



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 571 OF 2014

Consolidated with

HIGH COURT CIVIL APPEAL CASE NO. 132 OF 2015

JOHN K. WAWERU.....1ST APPELLANT
SAMUEL K. KAHINGA.....2ND APPELLANT
HANNAH W. NJOROGE.....3RD APPELLANT
SAMUEL M. NDIRANGU.....4TH APPELLANT
MICHAEL M. KIMANI.....5TH APPELLANT
STEPHEN K. NDIRANGU.....6TH APPELLANT
DANIEL W. NGUGI.....7TH APPELLANT
JANE GACHIRE NJUGUNA.....8TH APPELLANT
PAUL MBURU CHEGE.....9TH APPELLANT
MARTHA W. NGUGI.....10TH APPELLANT
JANE NJERI KABANGI.....11TH APPELLANT
JOSEPH MURIGI NDUNGU.....12TH APPELLANT
DOMINIC MUIRURI.....13TH APPELLANT

VERSUS

THETA TEA FACTORY COMPANY LIMITED.....1ST RESPONDENT
KENYA TEA DEVELOPMENT AGENCY LIMITED.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 28th November, 2014 and Ruling delivered on 17th March, 2015 by Hon. Obulutsa (Ag. Chief Magistrate) Chief Magistrate's Court at Milimani Commercial in CMCC No. 6870 of 2006).

JUDGMENT

1. HCCA No. 571/14 was filed by the Plaintiff's in CMCC 6870/06 against the judgment and decree given on 28th November 2014 while HCCA No. 132/15 was filed by the Defendants in CMCC 6870/06 against the ruling given on 17th March, 2015. The two appeals were

consolidated on 11th May, 2018. This judgment is therefore in respect of the two appeals. For ease of reference, the Appellants in HCCA 571/14 who were the Plaintiff's in the lower court will be referred to herein as the Appellants while the Defendants in the lower court who are the Appellants in HCCA No. 132/15 will be referred to as the Respondents.

2. The Appellants in their amended plaint dated 14th August, 2006 sued the 1st Respondent as a tea factory managed by the 2nd Respondent. The Appellants pleaded that at all material times they were tea farmers who had contracts with the Respondents for the supply of green tea leaf.

3. The Appellants' claim was that they supplied green tea leaf to the 1st Respondent but the Respondents have failed to pay for the same and continued making unlawful deductions from the Appellants dues. The Appellants claims were tabulated as follows:

- (i) John K. Waweru.....Ksh.529,249.60
- (ii) Samuel K. Kahinga.....Ksh.134,143.15
- (iii) Hannah W. Njoroge.....Ksh.27,604.05
- (iv) Samuel M. Ndirangu.....Ksh.115,040.25
- (v) Michael M. Kimani.....Ksh.27,068.50
- (vi) Stephen K. Ndirangu.....Ksh.85,626.90
- (vii) Daniel W. Ngugi.....Ksh.30,118.85
- (viii) Jane Gachire Njuguna.....Ksh.126,978.00
- (ix) Paul Mburu Chege.....Ksh.157,523.00
- (x) Martha W. Ngugi.....Ksh.67,993.50
- (xi) Jane Njeri Kabangi.....Ksh.56,081.00
- (xii) Joseph Murigi Ndungu.....Ksh.23,753.80
- (xiii) Dominic Muiruri.....Ksh.299,688.00

4. The Appellants prayed for judgment against the Respondents jointly and severally as follows:

- a. A declaration that the deduction or withholding of each of the Plaintiffs' dues is unlawful, null and void and an order for the payment of all sums withheld or deducted from the Plaintiffs' dues to date.**
- b. An order restraining the Defendants from unilaterally deducting or continuing to withhold or deduct the Plaintiffs' dues.**
- c. Costs and interest at commercial rates from September, 2005 until payment in full.**

5. The 1st Respondent denied the claim through a statement of defence dated 2nd October, 2006. In the alternative the 1st Respondent stated that it collects green tea leaf from tea growers who are its registered growers within the meaning of the Tea Act. The 1st Respondent blamed the Appellants of falsification of the quantities of green tea leaf purportedly supplied. The 1st Respondent further blamed the Appellants for breach of the terms and conditions of the agreements between the parties.

6. The 2nd Respondent denied the Appellants claims as per the amended statement of Defence dated 31st August, 2006. The 2nd Respondent described itself as a management agent of all tea factories under its mandate but denied dealing in tea farming, tea collection or making payments to tea farmers and stated that the 1st Respondent is a separate registered legal entity. The 2nd Respondent denied having entered into any agreements with the Appellants.

