



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 50 OF 2013

(An appeal from the Judgment of the Principal Magistrate, Runyenjes in Civil Suit No. 22 of 2012 delivered on 12/09/2013)

ABRAHAM MURIITHI NJERU.....APPELLANT

VERSUS

NICHOLAS MWANIKI..... 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY LTD....2ND RESPONDENT

J U D G M E N T

1. This an appeal against the judgment of Runyenjes Principal Magistrate in Civil Suit No. 22 of 2012 delivered on 12/09/2013. The appellant had sued the respondent for a claim of KShs.43,322/= plus costs of the suit and interests which claim was dismissed with costs.
2. The grounds of appeal are that the magistrate dismissed the plaintiff's claim without considering its merits and without giving the plaintiff a chance to explain and prove his case on a balance of probabilities. Secondly, it was claimed that the magistrate erred in failing to consider exhibits availed by the plaintiff during hearing and that he relied on falsified weight of the tea leaves delivered without complying with regulations of Rukuriri Tea Factory Ltd. The appellant alleged that the magistrate relied on the statement of the 2nd defendant's witness which was based on expectation and not on the weight of evidence. Further that the magistrate failed to consider that the appellant had been delivering tea since 2005 until May 2011 without any problem.
3. By consent the parties agreed to dispose of the appeal by way of written submissions which were duly filed. The appellant was represent by Victor Andande while Mr. Kathungu appeared for the 2nd respondent. The 1st respondent did not participate in the proceedings.
4. The appellant submitted that he delivered 800kgs of tea leaves valued to KShs.43,322/= but was never paid. The appellant states that having acted in person, he erroneously enjoined the 1st respondent for he had been told that the non-payment was due to the fact that the lease agreement between him and the 1st respondent was flawed. The magistrate found that the 800kg delivered by the appellant could not be accounted for thus justifying the deduction for payment. It is not in dispute that the appellant delivered 800kg tea leaves which were not paid for. The reason given by the 2nd respondent for not paying the appellant was that there was suspicion that he had falsified the weight. It was further submitted that the court over relied on the issue of the lease agreement between the appellant and the 1st respondent which was improper since the case before court was for payment of Khs.43 322/= being value of 800kgs of tea

leaves.

5. The appellant argued that the 2nd defendant's witness alleged that the appellant's tea plantation could only produce a maximum of 1568 kgs in a year which was based on an assumption without any evidence to support the allegation. The appellant relied on the provisions of Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.

6. In the case of **MUNUNGA TEA FACTORY LTD & ANOTHER VS SUSAN WANJIKU KARANI [2010] eKLR** the court held that *“the legality of the lease agreement was neither here nor there. The issue was not where or how the tea was grown but that tea was delivered at the factory by the plaintiff and received as correct and therefore it ought to have been paid for.”*

7. The 1st respondent urged the court to dismiss the appeal on the ground that the trial magistrate relied on exterior circumstances which had no bearing on the case.

8. The 2nd respondent in his submissions stated that his witness testified that for a farmer to be allowed to deliver tea leaves from a 3rd party's farm he had to provide evidence of a lease between him and the owner of the land with the tea bushes in accordance with the regulations of the factory. In this case, the tea was picked from the plantation of the 1st respondent without complying with the set procedure.

9. The 2nd respondent stated that the alleged agreement produced in court had not been signed by the lessor and neither was it witnessed by an agent of the 2nd respondent as required under paragraph A (6) of the Kenya Tea Development Agency -Tea Growers Registration Certificate. The 2nd respondent argued that the court was right in finding that the 2nd respondent failed to adhere to the regulation and was therefore not entitled to be paid for the tea leaves whose source he could not explain. It was further argued that the appellant did not produce delivery slips to prove that he delivered 800kg of tea leaves and did not explain how he had arrived at the figure of KShs.43,322/=.

10. The duty of the first appellate court was explained in the case of **KENYA PORTS AUTHORITY VERSUS KUSTON (KENYA) LIMITED [2009] 2 EA 212** wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

11. PW1 in his witness statement stated that the 1st defendant is the registered owner of Kagaari/Kanja/1330 on which he had planted 1000 tea stems. On 23/1/2005 he entered into a lease agreement with the 1st defendant where it was agreed that the 1st defendant leases the 1000 tea stems to the appellant for a period of 2 years at a consideration of KShs.20,000/= which the appellant paid in full. The parties agreed that the appellant would be picking the tea and selling the same to Kiathari Tea Buying Center using his membership number RKO/17 103.

12. After the expiry of the lease, the parties renewed the same for a period of 3 years and the payments were made as required. The appellant continued harvesting tea and selling it to the same tea buying center until 24/6/2010 when the 2nd respondent refused to accept the Tea Extension Service Assistant TESA recommendation form for transfer. The 2nd defendant refusal to sign the forms made the tea buying center refuse to pay the appellant his dues. He had already delivered approximately 800 kg worth KShs.43,322/=.

13. DW1 testified that he was a Field Service Co-ordinator assigned to Rukuriri Tea Factory. His duties included ensuring good husbandry and that all picked tea leaves are delivered to the factory in good time.

