



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO.38 OF 2012

PETER MURWE KITHURE.....1ST PLAINTIFF

MEME NAFTALY.....2ND PLAINTIFF

DAVID MBURUGU.....3RD PLAINTIFF

Versus

MICHIMINKURU TEA FACTORY COMPANY LIMITED.....DEFENDANT

JUDGMENT

[1] In a Plaint filed on 13th March 2012, the Plaintiffs sought the following reliefs against the Defendant:-

- 1. That the defendant be ordered and directed to reinstate the plaintiff to their respective positions of chairman, secretary and treasurer of the defendant for the remaining period of their terms.**
- 2. That the meeting of 14th March 2012 be cancelled.**
- 3. That the defendants be ordered to pay the plaintiffs general damages.**
- 4. Costs of the suit.**
- 5. Interest at court rates.**
- 6. Any other relief that this court may deem fit and just to grant.**

Plaintiffs' case

[2] The Plaintiffs claim that they were the duly elected officials of Kailune Tea Buying Centre, an affiliate of the Defendant to wit, Chairman, Secretary and Treasurer respectively, for a term of three years from 10th January 2011 to January 10th 2014. On 20th December 2011, one J.N Kungania the logistics coordinator of unit 4 and an employee of and acting on the orders of the Defendant orally informed a members meeting attended by the Plaintiffs that the Plaintiffs were incompetent and useless officials of the unit and ought to vacate office within 21 days so that new interim officials would be elected to replace them.

[3] However, when the matter came up for hearing on 28th July 2016, it emerged that prayer 1 and 2 of the Plaintiff had been overtaken by events as the Plaintiffs had been reinstated as prayed. The parties thereafter agreed that assessment of damages be canvassed by way of written submissions. Thus, no oral evidence was adduced or written witness statements filed by the plaintiffs.

Plaintiffs' submissions

[4] According to the submissions filed by the Plaintiffs, it was not in dispute that that they were elected as officials of Kailune Tea Buying Centre on 10th January 2011 for a term of 3 years which was to subsist until 10th January 2014. They also argued that, on 20th December 2014 (though I believe the plaintiff meant 2011), the Defendant unlawfully terminated their services and new officials were elected. It was contended for the Plaintiff that the parties herein were governed by KTD Management Services (KTDA MS) Tea Factories Buying Center Management By-Laws and that paragraph 14 of the manual shows that the working hours were from 10 AM to 4PM which according to them was a full time job. They also argued that, although not salaried, the committee members were entitled to daily allowances of Kshs 3,000 per day which would translate to Kshs 1,080,000 per year per person or Kshs 3,240,000 for the three years per person. It was further stated that there were other allowances which could not be proved off hand and the Plaintiffs submitted that a figure of Kshs 1,000,000 per person per year would be appropriate. Consequently, the Plaintiffs prayed for damages of Kshs 4,240,000 per Plaintiff for 3 years. It was further submitted in paragraph 5 of the Plaintiff the Plaintiffs were alleged to be incompetent and had embezzled funds. As a result, the Plaintiffs submitted that they were entitled to Kshs 800,000 as General Damages and Kshs 200,000 as Exemplary Damages.

Defendant's submissions

[5] On the other hand it was submitted for the Defendants that the Plaintiffs were removed from office on 20th December 2011, after the committee was dissolved by the tea growers' special meeting. The decision was made after audited accounts showed that there was misappropriation of funds. A care taker committee was then elected.

[6] On the claim for Aggravated, Exemplary and Punitive Damages, it was submitted that the claim was baseless as elected officials were not employees of Kailune Tea Buying Center as they were representatives of tea growers who elected them and they are the ones who dissolved the committee in a special meeting held by the tea growers for embezzlement of funds and the Plaintiffs could therefore not claim damages for unlawful termination. Again no evidence was tendered to show unlawful termination.

[7] In respect of damages for defamation, it was submitted that the Plaintiffs had not tendered their evidence to support the claim for damages for defamation. They stated that the words pleaded in the plaintiff are not defamatory at all. On that basis, they sought this case to be dismissed.

DETERMINATION

[8] The way this case has been canvassed is startling. On 28th July 2016, Mr. Ojiambo, the legal counsel for the Defendant informed the court that the main prayer in the plaintiff had been overtaken by events because the Plaintiffs had been reinstated. Mr. Kariuki, legal counsel for the Plaintiffs stated that they will now have to tackle assessment of damages through written submissions. Then all parties agreed to file submissions in accordance with the directions of the court. Other than what I have stated, there was no formal consent on liability which was recorded. The Plaintiffs did not adduce any evidence whatsoever on liability. The question becomes whether reinstatement of the Plaintiffs amounted to admission of liability. I think not. On this, I am content to cite the decision by Odunga J on the effects of not calling evidence in the case **LINUS NGANGA KIONGO & 3 OTHERS V TOWN COUNCIL OF KIKUYU [2012] eKLR** thus-

“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of

2002 Justice Lesiit, citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani)* HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

The case of *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu* HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 said:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

Damages

[9] Applying the test, have the Plaintiffs proved damages sought? The Plaintiffs’ contention is that though not salaried, the Committee Members were entitled to daily allowances of Kshs 3,000 per day and that there were other allowances which could not be proved off hand. Material relied upon is Paragraph 14 of the *KTDA Management Services (KTDA MS) Managed Tea Factories Buying centre By-Laws* which provides as follows:

“WORKING HOURS

All buying centers shall be opened at 10:00AM or such other time that the company in consultation of the committee and management shall determine the buying centre committee shall ensure that a member of the committee is present at the opening of the buying centre.

