REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 98 OF 2008

ABDUL MAJID SULEMAN ……APPELLANT

Versus

NYAKI FARMERS CO-OPERATIVE SOCEITY LTD. ....RESPONDENT

JUDGMENT

The Appeal

[1] This is an appeal arising from the award of the Co-operative Tribunal delivered on 24th September 2008. The Memorandum of Appeal carries eight (8) significant grounds of Appeal to wit:-

> **1) That the Co-operative Tribunal erred in law and in fact in not awarding judgment as claimed while the evidence on record and the proceedings in High Court Civil Case No. 220 of 2001 showed clearly that the Respondent had actually admitted the claim.**
>
> **2) That the Tribunal erred in law and in fact in not conclusively determining the issues which it had been called upon to determine by the parties to the dispute.**
>
> **3) That the learned members of the Tribunal erred in law and in fact in not ascertaining the payment rate for the cherry and mbuni for the crop year 1998-1999.**
>
> **4) That the learned members of the Tribunal erred in law and in fact in accepting the Respondent's version of the "crop year" story having found as a fact that the Respondent's main witnesses had cooked up the story.**

5) That the tribunal erred in law and in fact in finding that the claimant/Appellant was dishonest merely on the basis of a clerical error which the Respondent had rectified on the spot.

6) That the leaned members of the Tribunal misdirected themselves in law and in fact in awarding the Claimant/Appellant a mere shs. 31,885/99 on the face of the uncontroverted evidence of the Appellant and the contradictory evidence of the Respondent's witness.

7) That the judgment/award of the Tribunal made on the 24th September 2008 is against the weight of the evidence and the law.

8) That the Tribunal erred in law in reading the judgment on 24th September 2008 after hearing the case on 20th June 2007 more than 13 months later.

[2] The Appellant is seeking for the judgment by the Co-operative Tribunal to be set aside and be substituted thereof by the judgment of this court.

Analysis

[3] I will carry out the duty of this court of re-evaluating the evidence adduced before the Tribunal except I am minded that I neither saw nor heard the witnesses herein. Except ground No 8, all the other grounds of appeal herein are inextricable; I will, therefore, consider them together in light of evidence as recorded by the Tribunal and the submissions of the parties. I will, however, render myself on each ground proffered.

Was claim admitted by Respondent?

[4] The Appellant has argued that the claim herein was admitted by the Respondent prior to the filing of the primary case herein. According to the Appellant the admission of the claim is found in the letter dated 31st July 2001 (appearing at Page 19 of list of documents filed before the Tribunal). The letter was in reply to the letter dated 7th March 2001 that was written by the Appellant to the Respondent- the letter appears as No. 7 in the list of documents filed in the Tribunal on 23rd March, 2007. The Appellant claims that the Respondent admitted deliveries and amount claimed and confirmed that it will pay the said amount once it gets funds. According to the Appellant that was admission of the claim of Kshs. 1,601,968.25. He also urged that when all these are read together with Rate Circulars at page 20 and 21, advance payments receipts and official receipt amount to prove of case on balance of probabilities.

But what does the evidence say?

[5] The Appellant testified before the Tribunal on 20th June 2007. He told the Tribunal that he delivered 213,586 kilos of cherry and 8,584 kilos of Mbuni. He received three payments in Kshs. 353,060 on 11th June, 1999; Kshs. 407,480 on 30th June, 1999; and Kshs. 315,575.45 (which he clarified to be Kshs. 351,577.45). The last payment was made during the pendency of the case in the High Court and was by the order of the court. He said that he went to see Mr. Kathurima the Chairman of the Respondent on 31st July 2001 who convened a meeting of the whole committee and members of society. In the meeting, they requested the Appellant to give them some time so that they can first pay the small scale farmers as money was not enough. The Appellant agreed to the request but demanded that it be put down in writing, thus, the letter dated 31st July, 2001 in response to his dated 7.3.2001. During the meeting he also received the circular at page 20 of the bundle filed before the Tribunal. The Appellant said that after taking into account the last payment, i.e. Kshs. 351,577.45,his claim would be a sum of Kshs. 1,250,392.80. The Appellant insisted in cross-examination that his calculations are based on the circular issued by the

Respondent. He also insisted that there is no first crop and second crop. He refuted claims that 7th July 1999 was the demarcation date for the 1st crop. He stated that the Respondent kept on changing its years at whim and that is why they told him that the last date was 31st October 1999 and followed up on other farmers on that basis up to 30th October 1999. He denied the suggestion by Mr.Kiambati that he delivered only 106,091 kilos.