He testified that the 2nd respondent deducted 800kgs from the tea leaves delivered by the appellant based on the fact that he only had 784 stems which would not produce more kilograms. This was after considering the husbandry practice on the ground.

14. According to DW1, the appellant's tea plantation was expected to produce a maximum of 1568 kgs annually while the appellant claimed that he had delivered a total of 2386kgs. The excess tea leaves for which the appellant did not account for led to a conclusion that there was falsification of the weight of the tea leaves delivered. This led to a resolution by the board of directors of Rukuriri Tea Factory Company Ltd to recover the 800kgs from the appellant's second payment.

15. It was a requirement that the TESA form duly filed by the parties. The 2nd respondent argued that the lease presented by the appellant was not signed by the lessor and was therefore not acceptable. For this reason, the appellant was not entitled to payment of KShs.43,000/=. He further stated that according to the KTDA terms and conditions and the Tea (Licensing, Registration and Trade) Regulations 2008, when the farmer decides to lease tea bushes from another it has to be the entire farm for 3 years or a multiple of 3 years period. The lessor must then call the Tea Extension Services Assistant to verify the number of bushes being leased and subsequently either recommends or rejects the transfer of the tea bushes.

16. If transfer is recommended, the recommendation form is filed and signed by the two parties and witnessed by other growers and the same must also be signed by 5 committee members of the buying center. Both parties are supposed to then take the duly completed recommendation form to the factory where the agreement for lease of a tea plantation is formally prepared, signed by the parties and witnessed by the field services coordinator on behalf of KTDA.

17. The appellant alleges that his case was dismissed without considering its merits and without giving the appellant a chance to explain and prove his case on a balance of probabilities. This is not true as the proceedings clearly indicate that the appellant testified as a witness in accordance with his statement dated 20/4/2012. The appellant also produced several documents in support of his case which the magistrate considered together with all other evidence tendered. It is therefore not true that the magistrate failed to consider the evidence of the appellant in support of his case.

18. The evidence of DW1 on the production of the tea leaves from 784 bushes owned by the appellant was not challenged by any other expert evidence. It is worth noting that DW1 is an expert in tea growing and production.

19. It was held in the case of **DANIEL TOROITICH ARAP MOI VS MWANGI STEPHEN MURIITHI & ANOTHER [2014] eKLR** that he who alleges must prove. The court held:-

"In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act, as follows:-

"107 (1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person....."

20. The issue that arises is whether the trial magistrate erred in finding that the appellant was not entitled to be paid for the 800 kg delivered. The 2nd respondent list of documents dated 21/6/2012, the attached the Board of Directors resolution dated 6/9/2011, the KTDA Terms and Conditions as per the Tea (Licensing, Registration and Trade) Regulations, 2008, the sample sale agreement for lease of a tea plantation and the appellant's tea delivery records. It was resolved that 800 kgs be recovered from the appellant who is member number RK017-0103 for failure to comply with the regulations.

21. The KTDA terms and conditions listed in the term number 6 provides that:-

"where the grower has leased a tea garden, a lease agreement shall be signed between the lessor and the lessee and the particulars therefore verified by the respective factory and a copy of the agreement shall be submitted to the respective factory before accepting the extra green leaf supply"

22. The appellant did not produce any documents to prove that he had sought the required approval for transfer of tea bushes from the 2nd defendant as required by the KTDA regulations. The appellant was a member of the Kathari Tea Buying Centre which was a unit of Rukuriri Tea Factory operating under KTDA. The appellant was therefore bound by the regulations of the agency and failure to comply with the rules was improper.

23. The regulations required the appellant to do the following:-

(a) to have a valid lease agreement duly signed by the parties for a term of three years;

(b) to apply for approval of the transfer of the tea bushes through the TESA form signed by the parties, witnessed by other growers and signed by five committee members of the tea buying centre;

(c) to have the factory formally prepare an agreement to be signed by the parties and witnessed by the Co-ordinator of Field Services on behalf of KTDA.

24. The appellant did not comply with any of the above requirements, a fact which was not denied. Indeed, the appellant produced two lease agreements. The first one was 23/1/2005 and was to run from the 1/2/2006 while the second one was dated 3/01/2007 and was to run for a period of 2 years from 1/2/2007 to 31/1/2008. The requirement under the regulations was for a 3 year term.

25. It is under these flawed agreements that the 800 kg tea leaves were delivered to the tea buying centre. The appellant was paid for the tea leaves but deduction of the amount paid was made when he presented the second agreement for a 3 year period. The case of **MUNUNGA TEA FACTORY LTD & ANOTHER V SUSAN WANJIKU KARANI [2010]EKLR** cited by the appellant is distinguishable from the present case in that the appellant therein had not flouted any regulations. In the present case, it is clear that the appellant flouted the regulations and conditions of KTDA.

26. The magistrate was therefore correct in his finding that the appellant was not entitled to payment of the claim.

27. It is my considered opinion that this appeal has no merit and it is hereby dismissed with costs.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MARCH, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Andande for appellant

Mr. Kathungu for 2nd respondent