



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL APPEAL CASE NO. 12 OF 2012**

**JOHN MURIITHI KATHENGE.....PLAINTIFF**

**AND**

**KIMUNYE TEA FACTORY CO. LTD.....DEFENDANT**

**JUDGMENT**

1. This is a declaratory suit filed by **JOHN MURIITHI KATHENGE** the plaintiff herein against **KIMUNYE TEA FACTORY CO. LTD.**, the defendant for the following reliefs namely:

*a. A declaration that the defendant's decisions contained in letters dated 11<sup>th</sup> April, 2012 and 11<sup>th</sup> September, 2012 were unprocedural, irregular, illegal, null and void.*

*b. A permanent injunction restraining the defendant through its authorized agents, employees and/or directors from implementing the decisions contained in the said letters.*

*c. Costs of the suit.*

2. The plaintiff in his plaint dated 24<sup>th</sup> October, 2012 pleaded that he is a tea growing farmer and a member of Kiangwenyi Tea buying centre and that in September, 2012 on an unspecified date, he received a letter dated 11<sup>th</sup> April, 2012 notifying him that the defendant had taken the following adverse decisions against him namely:

*i. Suspending him from delivering his tea at Kiangwenyi buying centre.*

*ii. Deactivation of his number for a period not less than 3 months.*

*iii. Stopping him as a committee member.*

3. The plaintiff further claimed that he received another letter dated 11<sup>th</sup> September, 2012 asking him to refund Kshs.42,330/= to the Kiangwenyi Tea Buying centre. The two letters infuriated the plaintiff who felt that the same were unprocedural, illegal, null and void. As a result he filed this suit against the defendant.

4. The defendant denied the plaintiff's claim vide its defence dated 7<sup>th</sup> December, 2012. The defendant clarified that the letter referred by the plaintiff as dated 11<sup>th</sup> April, 2012 was incorrectly dated owing to

typographical error and that the same ought to have been correctly dated 11<sup>th</sup> August, 2012. The defendant justified the contents of the letters saying that the same were legal, proper and procedural. The case then proceeded to full hearing.

## **5. The Plaintiff's Case**

In his evidence in court, the plaintiff testified that he was a chairman of Kiangwenyi Tea buying centre which he said was under the management of the defendant. He told this court that he got the two letters referred above specifying that action had been taken against him before being accorded a chance to be heard as per the by-laws. He opined that the contents of the letter breached the by laws regulating the activities of the buying centre and its members in that the suspension period indicated on the letter was indicated to be no less than 3 months while the by-laws stipulated a suspension of a period not exceeding 3 months.

6. It was submitted that the disciplinary action taken by the defendant was unprocedural because the grievances against the plaintiff were not directed to the buying centre committee as per the by laws governing the defendant and its members including the plaintiff. The plaintiff submitted through his counsel Mr. Maina Kagio Advocate that the defendant conceded in their defence that the plaintiff was not accorded a chance to be heard and this in his view contravened Article 43 of the by-laws which was produced by the defence as Defence Exhibit 3.

7. The defendant was also faulted for writing to the plaintiff to refund Kshs.42,330/= vide a letter dated 11<sup>th</sup> September, 2012 (produced as Plaintiff Exhibit 2) before taking accounts and establishing the veracity of the loss of the money submitting that the letter was written in bad taste.

8. The plaintiff denied assaulting an employee from Kimunye Tea Factory known as Jane Wangu and challenged the defendant to provide proof. He submitted that the court action stopped the defendant from surcharging him for money which he denied having misappropriated arguing that there was no money lost as the defendant did not make any report to the Police regarding any misappropriation of funds.

## **9. Defence Case**

The defendant called one witness in their defence. The witness called was Obeid Oute Onduso who told this Court that he was a factory manager of the defendant. He told this Court that on 9<sup>th</sup> August, 2012 as one of the defendant vehicles was going to collect tea leaves from Kiangwenyi Tea Buying Centre, plaintiff assaulted a defendant's employee working as a clerk and gave the name of the employee as Jane Wangu. The witness further told this Court that a board meeting was convened on 10<sup>th</sup> August, 2012 where a decision was reached to suspend the plaintiff and that a letter dated 11<sup>th</sup> August, 2012 was done informing the plaintiff that he had been suspended for 3 months though he conceded that the said letter erroneously indicated that it was dated 11<sup>th</sup> April, 2012. He however, clarified that the contents of the letter talked of events that took place on 9<sup>th</sup> August, 2012 which was material to the reason for the suspension.

10. The defence further justified the contents of a letter dated 11<sup>th</sup> September, 2012 asking the plaintiff to refund Kshs.42,330/= stating that the company had received a letter from Kiangwenyi Buying Centre dated 8<sup>th</sup> September, 2012 complaining that the plaintiff could not account for the stated amount. The letter was produced as Defence Exhibit 3. The amount stated was said to have been collected from members and the plaintiff was accountable as the chairman of the buying centre.

