



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 69 of 2008

GATHUTHI TEA FACTORY CO. LTD.....1ST APPELLANT/APPLICANT
DANIEL MWANGI MAINA2ND APPELLANT /APPLICANT
LINUS KINGORI NODE.....2ND APPELLANT /APPLICANT
POLYCARP WATHUTA KANYUGO.....2ND APPELLANT /APPLICANT

VERSUS

CHARLES KAMUNYA KANUHI.....1ST RESPONDENT
PETER WACHIRA WAGURA.....2ND RESPONDENT
(Appeal arising from the judgment of E. J. Ogoro, Senior Resident Magistrate, in Chief Magistrate's Civil Case No. 716 of 2005 delivered on 7th August 2008 at Nyeri)

JUDGMENT

On 7th August 2008, Honourable E. J. Ogoro, learned Senior Resident Magistrate, delivered her judgment in favour of **CHARLES KAMUNYA KANUHI** and **PETER WACHIRA WAGURA**, the 1st and 2nd Respondents herein, vide **NYERI C.M.C.C. NO. 716 of 2005**. In that judgment, the Respondents were awarded damages for loss of income for 8 months plus costs of the suit. Being aggrieved by the decision, **GATHUTHI TEA FACTORY CO. LTD.**, **DANIEL MWANGI MAINA**, **LINUS KINGORI NDOGE** and **POLYCARP WATHUTA KANYUGO** being the 1st, 2nd, 3rd and 4th Appellants herein, preferred this appeal.

On appeal, the Appellants put forward the following grounds in their Memorandum of appeal:

1. ***“The Learned trial magistrate erred in law and in fact in holding that the Appellants failed to communicate to the Respondents the decision to suspend them from delivering their tea, yet it is the respondents who attached a copy of the notice of suspension to their pleadings.***

2. ***The learned trial magistrate further erred in law and in fact in rejecting the Appellants’ defence that the respondents were either present or represented in the meeting that resolved to suspend them from delivering tea, were given an opportunity to respond to the charges leveled against them, and were therefore aware of the decision.***

- 2.

3. ***That the learned trial magistrate erred in law and in fact in rejecting the appellants’ evidence on the service of the notice to suspend the respondents from delivering their tea.***

- 3.

4. ***The learned trial magistrate erred in law and in fact in her failure to appreciate that the claim for damages for lost crop was a special claim which ought to have been quantified, specifically pleaded and proved before the same could be awarded.***

4. ***The learned trial magistrate erred in law and in fact in quantifying and awarding damages that were not proved by the Respondents.”***

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

I have reconsidered that the case that was before the trial court plus the written submissions filed herein. The history leading to the filing of this appeal began when the Respondents herein filed a suit against the Appellants by way of the Plaint dated 27th September 2005 in which they sought for judgment in the following terms:

- (a) ***Injunction restraining the defendants from preventing the Plaintiff from picking and marketing their tea to the 1st defendant through Kigogoini Tea leaf collection centre and an order lifting the suspension.***

- (b) ***Damages for lost crop and damage to the Tea bushes.***

(c) *Costs of this suit.*

The Appellants filed a defence to deny the Respondents' claim. The 2nd – 4th Appellants and the respondents are members of Kigogoini Tea Buying Centre while the 1st Appellant is the tea factory through which the tea from Kigogoini Tea buying Centre is processed and sold. It is apparent from the evidence on record that 2nd – 4th Appellants were officials of Kigogoini Tea Buying Centre at the time of filing suit. The dispute before the trial court was that the Respondents had been unlawfully suspended from delivering their green tea leaves to Kigogoini Tea Buying Centre without any written communication. The respondent alleged that as a result they suffered loss and they claimed for damages against the Appellants and for an order lifting the suspension. After hearing the case, the learned trial Senior Resident Magistrate found the case in favour of the Respondents. The Appellants have now come before this Court on appeal in which they seek to upset the decision. Though the Appellants have put forward a total of five grounds of appeal, those grounds can be summarized to two grounds. The first ground is a combination of grounds 1, 4 and 5. There was a complaint that the Appellants did not serve the respondent with a written notice of suspension. The trial magistrate found as a matter of fact that the decision to suspend the Respondents was not communicated to the Respondents. The Respondents are of the view that the Appellants were enjoined to show that they served the notice of suspension which burden the Appellants failed to discharge. It is the submission of the respondents that the Appellants had failed to prove that the Respondents were present or represented. I have critically re-examined the recorded evidence and I have come to the following conclusion. It is clear from the record that the Respondents testified and told the trial court on oath that they were present in the meeting held on 11th February 2005, when the verbal decision to suspend the respondents was made. The learned trial Senior resident Magistrate therefore came to an erroneous conclusion. The Respondents were aware of the suspension, the reasons for the suspension and the period of the suspension. It would also appear that the by-laws of Kigogoini Tea Buying Centre does not expressly state that the office bearers of the Kigogoini Tea buying Centre to put into writing all decisions made by the growers. It is obvious from the minutes (annexure C.K.1) that the Respondents were aware of the period of suspension. The learned trial Senior Resident Magistrate therefore erred when she made an award of damages for loss of income covering the period between February to September 2005.

Another issue which was not given due attention by the learned Senior Resident Magistrate is the claim on lost crop. In my view such a claim is a special claim which can only be quantified by an expert, particularly an agricultural officer. The recorded evidence does not show that the Respondents called for the evidence of an expert to prove their claim of loss nor did they produce any documentary evidence of previous earnings. The award was therefore not quantified nor specifically pleaded nor proved.

The second ground is a combination of grounds 2 and 3. There is evidence that there were members who refused to pay the agreed levies on the basis that Kigogoini Tea Buying Centre was on a road reserve. That issue was substantively discussed in the meeting of the tea growers held on 11th February 2005. The recorded evidence shows that those members apologized save for the Respondents. The Respondents were then suspended for a period of two months. The Appellants through the evidence of D. W. 1 and D. W. 2 show that at the lapse of the two months suspension, the Respondents were requested to deliver their tea. With respect, I agree with the submissions of the Appellants that the trial Senior Resident Magistrate erred when she rejected the Appellants' evidence. The appellants were entitled to suspend the Respondents under the by-laws.

In the end and for the above reasons, the appeal is allowed. The judgment of the trial court is set aside and is substituted with an order dismissing the suit. Costs of the appeal and the suit are awarded to the Appellants.

D Dated and delivered at Nyeri this 7th day of October 2010.

J. K. SERGON

JUDGE

In open court in the presence of Kimunya holding brief J. Macharia for Respondents. No appearance for Mwai for Appellants.