



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 295 OF 2012

EVANS MACHARIA GIKONYO.....APPELLANT

-VERSUS-

NGERE TEA FACTORY LIMITED.....RESPONDENT

(Formerly PMCC Civil Case 69 of 2006 Milimani Commercial Courts, Nairobi)

JUDGEMENT

INTRODUCTION

1. The Appellant filed Civil Case No. 69 of 2006 in Thika claiming:-

- a) An order that the Appellant be allowed to deliver his green leaf to the Respondent and/or its agents immediately and the same be accepted by the Respondent and/or its agents.**
- b) General damages for loss of income.**
- c) The costs of this suit**
- d) Interest on (b) at court rates from 7th January, 2002 until payment in full.**

2. He pleaded that over the years as a tea farmer and a member of the Respondent Tea Factory, his green tea leaf was always been delivered to the Respondent Company through Kandeto collection Centre which Centre operates under the management of the Respondent and whose activities involve accepting, weighing and recording the green tea leaf from tea farmers before delivery of the same to the Respondent Company for manufacturing and sale.

3. The Appellant avers that on or about the 7th day of January, 2002, acting on the instructions of the Respondent Company, the Respondent's clerk at Kandetto collection Centre refused to accept the Appellant's green tea leaf purportedly on the grounds that the Appellant owed the Centre unspecified amount of money and which alleged debt the Respondent has to-date refused and/or neglected to divulge the full particulars thereof to the Appellant despite inquiries made by the Appellant.

4. The Respondent filed defence and denied the claim.

5. The matter went to full trial and same was dismissed with costs.

6. Being aggrieved by the above decision, the appellant lodged instant appeal and set out the following grounds:-

1) *THAT* the Learned Magistrate erred in law and in fact by dismissing the Appellant's suit with costs without having considered the Appellant's evidence most of which had been uncontroverted by the Respondent.

2) *THAT* the Learned Magistrate erred in law and in fact by failing to find that the Respondent had not adduced any evidence or produced any documentary evidence in support of the allegation that the Appellant owed it's management dues or at all.

3) *THAT* the Learned Magistrate erred in law and in fact by failing to find that by denying the Appellant the right to deliver his green tea leaf to Kandeto collection Centre without having given any reasons for that refusal, the Respondent had denied and infringed on the Appellant's right as a tea farmer thus breaching the very tenets of the principles of natural justice.

4) **THAT** the Learned Magistrate erred in law and in fact by disregarding and subsequently dismissing the Appellant's evidence in support of damages for loss of income despite the fact that the Respondent had failed to controvert the same in its evidence in response thereto.

5) **THAT** the Learned Magistrate erred in law and in fact failing to take into consideration the efforts that the Appellant had made to resolve the issue herein prior to the filing lower court suit having made unsuccessful appeals to the Chairman & Directors of the Respondent through his Area Director to be allowed to deliver his green leaf to the Collection Centre.

6) **THAT** the Learned Magistrate erred in law and in fact by failing to find that the Appellant had not defaulted in paying his due to the Respondent if any, and in any case, the respondent had failed to communicate to the Appellant the exact amount owing, if at all prior to the imposition of the ban on his green tea leaf.

7) **THAT** the Learned Magistrate erred in law and in fact by disregarding the Appellant's Counsel's submissions and thus arrived at a wrong decision.

7. The parties agreed to canvass appeal via submissions and the court gave directions to that effect and set the timelines.

8. None of the parties has filed the submissions despite lapse of the agreed timelines.

DUTY OF THE COURT

9. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand.

10. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

EVIDENCE TENDERED

11. PW1, used to deliver his tea to Kandeto tea factory which is managed by the Respondent's company. Ngere tea factory manages Kandeto Collection Centre.

12. PW1, talked to the Chairman Ngere tea factory who referred him to a member. The member promised to convene a meeting but did not do so. PW1 sued Ngere as they gave authority to deliver tea and determine where a farmer delivers.

