



**REPUBLIC OF KENYA**

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

**Civil Appeal 113 of 2003**

**STEPHEN KIBOI MWANIKI ..... APPELLANT**

**Versus**

**THE CHAIRMAN**

**THE SECRETARY NJOGUINI TEA BUYING CENTRE.... RESPONDENTS**

**THE TREASURER**

*(Being an appeal from the judgment and orders of*

*M. R. GITONGA, Senior Resident Magistrate in the Chief Magistrate's Civil Case No.351 of 2002 at NYERI)*

**JUDGMENT**

The appellant was the plaintiff in CMCC Nyeri No. 351 of 2002. He filed his case against the officials of Njoguini Tea Buying Centre. He pleaded in his claim that he was member No. 51 of that centre. That he grows 3900 tea bushes on parcel no. TETU/TAHATAHA/10. He pleaded that the tea buying centre had without reasonable cause or lawful excuse denied him the right to deliver tea leaves to the said centre. The tea buying centre in its defence stated that the appellant flouted their rules and regulations and hence had been suspended from delivering his tea leaves. The lower court after hearing the case dismissed the appellant case. The appellant being aggrieved filed this appeal. The appellant presented the following grounds:-

- 1. That the learned magistrate erred in law and in fact in dismissing the appellant case while the same was strong and meritorious.*
- 2. That the learned magistrate erred in law and in fact in relying solely on the evidence of the defendant while ignoring strong evidence adduced by the appellant.*
- 3. That the learned magistrate erred in law and in fact in solely relying on the by-laws of Njoguini Tea Buying Centre while ignoring strong evidence adduced by the appellant.*
- 4. That the trial magistrate erred in law and fact in not considering that the by laws spelt out unjustified severe punishment.*
- 5. That the learned magistrate erred in law and in fact in not considering that the appellant is suffering and has continued to suffer irreparably.*

In evidence the appellant stated that he was a farmer and that he grew tea. He said that he delivers his tea leaves at Njoguini Tea Buying Centre. He had delivered his tea since 1996. He delivers five hundred kilograms monthly. He however had not delivered tea since his suspension. That the tea buying committee had alleged that his trees were damaging the tea of John Thumbi. The alleged tea which was allegedly being destroyed by the trees did not however belong to Njoguini Tea Buying Centre. It was in April 2002 that the committee wrote to him and since then he had not delivered his tea at the centre. On being cross examined he confirmed that he was aware of the existence of the by laws of the centre. He said that his neighbour's tea bushes were 15 metres away. He confirmed that he was given notice to cut down the trees by the Chairman of the centre. He also confirmed that the tea bushes had been affected by the trees that were growing nearby. He however said that the AGM of the center should not have suspended him from delivering the tea. He said that that suspension was without reasonable excuse. The chairman of the tea buying centre in defence stated that the centre is managed by tea growers to facilitate selling their tea. The centre is in Nyeri. The tea is taken to Gathuri Tea Factory. The centre has 76 members. It has its own by-laws. He confirmed that the appellant was suspended from taking his tea to the centre because he had contravened the centres by laws. Specifically that he had contravened Clause 6(f) and Clause 3(c). The appellant was given warning of his contravention by a letter dated 6<sup>th</sup> April 2001. That letter was given by the tea extension assistant. He said that John Thumbi is a neighbour of the appellant. The trees of the appellant were offending John Thumbi. The appellant was given another notice by a letter dated 7<sup>th</sup> July 2001. He failed to comply with it. By a General Meeting held on 6<sup>th</sup> April 2002 the appellant was given a notice to comply within one month and in default to be suspended from delivering his tea. On being cross examined he stated that the appellant's trees were mature. That they had been growing on the appellant's boundary. The tea that was growing at the boundary was drying up. He then stated:-