7. After a full hearing of the case, the Lower Court entered judgment for some of the Appellants against the Respondents jointly and severally plus costs as follows:

- (a) Michael M. Kimani.....Ksh.27,068.50
- (b) Stephen K. Ndirangu.....Ksh.97,110.90
- (c) Daniel W. Ngugi.....Ksh.30,118.85

(d) Jane Gachire Njuguna.....Ksh.197,179.00

(e) Martha W. Ngugi.....Ksh.67,993.50

The claims by the other Appellants were dismissed with no order as to costs.

8. The Respondents subsequently filed the application dated 18th December, 2014 principally seeking orders that the judgment delivered on 28th November, 2014 be varied and or reviewed to the extent that:

a. The judgment entered in favour of Michael Kimani, Stephen Ndirangu, Daniel Ngugi, Jane Gacheri and Martha Ngige (sic) be set aside and replaced with an order for dismissal of their claims in entirety.

b. The defendants herein be entitled to costs of the suit as against the dismissed claims.

According to the grounds and the affidavit in support of the application, the trial magistrate is faulted for failure to consider material evidence. A review of the judgment was sought to correct any errors of omission or commission therein.

9. The application was opposed as per the replying affidavit sworn on 24th December 2014 by counsel for the Appellants. It was stated that the Respondent's remedy lay in filing an appeal and that the application for review was incompetent. That there was no error apparent on the face of the record nor were there sufficient reasons to warrant a review of the judgment.

10. The application was dismissed with costs on 17th March, 2015. The aforesaid judgment and ruling is what triggered the two appeals herein.

11. The appeals were disposed of by way of written submissions which this court has considered.

12. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”

13. In their memorandum of Appeal the appellants listed 7 grounds of appeal. However, these grounds of appeal were collapsed into three in the written submissions as follows:

a. Ground 1,2,3,4 &5 were argued together. The same are in respect of the weight of the evidence adduced.

b. Ground 6 which is on the interest to be awarded on the amount claimed.

c. Ground 7 which is in respect of the award of costs.

14. The grounds of appeal as per the memorandum of appeal dated 31st March, 2015 in HCCA 132/15 are as follows:

“1. That the learned Magistrate erred in fact and law in failing to consider wholistically the evidence on record thereby deriving an erroneous decision.

2. That the learned Magistrate erred in fact and law by wrongly interpreting and analyzing the evidence on record and the issues thereby arriving at contradictory and or inconsistent findings.

3. That the learned Magistrate erred in fact and law in failing to consider all the factual and legal issues raised thereby arriving at a wrong conclusion.

4. That the learned Magistrate erred in fact and law in failing to consider the weight of evidence adduced by the parties thereby deriving a wrong conclusion.

5. That the learned Magistrate erred in fact and law in disallowing an application for review when such a case warranting review had been overwhelmingly made out by the Appellants.”

15. John K. Waweru, the 1st Appellant and a tea farmer in Gatundu testified (PW1). His evidence was that he delivered tea leaves to the 2nd Respondent, Kenya Tea Development Authority (thereinafter KTDA) through the 1st Respondent, Theta Tea Factory, (hereinafter Factory)

but was not paid the sum of Ksh.529,249.60 on grounds that he had delivered less quantity of green tea leaf. He produced his statements as exhibits to show the amounts owing to him.

16. During cross-examination, PW1 gave out his share certificate number and his tea plantation number and stated that one has to be a member of a tea factory and have a licence in order to deliver tea leaves to a tea factory. Stating that his plantation has about 10,000/= tea bushes, he explained that during the period in question, he produced more green tea leaf than usual as he had leased some tea bushes from other farmers who he had entered into agreements with. PW1 was not sure if the lessors of the said leased tea plantations were registered with their tea factory (the 1st Respondent).

17. PW2 Samuel Karanja also gave out his registration number with the Factory. His evidence was that he was not fully paid for the green tea leaf delivered. His claim was for Ksh.134,143.15. He further stated that his tea bushes were capable of producing the quantity of green tea leaf that he supplied to the Factory.

18. PW3 Dominic Muiruri Ndigangu gave a similar account of evidence as PW1 & PW2 and also testified on behalf of the other Appellants as their evidence was similar. His evidence was that the Appellants supplied green tea leaf to the Factory but were not paid for the amounts claimed. During cross-examination, PW3 testified that a tea farmer must be registered and any additional tea bushes must be licensed. His response to the allegation of having delivered to the factory more green tea leaf than his plantation could produce was that he had leased some additional tea bushes.

19. The Respondents called two witnesses in support of their case. DW1 Luke Mwangi in his evidence stated that he was employed by KTDA as a Field Service Technician based at the Factory. That tea farmers must be registered under a particular factory where they deliver green tea leaf as shareholders and are licenced by KTDA. That the Factory maintains the farmers records which include the quantity of the green tea leaf delivered. That the farmers are paid on monthly basis for the supply and paid a bonus at the end of the financial year from the profits made. His contention was that some farmers had higher yields than normal during the period in question compared to previous years. That investigations were carried out and 42 of the farmers could not account for the abnormal production leading to conclusions of falsification of records and hence the recovery of payments made for the excess weight.