13. PW1 could not deliver his tea to any other factory as he was registered as a tea farmer at Kandeto Collection Centre by Ngere tea factory. He sued for loss of income at 204, 941/12 based on monthly income and bonuses and on previous earnings.

14. He used to deliver about 145kg per month at 7.50cts then. That from July 1998 to July 1999 he was paid Kshs.25,000/= bonus. That he had lost Kshs.160,000/= in bonuses. He prayed for the amount pleaded and for orders to be allowed to deliver his tea at Kandeto collection Centre.

15. Samuel Njoroge (DW1) said he was the Chairman Kandeto Collection Centre. That the Appellant paid Kshs.4,398/= that there are by-laws that if one does not pay they should be stopped from using the Centre.

16. The decision was made on 25/03/2001 and minuted that Ngere Tea Factory could not compel Kangere Tea Factory to buy tea from farmers.

17. That there are regulations that the farmer contributes to development and they sent a letter to the management that the Respondent had failed to do so and was not allowed to bring his tea to the center.

18. The farmers through Centre's Committee made the resolution. DW2 Josiah Mwangi Nderi the factory unit Manager Ngere Factory testified that buying centers were controlled by the farmers and committee of 5 people elected by the farmers from amidst themselves.

19. That the committee had stopped the appellant buying tea from the center. That the tea is only bought from authorized tea buying centers. That they had an obligation to buy tea from the Appellant but he had to deliver to a tea buying center.

20. The farmers had an AGM deliberated and decided on contributions by members but the Appellant refused to comply.

21. DW2 said that they were informed through a letter that the committee had refused the Appellant from delivering tea to the center. That at no time did the Respondent/Company tell the Appellant not deliver tea to the Respondent.

22. The Appellant informed the factory that he had problem with the buying center vide letter dated 04/02/2002.

ISSUES, ANALYSIS AND DETERMINATION

23. After going through material in court, I find the issues are;

1) Whether appellant proved case on balance of probabilities?

2) What is the order as to costs?

24. DW2 said that the Appellant was wrongly sued by the Respondent as they do not run the buying centers.

25. I have considered evidence on record as adduced by both sides. The Appellant said he sued the Respondent because he was a member of Kandeto tea buying center and they only sold their tea to the Respondent (Ngere tea factory). That authority to deliver tea came from the Respondent Company.

26. The Appellant therefore blamed the Respondent Company that he was not allowed to deliver his tea to Kandeto tea factory.

27. The Respondent on the other hand said they were not to blame as they could not be compelled to buy or not to buy from the farmers.

28. They also argued that the Appellant was not prevented from selling to any other center out of the 78 centers.

29. They also said they never wrote to the Appellant to stop him from delivering tea to the Respondent. I have looked at the exhibit (DEX 1).

30. The by-laws have been headed Ngere Tea Factory Co. Ltd. Meaning the same have emanated from Ngere Tea Factory and relate to tea collection centers.

31. One of the clauses relates to leaf collection center management wherein clause 4:4 deals with monetary contributions and that failure to pay will result to suspension from leaf sales at the tea collection centers until full payment is received.

32. In his evidence, the Appellant failed to address why he did not comply with this clause yet he was aware of the consequences, further, he still did not tell Trial Court whether to-date of hearing of case he had complied for him to seek reinstatement.

33. Although the Respondent denied anything to do with the 'ban' it was clear the by-laws emanated from the Respondent. However, the Appellant had not managed to show that the Respondents were the ones who issued the ban.

34. It was clear from the Appellant's evidence that the Kandeto Tea Collection Centre members resolved to ban the Appellant from delivering tea to the center due to non-payment of management contributions.

35. I do agree with side of defense the Appellant did not show the contract existing between him and the Respondent. The Appellant also by his letter (DEX 4) admitted that eventually got his tea weighed on 07/02/2002.

36. After going through all evidence, I find that the Appellant did not manage to prove his case on a balance of probabilities. Thus the court finds no merit in the appeal.

37. Thus the court makes the following orders;

i. The Appeal is dismissed.

ii. Parties bear their own costs.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

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HON.C. KARIUKI

JUDGE