



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
Civil Appeal 127 of 2003

GILBERT AGATA NYAMWAYA APPELLANT

VERSUS

MOTURI OIRERE

REUBEN OMWANDO MANYINSA

**NYAGECHANGA MBOKO
RESPONDENTS**

ONDIEKI OKWORO

JUDGMENT

The appellant GILBERT AGATA NYAMWAYA sued the four Respondents for general damages arising from loss of sale of his tea leaves. He and his wife QUNDEUSIA NYAMWAYA (PW2) testified. He told the court that the four defendants were officials of Nyaochi Tea Buying Centre. Appellant was a tea farmer with about 1,980 tea bushes and was delivering his tea leaves to that centre. On 17th February 1997 he wrote and informed him they had stopped him from delivering tea leaves to that centre on allegation that he had uprooted tea bushes of his sister in law one ESTHER BOTA NYAMWEMBA (DW1). For four months he was not delivering tea leaves. He said he was delivering between 250 to 300 kg of tea leaves per month. He therefore lost earnings of four months. By the time he was allowed to pick tea the bushes had overgrown and he had to cut them. It took him another 3 months to start harvesting.

The Respondent filed a defence denying the allegation and stating that appellant was only stopped in a general meeting from delivering tea picked from the shamba of her sister in law. None of the four however testified in court. Instead it was the appellants sister in law who testified and stated that appellant had indeed uprooted her tea bushes.

In her judgment the magistrate made a finding that the appellant indeed proved he was barred from delivering his tea leaves for four months. She however stated that the respondents in the submissions had raised an issue that they could not be sued in their personal capacity as they were bearers of a corporate entity. Mr. Masese submitted that this was not pleaded anywhere.

Indeed the magistrate considered extraneous issues which he should not have considered to arise at his judgment. The four respondents in their defence never raised the issue that they were wrongly sued. They never even raised a preliminary objection on that point before the case started or at any time. Worse still none of them took the witness box and claim they were wrongly sued; and allow himself to be cross examined. They could not raise that issue in submissions when they did not do so in their pleadings or even in their evidence. The magistrate clearly erred to take that point into consideration and dismiss the

appellants claim on the same.

The dispute between the parties was the barring of the appellant from delivery his tea leave by the respondent and the damages be suffered. It was not whether he uprooted his sister in law's (DW1) tea bushes or not. The dispute had therefore nothing to do with ownership of land as Mr. Minda submitted. If there was such a dispute it would have been between the appellant and her sister-in-law – (DW1). Provisions of Land Registered Act therefore do not apply.

The court found that the respondents actually barred the defendant from weighing his tea leaves. The Respondent did not go to court to contravert his evidence and that of his wife. Mr. Masese submitted that court should have found in his favour and proceed to assess damages. The court did find in his favour on that point. However no damages are awardable. Appellant claim is for general damages. However it is clear from his evidence he knew exactly what he lost. He said he was delivering between 250-300 of tea leaves per month. It would not have been difficult to calculate the kilograms he lost. Also he could easily find out how much was being paid per Kilo at the time and calculate the amount of money he lost. In short the Appellants claim was that of special damages and not that of general damages. It is trite law that special damages must not only be clearly pleaded but also strictly proved. The appellant neither pleaded the special damages in his plaint nor did he prove the same. Thus even if the court found otherwise no damages would be awarded. It will be futile therefore to order the court to assess damages. He did not prove his case to the extent that he did not prove general damages.

In the circumstances I find appeal has no merit and dismiss it. However since as I have stated the appellant proved he lost his tea leaves I will order each party to bear his own costs in this appeal and the court below.

Dated this 12th day of April 2005

KABURU BAUNI

JUDGE

Mr. Ogutu H/B for Sichangi for Respondent

N/A of Appellant