



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 11 OF 2010**

**ELIZABETH WANGARI MUIGA.....APPELLANT**

**VERSUS**

**JOHN CHEGE NJIRU.....1<sup>ST</sup> RESPONDENT**  
**JOSEPH KARIUKI MBUTHIA.....2<sup>ND</sup> RESPONDENT**

*(Being appeal against the judgment of D. A. Orimba, Senior Resident Magistrate in Kangema Senior Resident Magistrate's Civil Case No. 143 of 2009 delivered on 20<sup>th</sup> August 2010)*

**JUDGMENT**

On 20<sup>th</sup> January 2010, Hon. D. A. Orimba, learned Senior Resident Magistrate, dismissed the Summons dated 19<sup>th</sup> December 2009 vide **Kangema S.R.M.C.C. No. 143 of 2009**. **Elizabeth Wangari Muiga**, the appellant herein, was not happy hence she filed this appeal. On appeal, she put forward the following grounds in her Memorandum of Appeal:

1. ***That the learned trial magistrate erred in law and fact in failing to find that the Appellant had established a prima-facie case to warrant granting of the orders sought in her application dated 19<sup>th</sup> October 2009.***
2. ***That the learned trial magistrate erred in law and in fact in failing to find that the act of the Respondents of denying the Appellant right to sell her tea through TURU TEA COLLECTION CENTRE was occasioning the Appellant irreparable damage as she has nowhere else to take her tea leaves.***
3. ***That the learned trial magistrate erred in law in considering irrelevant facts in arriving at his decision.***
4. ***The learned trial magistrate erred in law and in fact in failing to find that the balance of convenience was in favour of the Appellant as opposed to the Respondents.***
5. ***The learned trial magistrate erred in law and in fact in failing to find that the Appellant presented before the court cogent evidence to warrant the granting of the temporary orders prayed for in the appellant's application dated 19<sup>th</sup> October 2009.***
6. ***The learned trial magistrate erred in not considering the submissions and authorities submitted on behalf of the Appellant.***

When the appeal came up for hearing, learned advocates appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions.

Before delving deeper into the merits or otherwise of the Appeal, let me set out in brief the case

that was before the trial court. The substantive matter before the trial court is the plaint dated 19<sup>th</sup> October 2009, in which the Appellant herein sought for judgment against John Chege Njiri and Joseph Kariuki Mbuthia, the Respondents herein, in the following terms:

- (a) A permanent injunction restraining defendants by themselves, their agents and or servants from preventing the Plaintiff from delivering tea leaves in respect of grower No. GRO6-0262 at Turu Tea Buying Centre.**
- (b) Payment of Ksh.24,500/=.**
- (c) Costs of the suit.**

The Respondents filed a statement of defence to deny the Appellant's claim. The Respondents filed a statement of defence to deny the Appellant's claim. The Respondents contended in paragraph 6 of their defence that they acted within their mandate by preventing the Appellant from delivering tea to Turu Tea Collection Centre until the debt owed to the collection Centre was settled. The Appellant appears to have contemporaneously filed the Summons dated 19<sup>th</sup> October 2009 in which she prayed for *interalia* a temporary order of injunction to restrain the respondents from preventing her from delivering her tea to Turu Tea Collection Centre pending the hearing and determination of the suit. The application was opposed by the Respondents who relied on the replying affidavit of John Chege Njiri. The Summons was heard *inter partes* by D. A. Orimba, learned Senior Resident Magistrate. On 20<sup>th</sup> January 2010, the learned Senior Resident Magistrate, delivered his ruling in which he dismissed the Application. In the ruling, the trial Magistrate found as a matter of fact that the Appellant and her husband were members of Turu Tea Collection Centre. He also found out that there was a sudden increase in the number of Kilogrammes delivered by the Appellant while there was a marked decrease in the number of Kilogrammes delivered by the Appellant's husband. The learned Senior Resident Magistrate dismissed the Appellant's application on the basis that the By-laws of the Tea Collection Centre were applied to address the Appellant's complaint.

