able to access it. He stated that he did not operate a bank account of his own, and that he was being paid through the Sacco. He testified that the Sacco was not aware that his father was dead. He said that the local buying centre committee was aware of that fact, and it was the said committee which had asked the Sacco to pay him. He said that the farm on which the tea he was harvesting was growing belonged to his father and that there was succession matter in court. On the fertilizer, he said that he was aware of the regulations. He had complained that he did not want the defendant to supply him with fertilizer, and that he had orally informed them of the same. He said that he was not aware of the company's bye-laws, but when his father was alive he never heard him complain about exorbitant charges for the fertilizer supplied or failure to be supplied. He said that he had never seen the agreement between his father and the defendant and therefore he could not say what they had agreed on. He said that the Sacco deducted money from him monthly, the highest charge being Kshs. 200.00. He said that the Kenya Commercial Bank account was for Mudete farmers, and that he had no account with Kenya Commercial Bank. He said on cross-examination, that he had not applied for his own number because of the pending the succession cause and because the company demanded that to get a number one needed to have 800 stems of tea. He said that he never had any account with the Sacco and had never filled any form with them. He also said that he knew from the beginning that the fertilizer had to be supplied by Mudete.

8. The third plaintiff, Jotham Givasa Amufani, testified next. He said that he started growing tea in 1982. He testified that he did not know the company's bye-laws. He said that he was never paid in cash, saying that he was always paid through the Kenya Commercial Bank, Mbale branch. He said the defendant always supplied the fertilizer, and the deductions for it were made before the same was supplied. He stated that there was no time that he never got his supply of fertilizer. He said that he did not know why some farmers were paid through the Sacco. He also said that he knew that some farmers were paid in cash, but did not know the amounts involved. He said that the Sacco deducts some money. He confirmed being a member of the Sacco. He said that it was the defendant that informed him to go and get his money through the Sacco. He said one gets a pay slip, and then he is paid by the cashier. He stated that the amounts charged by the Sacco ranged from Kshs. 200.00 to Kshs. 300.00.

9. The matter was first placed before me on 2<sup>nd</sup> July 2018. The parties indicated that they wished the matter to proceed from where Sitati J. had reached. The plaintiffs also indicated that they had closed their case.

10. The defence case then opened with Meshillam Kamunya Mathenge on the witness stand. He was a factory manager with the Kenya Tea development Agency (KTDA). He had previously worked at Mudete before transfer. He explained that the duties of a factory unit manager include collection of leaf. Thereafter the leaf was processed and delivered to the market and the proceeds paid to the growers as appropriate. He said that he knew all three plaintiffs, save that the second plaintiff was not a registered grower at Mudete Tea Factory. He said that once green leaf was collected and weighed, the total value of the kilos collected would be paid at the end of the month into the grower's individual accounts. Each grower who did not have an account were paid in cash through a Sacco contracted to pay on behalf of the company. He explained that it was security concerns that necessitated that the company subcontracted payment to a financial institution. He stated that that was not a decision made at factory level. He stated that the first plaintiff had a bank account into which his proceeds were paid, while the second plaintiff did not have an account and therefore he was paid in cash through the Sacco. He said that the second plaintiff had not furnished the company with an account into which to pay his proceeds. He stated that the Growers Pay Account at Kenya Commercial Bank Mbale branch existed, it was owned by the factory and it was a factory account. He said that the growers were not and could not be paid through the account since they should be paid through their own bank accounts. He said that the defendant deducted nominal charges to cover the Sacco's costs. He said that was the agreement between the Sacco and the company. He said that the banks would similarly levy similar charges for those paid through their own individual bank accounts. On fertilizer, he said that as part of tea growing the farmers were supposed to apply for fertilizer every year. He said that he had evidence that the three plaintiffs had been supplied with fertilizer. He said that once the farmers applied for fertilizer the company deducted a suspense figure. He said that the farmers were not forced to apply for fertilizer. He said that there were by-laws governing the tea growing process, which were passed by the farmers themselves. He referred to Clause 10(2) of the by-laws, which he said provided that the farmers place the orders for fertilizer themselves. He said that the company did not place the orders for the farmers. He said that the company did not deduct from the farmers' accounts without supplying fertilizer. He said that it was the farmers who decided where their deposits were to be paid.

