



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELC CIVIL APPEAL NO. 228 OF 2010

STEPHEN OGECHI MENGE.....APPELLANT

VERSUS

EVANS MATOKE NDEGE

SABINA KEREBI MAYOYO

WILLIAM MBUGA

ENOCK GECHO

NYANGWESO NYAEMARESPONDENTS

(Being an appeal from the judgment and decree of the Resident Magistrate's Court at Keroka(Hon. A. P. Ndege, RM) delivered on 23rd September 2010)

JUDGMENT

This appeal must succeed although in part only. The Appellant and the Respondents are tea growers. They sell their tea to Nyansiongo Tea Factory Limited which is under the management of Kenya Tea Development Agency Limited. The Appellant and the Defendants sell their tea to Nyansiongo Tea Factory Limited through Kenyoro Tea Buying Centre. Kenyoro Tea Buying Centre is managed by a management committee comprising of a chairman, vice chairman, secretary, treasurer and committee members. The 2nd Respondent is the chairlady of Kenyoro Tea Buying Centre while the rest of the Respondents are Committee members. The affairs of the Tea Buying Centres are regulated by By-Laws. For Kenyoro Tea Buying Centre, its affairs are regulated by the By-Laws which have been enacted by Nyansiongo Tea Factory Company Limited for the Tea Buying Centres falling under its jurisdiction. At pages 36 to 46 of the record of appeal are the By-Laws of Nyansiongo Tea Factory Company Limited under which the activities of Kenyoro Tea Buying Centre were being regulated. At paragraph 4 of their statement of defence in the lower court, the Respondents had averred that their decision which was the subject of the suit in the lower court was arrived at in accordance with the rules and regulations of Nyansiongo Tea Factory Co. Ltd.

In the lower court, the Appellant had challenged the decision that was made by the Respondents at a General Meeting of the members of Kenyoro Tea Buying Centre on 17th November 2009 barring him from selling his green tea leaves through Kenyoro Tea Buying Centre. According to the letter dated 17th November 2009 that was written to Nyansiongo Tea Factory Company Ltd by Kenyoro Tea Buying Centre, the Appellant was barred from selling his green tea leaves through Kenyoro Tea Buying Centre because he had stopped the members of Kenyoro Tea Buying Centre from using a communal cattle dip

which he claimed to be situated on his land. The Appellant contended in the lower court that the Respondents said decision was wrongful, unlawful and oppressive. The Respondents on the other hand contended that the said decision was lawful.

When the suit came up for hearing in the lower court, the Appellant gave evidence and called one witness, Pauline Kerubo Oyugi (DW1). The Appellant told the court how he was barred and prevented by the Respondents from selling his green tea leaves through Kenyoro Tea Buying Centre for the reason that he had stopped them from using a cattle dip. The Appellant's witness (PW1) on the other hand told the court that she received a letter from Kenyoro Tea Buying Centre informing Nyansongo Tea Factory Company Ltd of the expulsion of the Appellant from Kenyoro Tea Buying Centre and the reason for the action.

PW1 told the court that she wrote to the Respondents informing them that a member of Tea Buying Centre could only be punished for breaching Tea Buying Centre By-Laws and not otherwise. She stated that she informed the Respondents further that the cattle dip on account of which they had expelled the Appellant had no relationship with buying and selling of tea. The 2nd Respondent gave evidence on behalf of the Respondents. She admitted that they had expelled the Appellant from Kenyoro Tea Buying Centre because he had denied the members of Kenyoro Tea Buying Centre access to a communal cattle dip. She stated that the decision to expel the Appellant from Kenyoro Tea Buying Centre was made by members at their Annual General Meeting.

The case was heard before A.P Ndege- RM who dismissed the same with costs on 22nd September 2010. The learned trial Magistrate held that the Appellant had failed to prove that his expulsion from Kenyoro Tea Buying Centre was unlawful and that he had also failed to prove special damages which he had claimed.

The Appellant was dissatisfied with the decision of the learned Magistrate and preferred an appeal to this court. The decision of the learned Magistrate has been challenged on four (4) grounds which are set out in the Memorandum of Appeal dated 15th October 2010 as follows:

- 1. The learned Magistrate erred in fact and in law by failing to appreciate that the Appellant had proved to the required standard that the Respondents had wrongfully denied and/or blocked the Appellant from selling his green tea leaves through Kenyoro Tea Buying centre NS 50.**
- 2. The learned trial magistrate erred in fact and in law by failing to consider any of the compelling evidence adduced by the Appellant at the trial.**
- 3. The learned magistrate erred by disregarding and failing to take into account credible and reliable evidence presented by the Appellant.**
- 4. All in all, the learned Magistrate misdirected himself on matters of both law and fact as to occasion miscarriage of justice against the Appellant.**

The main issues which were before the trial magistrate for determination were two (2) namely, whether the expulsion of the Appellant from Kenyoro Tea Buying Centre was lawful and secondly, whether the Appellant had suffered any damage and as such was entitled to compensation. On the first issue, it was common ground that the affairs of Kenyoro Tea Buying Centre were regulated by Nyansiongo Tea Factory Company Limited, Tea Buying Centres By-Laws. The Appellant had contended that his expulsion from the Kenyoro Tea Buying Centre was not carried out in accordance with the said By-Laws. The Respondents on the other hand had contended to the contrary. The learned trial magistrate had the relevant By-Laws on the court record. The learned trial magistrate had in fact referred to the said By-Laws in his ruling that was delivered on 27th April 2010 on an interlocutory application. I don't know what further proof the learned trial magistrate wanted the Appellant to adduce in relation to those By-Laws. Looking at the said By-Laws, there is no doubt that the Respondents acted unlawfully. There was no By-law allowing a Tea Buying Centre to bar a member from selling tea through a centre on account of

an act not related to the activities of the centre. The learned trial magistrate fell into error in not finding that the Respondents' action was unlawful and should have been restrained.

On the issue of damages, the Appellant had sought damages. It is not clear from the plaint that was filled in the lower court whether the damages sought were general or special. However in his evidence, the Appellant told the court that his claim was for special damages. On this issue, I am in agreement with the finding of the trial magistrate that special damages must be pleaded and specifically proved. I am also in agreement that the evidence that was placed before the trial magistrate fell short of proving special damages that had been sought by the Appellant.

The upshot of foregoing is that the Appellants appeal succeeds in part. Consequently, I hereby make the following orders;

- i. The judgment and decree of A.P. Ndege- RM made on 23rd September 2010 dismissing the Appellant's suit with costs is hereby set aside and in place thereof there shall be judgment for the Appellant against the Respondents for a permanent injunction restraining the Respondents jointly and severally by themselves or through their employees or agents from denying, blocking, objecting to and/or interfering with the selling of the Appellants green tea leaves through Kenyoro Tea Buying Centre NS 50 save for reasons which are set out in the Tea Buying Centre By-Laws.
- ii. The appeal against the trial magistrate's refusal to award damages to the Appellant is dismissed.
- iii. Each party shall bear its own costs of the lower court suit and this appeal.

Signed at Nairobi this.....day of2016.

S.OKONG'O

JUDGE

Delivered, dated and signed at Kisii this 15th day of April 2016.

J.M. MUTUNGI

JUDGE

In presence of

.....for the Appellant

.....for the Respondents