On my part I have reconsidered the affidavit evidence tendered before the trial court plus the submissions on record. There is no doubt that the Appellant is a member of Turu Tea Collection Centre being grower No. G.R.06-0262. It is also not in dispute that she was prevented from delivering tea leaves to the aforesaid centre on 30<sup>th</sup> June 2009. It is her submission that the Respondents acted unlawfully. The Respondents on the other hand have complained that the Appellant had conducted herself in a dishonest manner hence they were entitled to act in the manner they did. It is alleged that the Appellant's husband owes Turu Tea Collection Centre a sum of Ksh.50,000/=. It is said that the Appellant's husband has refused to repay the loan nor deliver his tea but has instead delivered his tea through the Appellant. I have also perused the Leaf Collection Centre By-laws for Gatunguru Tea factory Co. Ltd. and it is clear from the provisions of clause 6.1 that the respondents were entitled to suspend the appellant from delivering tea leaves to Turu Tea Collection Centre if there is evidence to show that she acted in a manner to falsify green leaf sales. I have also looked at the Grower statements of Elizabeth Muiga and that of Bernard M. Kamau, the Appellant's husband. It is apparent from the aforesaid annexures that Bernard Kamau was making no deliveries of tea leaves whereas there was a marked increase of the amount of tea delivered by the Appellant. Having re-evaluated the evidence on record, let me now address each of the grounds of Appeal vis-à-vis the submissions filed by each side.

On the first ground, it is argued that the learned magistrate erred when he failed to hold that the Appellant had established a *prima facie* case. The Respondents are of the view that the Appellant had failed to establish a *prima facie* case hence the trial magistrate could not find that issue in her favour. On my part, I have re-evaluated the material placed before this court and the court below. There is no doubt that the Appellant subscribed to be bound by the Leaf Collection Centre By-laws of Gatunguru Tea Factory Co. Ltd. the Respondents executed the decision of the members of the Turu Tea buying Centre made on 30<sup>th</sup> June 2009 by suspending the Appellant from delivering tea leaves to Turu Tea Collection Centre. In the plaint, the Appellant simply applied for an order of injunction. She did not seek for an order to quash the decision. With respect, I am convinced the Appellant had miserably failed to establish a *prima facie* case before the trial court.

In the second ground of Appellant, the Appellant has alleged that the trial magistrate had failed to notice that she would have suffered irreparable loss hence he should have given her the order. The Respondents on the other hand are of the view that the kind of loss the Appellant is likely to suffer was self-inflicted in that she decided to go against the By-laws of the tea buying centre hence she has herself to blame. I have considered the rival submissions. It is not denied that the Applicant will suffer some loss if the order is denied. The question is whether or not the loss is irreparable? In my view, I do not think the anticipated loss is irreparable. Looking at the statement provided, one can easily determine in monetary terms the value of the tea supplied. It is not therefore true that the Applicant will suffer irreparable loss. In any case, an order for injunction is an equitable remedy. He who comes to equity must come with clean hands. In this appeal, there is clear indication that the Appellant has not come to court with clean hands. The tea collection centre appears to have conducted some investigations and found her to have colluded with her husband to deprive Turu Tea Collection Centre from receiving tea leaves from Bernard Kamau in order to deduct a loan the latter owed the tea buying centre. That is a conduct of person a court of equity will not countenance. In ground 3, the Appellant has cried foul stating that the trial court considered irrelevant factors. The Appellant is of the view that the Court had taken into account the allegation that the Appellant's husband had mismanaged the Tea Collection Centre's accounts. With due respect, the record does not reflect that the trial magistrate considered such an issue. The submission therefore flies on the face of record. Grounds 4 and 5 talks about the issue touching on the consideration of the principle of a balance of convenience. In my view, that principle can only be taken into account where the court is in doubt. The recorded evidence shows that the trial magistrate was not in doubt. In the circumstances, he was not bound to consider that principle.

In the end, I see no merit in the appeal. The same is ordered dismissed in its entirety with costs. In short, the application did not meet the requirements of granting orders of injunction as enunciated in the case of **Giella =Vs= Cassman Brown**.

***Dated and delivered at Nyeri this 15<sup>th</sup> day of July 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Karweru holding brief for Muchiri for the Appellant and Mr. Ndirangu holding brief for Miss mwai for Respondent.