11. During cross-examination, he testified that before the Sacco arrangement came on place, the farmers were being paid in cash at appointed places, especially at buying centres. He said that the money would be withdrawn from the company's Tea Growers Account at Kenya Commercial Bank Mbale branch and paid to the farmers. He said that the farmers had been informed of the change over from being paid in cash to being paid through the Sacco if they did not have a bank account. He said that after the communication, the growers collected their money from the Sacco and later from their bank accounts for those who had them. He said that the Sacco paid the farmers in cash, and that one did not need to have an account with the Sacco to be paid through it. The Sacco would withdraw the money and take it to the farmers at the buying centres where they would be paid in cash. He said that the subcontract was drawn between the company and the Sacco without involving the farmers, but added that the farmers had been represented by their directors at the factory level. He said that the grower was to meet the Sacco charges which were matched to normal bank charges. He said that the first plaintiff was paid through his bank. He said that he did not have records that the third plaintiff had applied for fertilizer. He explained that the fertilizer suspense account was for the amount held before the fertilizer deduction. He said that if the fertilizer was not supplied, there would be no deduction. He confirmed that the second plaintiff was using his father's account and therefore there was nothing on record to indicate that the company ever dealt with him. He said that he could not confirm whether the Sacco was paying him. He stated that if the second plaintiff was receiving any money then he must have been receiving his father's money.

12. On reexamination, he explained that the suspense was not a deduction, in terms of the money not having been deducted from the farmer. He stated that the defendant issued the pay slips used to pay the farmers and any writings thereon in the pay slips produced by the plaintiffs were not attributable to the defendant. On the second plaintiff, he stated that he had no documents in his name. He said that the second plaintiff had not produced any probate papers to show that he was representing his father. He stated that growers were identified by a growers' master list, with each grower being assigned a number, and said that the second plaintiff had no such number. He said that deductions on the fertilizers were indicated on the pay slip. If the entry read zero, then the same meant that no money had been deducted.

13. At the close of the oral hearings the parties were directed to file written submissions. There has been compliance. Both parties have filed detailed written submissions, that I have perused through and noted the arguments advanced in them.

14. From the pleadings and the oral evidence what I discern is that the parties hereto were in a contractual arrangement, where the plaintiffs were farmers who grew tea and supplied their produce to the defendant, a tea factory. They were paid on a monthly basis for the produce supplied. There was also an arrangement that the defendant would supply them with fertilizer for their farms, and recover the cost of the same from the farmer's dues.

15. The dispute between the parties, as I understand it, has two elements. There is the question of pay point for the produce supplied and there is the issue of fertilizer. On the pay point, the plaintiffs appear to be unhappy that the defendant is forcing them to collect their dues from the Sacco instead of paying them in cash or through the growers pay account at the defendant's bank account with the Kenya Commercial Bank, Mbale branch. They complain that they were not consulted over the matter, and that the Sacco was charging them unlawfully. On the fertilizer, they say that the defendant supplies them with fertilizer which they have not ordered for and in respect of which the defendant makes deductions from their dues.

16. On the pay point, the defendant says that it originally used to pay the farmers in cash but due to security concerns they decided to change the manner it was releasing payment to the farmers. They contracted the Sacco to make the payments to the farmers on its behalf and also encouraged the farmers to open bank accounts so that they could pay them through those accounts. On fertilizer, the defendant's position is that the company does supply the farmers with the same, at the farmers request after which the cost is deducted from the farmers' dues.

17. Given that the arrangement is contractual, where one party supplies produce and the other pays for it, and the second one is where one party supplies fertilizer and the other pays for it, it would be presumed that there are terms that ought to govern those arrangements, inclusive of how the payment was to be done. The cause of action here ought to be founded on the breach of the terms of the said contractual arrangement, especially on the manner in which payments were effected.

18. I have noted that the plaintiffs have not gone out of their way to bring out the actual terms of payment for the produce they supplied. They only said that they were paid monthly. They did not talk about how the payment was to be effected, whether in cash or cheque or through some bank account. They did not produce any documents that spelt out the said terms of engagement. He who alleges must prove, that is the essence of civil action. It has not been established that there has been breach of any terms of any arrangement or engagement.