[6] Wilson Mwathe member no. 2201 testified as CW No. 2. He said that he delivered 9,102 kilos of cherry to the Respondent. He received a total payment of Kshs. 96,845 which was at the rate of 10.64 a kilo. His last delivery was on 5th July, 1999. He confirmed that all farmers were paid except the Appellant. The payment he was referring to was of up to July 1999.

[7] Mr. Kiambati testified for the Respondent and denied receipt of 213,586 kilos of cherry during the year 9th July, 1998 – 30th June 1999. He, however, acknowledged that the Respondent received delivery of 106,091 kilos of cheery during that year. He produced MPRI. He said that during that year many members including the Appellant delivered cherry totaling to 262,114 kilos and rate of payment was 10.64. They also received cherry amounting to 106,995 kilos during the period of 7th July, 1999 – June 2000. Mbuni for 1998/1999 was 854 kilos at the rate of 17.80 at Kshs. 15,201/20. In 1999/2000 Mbuni delivered was 3584 kilos worth 60,820/48 so total sum due to the Appellant is Kshs. 1,091,415/22 less payments made of Kshs. 1,112,117.45 which is an overpayment by Kshs. 20,702.23. He said this is a normal occurrence between the society and its members which is a factor of continuous service to and from members. He said that those calculations are based on universally accepted Member Transaction Systems. He also stated that the coffee Industry is regulated by the Coffee Act which set seasons. Each year coffee is processed, sold and paid for separately. He produced documents to support his testimony and the Respondent's defence.

[8] In cross-examination, Mr.Kiambati agreed that the Appellant had delivered 106,091 kilos and 106,995 kilos in the 1998/1999 and 1999/2000 respectively making a total of 213,086 Kgs. He arrogantly said that he did not add the figures and he needed not to. He also admitted that he wrote the letter dated 31st July 2000 after the claimant had seen the Manager on the same date. He also admitted having received the letter dated 7th March 2001 and undertook to pay the debt. He said that he did not file audited accounts with the Tribunal. He also said that Wilson delivered his coffee on 5th July and was paid at 10.64 while the claimant brought his coffee on 5th July and 7th July and was paid Kshs. 1,250,392.50.

Overall impression

[9] Now, considering the foregoing evidence there are some clear matters that arise. First, the witness for the Respondent admitted that the Appellant delivered 106,091 kilos in the year 1998/1999 and 106,995 Kilos in the year 1999/2000. The total of the two deliveries is 213,086 kilos. In fact he confirmed that the total kilos received from the Appellant were 213,086 at the rate of 10.64. He, however, claimed that the Respondent paid for the entire delivery of 213,586 kilos. From the record and documents produced before the Tribunal the total sum that they paid during the period 1998/1999 and 1999/2000 was Kshs. 1,112,117.45 vide cheques No. 001090 for Kshs. 353, cheque No. 1625 of Kshs. 407,480 and deposit of Kshs. 351,577.45. It is clear that the rate applicable at the time was 10.64 for cherry and 17.80 for mbuni for Kithoka and the circular Ref. NYK/COMM/CORP/VOL. 2/1 by the Respondent is clear. Deliveries of 106,995 kilos of Cherry and 3,264 kilos of Mbuni were admitted by the Respondent. The Respondent did not also deny that it received deliveries of 854 kilos of Mbuni in 1998. The Respondent did not claim to have paid anything towards these deliveries. The Tribunal discarded rates that the Respondent through Mr. Kiambati purportedly were applicable to the deliveries made for 1999/2000; doubted and rejected document "MPCR 2000" for it seemed to have been tampered with. The Appellant, on the other hand, clearly stated that the applicable rate was as communicated in circular dated 15th November 2000. The Circular was availed. Now, with such evidence of admission of delivery

and receipts, which were not denied, and in the absence of any evidence to the contrary, it was blatantly wrong for the Tribunal to have dismissed the Appellants claim without regard to the evidence adduced. The Appellant stated clearly that the Respondent kept on giving varying rates for payment and at different times. In the absence of any evidence to the contrary, I find that the applicable rate for the deliveries made of 213,086 kilos of cherry was 10.64 and 17.80 for Mbuni for Kithoka factory where the Appellant delivered coffee. *(See evidence by Wilson).*

[10] The Tribunal also committed another grave error on crop year. It began by stating that:

> **"Neither party produced any document indicating when the so called crop year begins or ends. Claimant's documents 20 and 21 which are not denied by the Respondent have referred to crop years 1997/98 and 1998/99."**