11. When cross-examined by the plaintiff's counsel, the defendant's witness conceded that the by-laws provided that a member was entitled to be heard before a disciplinary action was taken against him or her. He confirmed that the plaintiff faced discipline and sanction for the assault of their clerk and that he was not called to defend himself before action was taken. He however, stated that the plaintiff was later found to be innocent in regard to missing funds as no money was found to be missing after reconciliation of the accounts. The defendant submitted that it could not be blamed on the question of a letter dated 11<sup>th</sup>

September, 2012 because the complainant was buying centre – Kiangwenyi Buying Centre where the plaintiff was its chairman. In its view the plaintiff should have sued the buying centre if it felt aggrieved by its letter dated 11<sup>th</sup> September, 2012.

12. The defendant in its submissions through Messrs. Joe Kathungu Advocate stated that the defendant's disciplinary action was justified in view of what the plaintiff had done in its buying centre.

13. Issues for determination

The issues in this suit as framed are fairly simple. They are as follows:

- i. Whether the plaintiff was accorded a chance to be heard on the grievances facing him before action was taken.
- ii. Whether action taken against him was irregular, unprocedural and illegal.
- iii. Who should bear costs.

14. On the first issue the defendant admitted that the disciplinary action was taken against the plaintiff without according him a chance to be heard. I have looked at the by-laws governing the operations of the defendant and its relationship/transactions with its buying centres and members. Article 43 of the by-laws clearly shows elaborate Disciplinary Processes which *inter alia* provides as follows:

***“Every person shall be given an opportunity to be heard before any disciplinary action is taken against them. Such opportunity may be oral or written presentation.”***

This was clearly breached by the defendant. It is also apparent that the defendant breached the plaintiff's constitutional right to a fair administrative action as per **Article 47 (1)** of the Constitution which provides as follows:

***“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” (emphasis added).***

The defendant's action in the light of the two impugned letters which I find to have been administrative in nature did not meet this constitutional threshold.

A right to be heard before action is taken is a basic rule of natural justice and the defendant cannot really escape sanction for breaching this basic rule of natural justice imbedded in our Constitution and the by laws enacted or drafted by the defendant itself and other stakeholders. In the premises I find that the defendant was at fault in condemning the plaintiff without affording him an opportunity of being heard. As a matter of fact considering what later transpired after accounts were reconciliated, it is obvious that had the defendant afforded the plaintiff a chance to be heard, before taking the drastic action it took, perhaps this suit would not have been necessary as all the issues would have been clarified and thrashed out. The management of the defendant in my view appeared to have hurried in taking disciplinary action and in their haste overlooked its own by-laws, the constitutional provisions and the rules of natural justice. In that regard the defendant was clearly wrong.

15. I also find that the letter dated 11<sup>th</sup> April, 2012 was irregular and even if it was correctly dated 11<sup>th</sup> August, 2012 as submitted by the defendant. This is because the by-law provides that a member facing disciplinary action may be suspended for a period not exceeding 3 months but the letter indicates that the plaintiff had his membership deactivated for a period “not less than 3 months” which obviously is erroneous and although the suspension was not carried out, the plaintiff had legitimate concerns to feel aggrieved.

16. The defence submissions that the decision to suspend the plaintiff was justified is not convincing to this Court. In the first place, there was no evidence tendered that the plaintiff had assaulted an employee

of the defendant or anyone at the buying centre. I find that there was no report made to the Police regarding the alleged assault because the alleged assault was a crime and any responsible person is obligated to report occurrence of crime in the nearest Police Station. There was no evidence that this was done by the defendant or any of its employees. The employee purportedly assaulted was not called to testify on behalf of the defendant thereby casting serious doubts about the allegations of assault. The action that the defendant took against the plaintiff was not justified in any way.

In view of the evidence tendered in this case, this Court finds that the Plaintiff has proved his case against the defendant to the required standard in civil law (which is on a balance of probabilities.) I therefore enter judgment for the Plaintiff against the defendant as follows:

i. That this Court declares that the defendant decisions contained in the letters dated 11<sup>th</sup> April, 2012 (or 11<sup>th</sup> August, 2012) and 11<sup>th</sup> September, 2012 were unprocedural, irregular and unlawful. The same are nullified.

ii. The Plaintiff shall have costs of this suit.

***Dated and delivered at Kerugoya this 19<sup>th</sup> day of May, 2016.***

**R. K. LIMO**

**JUDGE**

19.5.2016

Before: Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Macharia holding brief for Maina for plaintiff

Igati Mwai holding brief for Kathungu present.

**COURT:** Judgment signed, dated and delivered in the open court in the presence of Macharia Advocate holding for Maina and Igati Mwai holding for Kathungu advocate for the defendant.

R. K. LIMO

**JUDGE**

19.5.2016