It’s the duty of the grower member to deliver green leaf to the buying centre from 10; 00 am up to 4:00pm or such other theme that the company in consultation with the committee and management shall set.

The buying centre shall be closed after all the members who delivered green leaf within the designated time had been served and the leaf loaded to the truck for transportation of the tea factory.”

This document does not support the plaintiffs’ assertion that they were entitled to daily allowances of Kshs. 3,000 or any other allowances. No any evidence was lead to support this claim. In any case, such claim based on specific sums ought to have been specifically pleaded but it was not. Therefore, that claim fails.

[10] The plaintiffs have made a claim of aggravated, exemplary and punitive damages for wrongful termination. The defendant dismissed this plaintiffs’ claim as baseless as elected officials were not

employees of Kailune buying centre but were representatives of tea growers who elected them. The tea growers dissolved the committee through a special meeting held by them. Paragraph 33 of the KTDA Management Services (KTDA MS) Managed Tea Factories Buying centre By-Laws provided as follows:

“all buying centre buying committee members shall be elected by the growers of the buying centre catchment for period of three years.”

The material before the court confirms that Committee Members including the Plaintiffs were elected by growers. The dissolution of the committee was in a special meeting held by the tea growers in accordance with the by-laws. The witness statements herein namely Romano Mugambi, J.N Kuungana and Joseph Karanja who stated in their witness statements that the decision to remove from office the former 5 committee members including the Plaintiff was made by the growers themselves. The said information has not been controverted. There is also no evidence offered to support unlawful termination of employment by the Defendant. Therefore, the Plaintiffs’ claim for General Damages for unlawful termination fails.

[11] The plaintiff, in paragraph 11 of the plaint made a generalized claim that the actions of the Defendant were malicious and has brought the plaintiffs’ name into great public contempt and odium and lowered their reputation in the eyes of right thinking members of the public. They ought to have called evidence to proof defamation. See the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR* where the Court of Appeal observed that:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

“(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.”

The leading English monograph of Gatley on the subject of defamation defines what is defamatory as

“Any imputation which may tend to lower the plaintiff in the estimation of right thinking member of society generally’ per Lord Atkin in *Sim –vs- Stretch (1936) 52 TLR 669, at 671) “ to cut him off from society’ (per *Wilmont C.J Villers –vs- Mosley (1769) 2 Wils 403 at pp403, 404 or “to expose him to hatred contempt or ridicule (per *Parke B. in *Parmiter v Coupland (1840) 6M&W 105 at p 108) is defamatory of****

him .

In its definition of the wrong of defamation the great treatise of Salmond in the field of tort put forward the following definition:

“The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification”.

No evidence whatsoever was adduced to show that the actions by the Defendant constituted malice or brought the plaintiffs into great public contempt or their reputation was lowered in the eyes of the right thinking members of society. In any case, those actions were in compliance with a resolution by the tea growers who elected the plaintiffs as their representatives. I have already discussed the consequences of not calling evidence to prove ones case in the case of **LINUS NGANGA KIONGO (supra)**. Counsels

only filed submissions and made statements of facts which by law require proof. This brings me to state that, short of a clear consent between the parties, mere submissions by legal counsels will not be a substitute to adduction of evidence to prove a case. See the Court of Appeal in the case of **DANIEL TOROITICH ARAP MOI V MWANGI STEPHEN AND ANOTHER (2011) eKLR** that:

“Submissions cannot take the place of evidence. The 1st respondent has failed to prove his claim by way of evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and were are unable to countenance it. Submission are generally parties “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

[12] In conclusion, I need not say more. My overall impression of the entire case points the court to one direction; that the Plaintiffs did not even attempt to prove any of the three prerequisites for a claim of defamation to succeed. They did not also offer an iota of evidence to prove the allowances they received and which they lost due to the alleged termination of services. They left everything to speculation and mere conjecture. In the end result and having come to the above conclusion, I find the Plaintiffs claims were not proved on the balance of probabilities and no damages are awardable. I dismiss this suit in toto. However, from the conduct of the parties who seem to have reached some compromise of sort, I will order each party to bear own costs of the suit. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of April 2017

F. GIKONYO

JUDGE

In the presence of:

Gichuki for B.G Kariuki for plaintiff

M/S Mwiraria for defendant

F. GIKONYO

JUDGE