***“I assume the plaintiff was allowed to grow the tea with the trees being there”.***

He stated that all members of the centre had agreed to be governed by the by laws. The path between the appellant's boundary and his neighbour Ndungu was 10 feet. He said that the tea of Ndungu was next to the trees. DW 2 was John Ndungu Thumbi. He said that he was a farmer of tea and was a neighbour to the appellant. That the appellant's trees were growing too close to his tea bushes. He had been a neighbour to the appellant for forty years. The appellant had grown tea for more than 20 years. He himself had planted 1500 tea bushes but 50 had dried up because of the trees. That the tea bushes on his farm were 10 ft away from the trees. He said that he was aware that the tea buying centre had by laws that the general meeting had disciplinary powers over its members and accordingly it suspended the appellant from delivering his tea. He said that he required the appellant to cut down his trees. In cross examination he confirmed that the plaintiff planted his tea before 1986. That he himself planted his tea in 1986/87. His tea was affected in the year 2000. DW3 was the tea extension officer with Gathuri Tea Factory. She stated that her duties were to give technical advice to farmers. In that regard she was seconded to Njoguini tea centre. In that capacity she had worked for 3 years. She was aware that there were trees on the appellant's land which were between Appellant's boundary and Ndungu's tea bushes. She stated that the trees had affected Ndungu's tea bushes because of their roots and leaves. She had visited the appellant's land and also Ndungu's farm. Following that visit she issued the appellant with a letter and also talked to him about the effect of the trees on the tea. He however failed to cut the trees down. In cross examination she confirmed that the appellant planted his tea in 1986. That the trees had been planted earlier than the tea bushes. Mr. Ndungu had planted his tea in 1986/87. She was not aware whether the appellant had been requested to cut his trees when Ndungu planted his tea bushes.

It is clear that all the grounds of appeal raised in this appeal can be dealt with together. The appellant is a member of Njoguini Tea Buying Centre. The centre is regulated by by-laws. The parties in this action accept that all members were bound by those bylaws. The respondent relied on two clause of those by laws to support their suspension of the appellant from delivering the tea. They relied on clause 3(C) and 6(f) which provides as follows:-

***3(C). Any member who refuses to cooperate with other members or shows disrespect with other members shall be suspended for a period which should be determined by the growers of the centre.***

**6(f). All trees at the boundaries should be 10 metres away from the tea bushes.**

The respondent contention is that the appellant trees are not in conformity with clause 6(f) which provides that the trees in the boundary should be 10 metres from the tea bushes. It should however be noted that when DW 1 the Chairman of the tea buying centre in evidence said:-

**“..... the plaintiff’s (the appellant) tea bushes should be 10 metres from the boundary.**

The respondent evidence clearly shows the confusion in their evidence viz a viz the by-laws. The by-laws state that the trees at the boundary should be 10 metres away from the tea bushes. It is not clear what that clause provides. Is it that the appellant’s tea bushes should be 10 metres from the trees or is it that the appellant’s trees should be 10 metres away from his neighbours tea bushes? The by-law in that clause 6(f) is not clear. The learned magistrate in her considered judgment erred in giving effect to that clause which was not clear. She stated in her judgment as follows:-

***I consider evidence on both sides it is contended that the defendants had no locus standi to restrain the plaintiff from delivering his coffee through Njoguini Tea Buying Centre. I consider this issue carefully. I find that the plaintiff admits he is a member of the said centre. Its objectives have been spelt out. There are by-laws governing the members of the society. The witness Ndungu Thumbi (DW 2) is also a member of the said centre. In my opinion both the plaintiff and Thumbi are rightfully governed by the by-laws of the society. Any decisions emanating from the society as long as they be properly channeled; are binding to members. The plaintiff seeks to continue delivering his tea through the same centre whose rules and regulations he does not want to bind him. This is ridiculous. He was issued sufficient notice and he failed to comply or respond. Even after a general meeting which the plaintiff admits he was aware of, he still ignored the situation. I find that the suspension is in order and within the ambits of the by-laws governing the members.”***

I find that the plaintiff on a balance of probability proved his case for an order restraining the tea buying centre from refusing to accept delivery of his tea leaves. It should be noted that the respondent in evidence did not show how the appellant had contravened Clause 3 (c). In view of the fact that the by laws as stated before are not clear on where the responsibility lies in respect of trees that are planted the appellant cannot be said to be bound by the same. Accordingly the Judgment of this court is as follows:

1. *The judgment of Nyeri CMCC No. 351 of 2002 dated 19<sup>th</sup> May 2003 is hereby set aside.*
2. *Judgment is hereby entered for the appellant that is an injunction is hereby issued in favour of the appellant restraining the respondent from denying the appellant the right to have his tea leave received by the Njoguini Tea Buying Centre.*
3. *The appellant is awarded costs of Nyeri CMCC No. 351 of 2002 and the costs of this appeal.*

***Dated and delivered this 27<sup>th</sup> day of January 2009.***

**MARY KASANGO**

**JUDGE**