And went on to make assumptions that were not based on anything as follows:-

> **"This clearly proves that the claimant was aware that payment was based on a crop year. If the same was based on a calendar year i.e. January to December, there would have been no need to split the years. The said documents would have simply referred to crop year 1997, 1998 etc."**

From what the Tribunal stated and the evidence produced, crop year was not an issue that was before them for determination. The Tribunal based its decision on speculation, inferences and conclusions that were not supported by evidence. The matter of a decision being devoid of or lacking anchorage in or is not supported by evidence is a matter of law; and such decision is wrong only amenable to be set aside. This is the obtaining position here. I have considered all the evidence adduced and I am not able to come to any conclusions as that the crop year to which the debt herein falls was an issue for determination by the Tribunal. Indeed, nothing makes crop year any issue for determination before the Tribunal. Courts have said time and again that issues for determination must always emanate from pleadings filed or evidence adduced by parties and not from ingenious craft or imagination of the Tribunal or judicial organ exercising quasi-judicial or judicial function. The wrong Tribunal made wrong assumption and so set out on a path that was completely off the road to justice. As a consequence, the Tribunal was preoccupied with crop year until it trumped everything as falling under so called crop year 1998/1999 and concluded that everything was paid for and in full. Matters became headlong when the tribunal totally ignored all the deliveries made up to October 1999 totaling to 106,995 despite clear admission of these deliveries by the Respondent during the trial. The Tribunal laid too much emphasis on the crop year aspect until they lost focus on the claim before them for all deliveries made by the Appellant from 12th April 1999-October 1999. It was a blatant error for the Tribunal to have denied a claim that had been proven on a ground which the Tribunal took upon itself without the backing of pleadings and evidence before them. The entire decision, in so far as it was based on the "crop year" obsession was a travesty of justice. I should state that the circumstances of the case are different from those in the case of **CA No. 283 of 196 – David Begine vs Martin Bundi.** That distinction is important as the Respondent seems to have put too much reliance on the said case.

[11] The submissions by the Respondent that the claimant purported to claim payment for the year 1999 to 2000 which was premature is without any basis as no evidence was led to support such assertion. The Appellant testified, and it is clear from record that the Respondent did not have specific and static times that define crop year and the applicable rate of payment. The purported evidence on purported 1999/2000 crop year and the purported applicable rate was discarded by the tribunal as it had been tampered with and therefore unreliable. See also evidence of the Appellant's witness 2. No evidence on the cut-lines for the early and late harvests or yields that was adduced by the parties and as a matter of law; it was not a matter in issue before the Tribunal. Section 2 of the Coffee Act will not come into play in a dispute unless facts and evidence say that crop year is the issue at hand. The Tribunal itself found that no evidence was led towards that end. I should say that this was a case of pure admission of a debt arising from delivery of coffee. Therefore, in light thereof, estoppel from attacking the Tribunal's finding on

crop year does not arise as was argued by the Respondent. I also have to re-state here that the claim by the Appellant cannot by any stretch of imagination be unjust enrichment as the Respondent has submitted. It was not shown to be fraudulent; the Appellant has not received a benefit that will enrich him unjustly; the Appellant has not been so enriched at the expense of the Respondent; and in the circumstances it would not be unjust to allow the Respondent to retain the benefit. The doctrine of unjust enrichment clearly does not apply in this case. Indeed, by allowing the Respondent to keep the sum owed herein as the Tribunal did is what amounts to unjust enrichment of the Respondent.