20. That 13 of the farmers who were dissatisfied filed suit. DW1's further evidence was that the Appellants had no approvals for any additional tea bushes contrary to the agreement between the parties which stated, *inter alia*, that a tea plantation license has to reflect the number of tea bushes. DW1 was not aware whether any clerk had been charged with any offence. He further stated that the Appellants failed to show that they were the ones who produced the quantity of the green tea leaf in question.

21. DW2 Jamleck Njuguna, an Agricultural Officer and an employee of KTDA at the material time gave evidence that he was a member of the committee formed to investigate allegations of falsification of tea records by farmers who were allegedly colluding with clerks at tea buying centres. That the investigations carried out to verify the population of the tea bushes and productivity levels *visa viz* the questioned deliveries reflected higher figures than in the previous or subsequent years for some of the farmers without any satisfactory explanation, hence the non payment.

22. From the foregoing evidence, there is no dispute that the Appellants were farmers who were registered and licensed by the Respondents to supply green tea leaf. It is also abundantly clear from the evidence of PW1 and PW3 that the farmers had to be registered and the tea bushes had to be licensed. Indeed PW1, PW2 and PW3 confirmed in their evidence that they knew their membership numbers and plantation registration numbers. This evidence is therefore in agreement with the evidence of DW1 and DW2 that the Appellants had share certificates, plantation licences and verification certificates which reflected the number of tea bushes and the year planted.

23. The big question is whether the Appellants supplied the Respondents with the green tea leaf that was not paid for. It is noteworthy that the Appellants explanation for having delivered more green tea leaf over and above what their own tea bushes could produce was that they had leased out some extra tea plantations. This is evident from the evidence of PW1 and PW3. However, other than for the oral evidence presented by the Appellants in court in respect of the leased tea bushes, no documents were produced to support the assertions made regarding the leases and neither were the lessors of the said leased tea bushes called to testify.

24. On the other hand, the Respondents position was that there was collusion with the clerks at the tea buying centres and falsification of records. There was no direct evidence of falsification or an evidence of any reports made to the police or any disciplinary action taken against the said clerks. However, there is evidence from the Respondents that reflect that the investigations carried out reflected higher quantities of by the Appellants during the questioned period than in the previous or subsequent years.

25. Without sufficient evidence of the tea bushes said to have been leased and from whom, it is difficult to agree with the Appellants position that they delivered green tea leaf to the Respondents in excess of their registered tea bushes. The investigations carried out for the period before and subsequent to the period in question as per the evidence of DW1 and DW2 failed to exonerate the Appellants. Without any satisfactory explanation in respect of the excess quantities, the Appellants failed to prove that they indeed had produced the green tea leaf claimed to have been delivered to the Respondents. He who alleges must prove.

26. Section 107 (1) Evidence Act Cap 80 Laws of Kenya stipulates as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

27. Section 109 Evidence Act Cap 80 Laws of Kenya stipulates as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is

provided by any law that the proof of that fact shall lie on any particular person.”

28. Having analysed the evidence, this court's view is that all the Appellants failed to prove their case on a balance of probabilities. Although the trial magistrate held that some of the Appellants herein were cleared during the investigations, all the Appellants herein were not in the list of the 19 who were cleared. The names of the Appellants appear in the list of the 42 who were not cleared. Consequently, none of the Appellants was entitled to a judgment in their favour. I therefore set aside the judgment of the Lower Court and substitute the same with a judgment dismissing the Plaintiffs (Appellants) case.

29. The next issue is whether the application for review met the threshold set out under Order 45 Civil Procedure Rules 2010. Order 45 Civil Procedure Rules which provides as follows:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

30. The Court of Appeal in the case of **Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR** held:

“An error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

(See also the case of **Pancrast T. Swai v Kenya Breweries Limited;**

National Bank of Kenya Ltd v Njau Ealr [1995-98] 2EA 259(CAK))

31. It is evident from the grounds and the affidavit in support of the application for review that the Respondents herein were dissatisfied with what was stated as the lower court's failure to consider material evidence and to correctly evaluate the same. Clearly this does not fall within the purview of the law regarding applications for review. The application amounted to requesting the trial magistrate to re-evaluate the evidence with a view to arriving at a different conclusion. The application for review had no merits. Consequently the appeal in respect of the ruling dated 28th November, 2014 is hereby dismissed.

32. There are two appeals herein by parties herein. Both appeals have failed. Each party to bear own costs of the appeal. On the costs before the lower court, I find that the evidence adduced by the Defendants (Respondents) blamed their own employees of collusion. Both parties therefore contributed to the state of affairs that they found themselves in. Consequently, each party to also bear own costs in the lower court.

Dated, signed and delivered at Nairobi this 23rd day of Sept. ,2019

B. THURANIRA JADEN

JUDGE