19. As stated above, what is between the parties hereto is a commercial arrangement. Originally, the defendant would pay in cash. It would appear that the defendant would hold money in bulk which he would release in cash form to the farmers. It was said that the money was paid monthly. That would mean that the defendant would handle lots of hard cash at one time, which has its risks. The security concerns were therefore reasonable. It is handler of bulk cash who should worry about security and therefore make contingent plans regarding payment. It should be for him to dictate the mode of payment as it would be him facing a greater risk of theft or robbery. If he were to lose the money in bulk, during transfer or payment he would still be obligated to pay the farmers the loss notwithstanding.

20. Secondly, we are towards the end of the second decade of the twenty-first century. The modern economy is fast moving away from paper money, and money transactions are now being done through banks transfers and digital platforms. In this day and age, it is retrogressive to expect that regular payments would be made in cash form, and it would be unreasonable to hold a serious business person or entity to payments in that form.

21. Thirdly, I do note that the first and third plaintiffs do not appear to have any serious issues with the mode of payment. The first plaintiff says that he is paid through Equity Bank, and not in cash or through the Sacco. What he therefore says in the plaint about being forced to collect cash from the Sacco does not tally with what he said in court, that he was paid through his bank account. The third plaintiff did not have a bank account. He was a member of the Sacco and was paid through the Sacco. He said that he did not know why he was paid through the Sacco.

22. Regarding the second plaintiff, I have noted that he was not a registered grower with the defendant. He had no number therefore. The person who was registered with the defendant was his deceased father, who was the registered owner of the land from which he harvested the leaf that he supplied to the defendant. He dealt with the defendant and the Sacco through the accounts of his father. He stated that he had not made an effort to cause himself to be registered as a grower or to have his father's accounts transferred to his name. He mentioned that there was a succession cause to his father's estate, but he did not state whether he was the administrator of the estate, and therefore the person with authority to administer the estate and to represent it in its dealings with the defendant and the Sacco.

23. According to section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, the property of a dead person vests only in the person to whom a grant of representation has been made. Section 82 states that one of the powers of an administrator or grant holder is to sue and be sued on behalf of the estate. The effect of these provisions is that it is the grant-holder who wears the shoes of the deceased and represents him in all matters that concern his estate. In this case there is no evidence that the second plaintiff was appointed administrator of the deceased. It cannot therefore be said that the property of the deceased vested in him as such, and that he had capacity to sue or be sued on behalf of the estate. It cannot be said therefore that the second plaintiff has the requisite capacity to sue the defendant herein on behalf of the estate of his father, and to even deal with the property of his father as if that property belonged to him. He cannot possibly sustain any suit against the defendant.

24. Then there is section 45 of the Law of Succession Act, which provides against intermeddling. It states that the property of a dead person is not to be handled in any manner whatsoever by a person who has no authority in law to deal with it. It goes on to state that such authority is derived from a grant or representation. The second administrator has not demonstrated that he holds a grant of representation over the estate of his father, and therefore clothing him with authority to carefully deal with it. That would mean that he has no authority to deal with it. It makes him an intermeddler. Section 45 makes intermeddling a criminal offence for which a person can be sent to jail or be ordered to pay a fine or both. The second plaintiff is indulging in criminal activity for as long as he handles the property of a dead person without authority.

25. On the fertilizer, the plaintiffs do not deny being supplied with the same, indeed, they all acknowledge that supply of fertilizer went hand in hand with being registered as a grower with the defendant. None of the plaintiffs testified as to being supplied with fertilizer that they had

not ordered, nor ordering fertilizer that was not supplied though paid for, nor paying for fertilizer that was never supplied. Indeed, they all stated that they personally had no issues at all with respect to fertilizer.

26. The defendant called a witness who clarified issues on the relationship between the plaintiffs and itself, and more particularly as it related to payments for the produce supplied, the mode of payment and also on the matter of the fertilizers. The testimony of the witness was clear, flowing and consistent.

27. It would appear to me that the case by the plaintiffs against the defendant is driven more by ignorance and lack of information or knowledge of the actual position. I believe that the testimony by the defence witness filled the information gap. I find the suit to be fanciful, speculative and founded on conjecture. I am not persuaded that the suit herein discloses any cause of action against the defendant, and I am not persuaded that I should grant the prayers sought. I shall dispose of the suit by dismissing the same in its entirety with costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JUNE 2019**

**W MUSYOKA**

**JUDGE**