[12] Accordingly, the Appellant proved its case on balance of probabilities and produced receipts of delivery of 213,086 kilos of cherry, 854 kilos of Mbuni (1998 and 326 kilos of Mbuni (1999) *(See receipts from page* 3 *– 16 of the Appellants list of documents filed in the Tribunal);* The Respondent admitted the debt as tabulated in the demand letter dated 7th March, 2001. *See their letter of admission dated 31st July 2001.* The letter was written after a meeting had been convened by the Respondent on this debt on 31st July, 2001. Mr. Kiambati's evidence was just evasive; contrast his evidence in chief with cross-examination. In sum, I find that the applicable rates for coffee delivered herein in 1999 is Kshs. 10.64 for cherry and 17.80 for Mbuni for Kithoka factory where the Appellant delivered his coffee. See circular dated 15.11.2000. The claim for Mbuni delivered in 1997/1998 was governed by rates set out in Circular dated 8.7.1999. This fact is very clear from evidence and it is not clear where or what the difficulty was there for the Tribunal not to have granted the prayer thereto. I, therefore, find that the rate applicable for Mbuni delivered in 1997/1998 is 30.63. *See circular dated 8.7.1999.*I also find that the total cherry supplied which constitutes the debt herein is 213,086 kilos, Mbuni is 3284 for 1999 and Mbuni for 1998 is 854 kilos. The evidence shows that there was an error in the tabulations by the Appellant when he claimed for 213,586 kilos. There was also an error as to the period of the deliveries. It was indicated to be from 20/6/1999 to 28th September 1999 yet it was from 12th April 1999 to 28th September 1999 for the entire delivery. This error was easily discernible and remediable because the receipts produced and other records of the parties showed this fact. The Respondent also admitted that the total cherry delivered was 213,086 i.e. 106,091 during 1998/1999 crop year and 106,995 during 1999/2000 crop year. These corrections were placed before the Tribunal. The Tribunal was able to discern these things but somehow it placed unnecessary weight on the errors to deny the Appellant relief. The Tribunal also noted that addition for Mbuni delivery for 1999 was 3264 and not 3764 as indicated in the letter dated 7th March 2001 after receiving evidence of the parties. But yet again the Tribunal used the error to deny the Appellant relief. The Tribunal also became obsessed with "crop year issue" until it failed to determine the issue before it i.e. debt owing for all deliveries admitted by the parties less payment made. It limited itself to what it called 1998/1999 crop year and discarded all other evidence of deliveries received by the Respondent.

Determination of each ground of appeal

[13] The following is determination of each ground of appeal.

Ground 1

The Co-operative Tribunal erred in law and in fact in not awarding judgment in favour of the Appellant despite the overwhelming evidence adduced before it.

Ground 2

The Tribunal erred in law and in fact in not conclusively determining the issues which it had been called upon to determine by the parties to the dispute. Instead it showed unexplained fetish and fervor for ''crop year'' and completely missed the points in issue.

Ground 3

The Tribunal erred in law and in fact in not ascertaining the payment rate for the cherry and Mbuni for the crop year 1998-1999 despite clear evidence before it on the matter.

Ground 4

That the learned members of the Tribunal erred in law and in fact in accepting the Respondent's version of the "crop year" story having discarded evidence by the Respondent.

Ground 5

The tribunal erred in law and in fact in finding that the Appellant was dishonest merely on the basis of a clerical error which the Respondent had rectified in good time. The error was explained and the Tribunal also found it was an error yet it went ahead to deny the Appellant remedy on that basis. Such errors even if it had not been explained could not have amounted to any dishonesty in the absence of proof of intention to mislead the Tribunal. The best it could have become in the circumstances of this case is a technicality for which substantive justice would not be denied.

Ground 6

The Tribunal misdirected itself in law and in fact in awarding the Appellant a sum of Kshs. 31,885/99 without any basis save on the obsession of ''crop year''- a matter that was not available for determination as an issue. It was a creation of the Tribunal and made it completely veer off the course of justice especially given the evidence of the Appellant and the contradictory evidence of the Respondent's witness.

Ground 7

The judgment/award of the Tribunal made on the 24th September 2008 is against the weight of the evidence and the law.

Ground 8

The long age adage- justice delayed is justice denied- has gained expression as a principle of justice under article 159 of the Constitution. Therefore, prolonged delay in delivery of judgment would certainly be a denial of justice. Ordinarily, judgment should be delivered within reasonable period after the close of the case. And laws on procedure have provided for time of delivery of judgment by a court as an indicator as to what is reasonable time which is normally a maximum of 60 days from the close of the case. Therefore, the Tribunal committed a judicial error in delivering judgment on over 13 months after the close of the case on 20th June 2007. This is a travesty of justice. But the appeal has not been determined on this ground.

[14] In totality, the appeal succeeds in its entirety. I hereby set aside the judgment of the Tribunal and substitute thereof with judgment in favour of the Appellant and against the Respondent in the sum of Kshs. 1,239,374.81 which is made up as follows:-

(a) Cherry delivered between April 1999 and September 1999

213086 Kilos x 10.64 ……Kshs. 2,267,235.04

(b) Mbuni delivered between September 1999 to October 1999

3264 kilos x17.80 ……Kshs. 58,099.2

(c) Mbuni for 1998

854 kilos x 30.63 …….....Kshs. 26,158.02

TOTAL……Kshs. 2,351,492.26

Less paid…….…… Kshs. 1,112,117.45

Net total…… Kshs. 1,239.374.81

Dated, Signed and Delivered in open court at Meru on the 24th day of November, 2015

F. GIKONYO

JUDGE

In the presence of

Mr. B.G. Kariuki for appellant

Mr. Muthomi for respondent

F. GIKONYO

JUDGE