



REPUBLIC OF KENYA



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**Kabuu v Chinga Tea Factory Company Limited (Civil Appeal  
E005 of 2021) [2025] KEHC 4482 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4482 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E005 OF 2021  
DKN MAGARE, J  
APRIL 7, 2025**

**BETWEEN**

**HARUN KAGWI KABUU ..... APPELLANT**

**AND**

**CHINGA TEA FACTORY COMPANY LIMITED ..... RESPONDENT**

*(Appeal from the Judgment and decree of Hon. M.N. Munyendo  
(PM) dated 6.1.2021 arising from Othaya CMCC No. 37 of 2019)*

**JUDGMENT**

1. This is an appeal from the Judgment and decree of Hon. M.N. Munyendo (PM) dated 6.1.2021 arising from Othaya CMCC No. 37 of 2019.
2. The Memorandum of Appeal dated 1.2.2021 raised the following grounds:
  - a. The learned magistrate erred in delivering a judgment that was against the evidence.
  - b. The learned magistrate erred in law and fact in delivering a judgment that was against the law.
  - c. The learned magistrate erred in applying extraneous evidence.
3. The plaint dated 8.10.2019 claimed an order that the Respondent should pay the value of the tea leaves delivered by the Appellant. The Appellant averred that he was a duly licensed tea grower under the Crops Act, Grower No. CH0xxxxx, CH0xxxxx and CH00xxxxx. Further, the Appellant entered into contract with the Respondent to grow and supply tea to the Respondent through Kahiagira Tea Buying Centre, Nyakone Tea Buying Centre and Ngaru Tea Buying Centre.
4. It was pleaded that the Appellant supplied under No. CH0xxxxx in September -December 2018, and January 2019; and under No. CH0xxxxx in the months of September – October 2018 and ultimately



under No. CH0xxxxx in the months of September-December 2018 and January – March 2019 and the due and owing payment was Ksh. 1,750,946.35 which the Respondent refused to pay.

5. The Respondent entered appearance and filed defence dated 5.12.2019 denying the averments in the plaint. In particular, the Respondent averred that the Respondent discovered that the Appellant had supplied excess weight of green tea that could not be supported by the number of the registered tea bushes as per the Tea Buying Centre By-laws. The Appellant also owed the Respondent various debts which the Respondents continued to recover over time.
6. The trial court heard the parties and proceeded to render judgment dismissing the Appellant's case on the basis that the Appellant failed to produce lease agreements for the tea bushes to prove his claim. Aggrieved by the finding of the lower court, the Appellant lodged a Memorandum of Appeal hence this appeal.

### **Evidence**

7. During the hearing, PW1 was the Appellant. He relied on his witness statement and produced the documents in the list of documents dated 30.10.2019. It was his stated case that he sold tea and was never paid. He was not paid bonuses for 2017-2018. He was not aware of the by-laws. On cross examination, it was his case that he did not plant the tea bushes, he inherited them. The extension officer could issue a license once he concluded teas census. It was his further case that he was not involved in the audit of 2017-2018. He inherited 1,287 tea bushes in No. CH0xxxxx.
8. On its part, the Respondent called DW1, one Lucy Wanja Mwangi. She introduced herself as the field service coordinator of the Respondent. She was in charge of leaf collection and trained farmers. According to her, teas bush transfer could be done in 3 ways; by transfer, inheritance or purchase. They did verification for leases. She relied on her witness statement and bundle of documents dated 5.12.2019 which she produced in evidence. They did the audit in 2017/2018 year. They visited about 800 farmers. The Appellant had 1,287 bushes which he inherited from his father. They only paid the Appellant for what they saw on the ground. The payments were subject to the money the Appellant was paid in excess which was subtracted.
9. On cross examination, it was her stated case that there were bylaws but she was not aware whether they were published. They did not pay for what was excess. There was no criminal case against the Appellant.

### **Submissions**

10. The Appellant filed submissions dated 17.10.2024 by which it was submitted that he had proved his case to the required standard and the lower court erred in dismissing it. He relied on Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 17.
11. The Appellant also submitted that he had fulfilled the contractual requirement of common intention of the parties to enter into legal obligations that was communicated impliedly or expressly. He cited inter alia *Rose & Frank Co. v J Crompton & Bros Ltd (1923) 2 KB 293*.
12. The Respondent filed submissions dated 8.11.2024 by which it was submitted that the Appellant failed to produce evidence to support the allegations of the existence of leases and the lower court correctly dismissed his case. Reliance was placed on *Michael Rono v Trigaga Tea Factory & Another (20121) eKLR*. Based on this, it was submitted that there was no evidence to show the leases.
13. It was also submitted that the Respondent could not be bound by an agreement they were not privy to. Reliance was placed on *Finance Corporation v Lengetia Limited & Another (1985) eKLR*.



## Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
15. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
16. The duty of the first appellate court was set out in the case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the court in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
17. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
18. This court’s jurisdiction to review the evidence should be exercised with caution. In the case of *Peters vs Sunday Post Limited* [1958] EA 424 , the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
19. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions.
20. The Appellant urged the court to find that the lower court erred in dismissing the suit. This court is entitled to reevaluate by way of a retrial the pleadings and evidence at the lower court. On the prove of the allegations of breach of contract in *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the Court of Appeal stated thus:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part



thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

21. The burden was with the Appellant to prove his case against the Respondent. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

22. A party who invokes the aid of the law and asserts affirmative of an issue has the burden to prove the matters in issue. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

23. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case.

24. The burden of proof also casts upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

25. The question then is what amounts to proof on a balance of probabilities. *Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

26. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is



established on the balance of probability. Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

27. The preponderance of probabilities is degree well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in *Palace Investment Ltd – vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

28. With the above guide, in the instant appeal, the Appellant sought an order against the Respondent to pay the tea leaves delivered. The value of the tea leaves delivered was stated as Ksh. 1,750,946.35. It was the burden of the Appellant to prove the quantities delivered that yielded the claimed amount. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

29. The nature of the Appellant’s claim was also a liquidated sum. The amount was specific and how it was arrived at was important as to enable the court discern the source and import of the claim. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of



a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

30. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the lower court failed to award the sum of Ksh. 1,750,946.35 that was pleaded and proved. In *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

31. Regarding proof of loss, while it is true that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances; that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa*



Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

32. The Respondent's case was that the amount of tea supplied was over and above the number of tea bushes as per the audit. In other words, there is no way the Appellant's tea bushes could have yielded the quantities that he purported to supply. It was also the case of the Respondent that it paid only what the Appellant could justify as per the audit and the bylaws. Further, the Appellant could not be paid because he was in debt and any proceeds were applied towards settling the debt.
33. In my view, it was not in dispute that the Appellant supplied tea that he was not paid. The Respondent also tendered reliable evidence that the Appellant supplied excess quantity of green tea which the number of tea bushes could not support. A party is bound by its pleadings. The Appellant failed in stating the exact quantities that could be justifiably paid. This could have enabled the court to establish whether any amount or whatever amount was due to the Appellant, if any, in relation to the alleged debts with the Respondent. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

“

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

34. The Appellant instead resorted to pleading quantities and amounts that he could not justify by evidence. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and



cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

35. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

36. The quantities of green tea supplied were not pleaded as to enable the court to discern the difference from that which was said to have been over and above the number of tea bushes and so the attempt to prove Kshs. 1,750,946.35 was unsuccessful. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential election petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu & INEC & 3 others consolidated with petitions No. 4 and 5 both of 2023, stated as doth: -

“In *Belgore Versus Ahmed*(2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -

“Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

37. The last aspect is whether the Respondent is entitled to audit and not to pay for excess tea supplied. The parties entered into an agreement where the Appellant was to supply tea from his farm. He ended up supplying tea in excess of the capacity he had. The Appellant was unable to explain the origin of the excess tea. This was the agreement between the parties. There was no agreement to supply tea that the Appellant did not grow. The court cannot make a party avoid a lawful contract they have entered into.



In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR it was held as follows: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

38. While dealing with the question of the supply of excess or unaccounted-for tea, the court, B. Thurairaja Jaden, J had this to say in the case of *John K Waweru & 12 others v Theta Tea Factory Company Limited & another* [2019] eKLR:
24. On the other hand, the Respondent’s position was that there was collusion with the clerks at the tea buying centers and falsification of records. There was no direct evidence of falsification or evidence of any reports made to the police or any disciplinary action taken against the said clerks. However, there is evidence from the Respondents that reflect that the investigations carried out reflected higher quantities of by the Appellants during the questioned period than in the previous or subsequent years.
25. Without sufficient evidence of the tea bushes said to have been leased and from whom, it is difficult to agree with the Appellant’s position that they delivered green tea leaves to the Respondents in excess of their registered tea bushes. The investigations carried out for the period before and subsequent to the period in question as per the evidence of DW1 and DW2 failed to exonerate the Appellants. Without any satisfactory explanation in respect of the excess quantities, the Appellants failed to prove that they indeed had produced the green tea leaf claimed to have been delivered to the Respondents. He who alleges must prove.
39. The evidence on record shows that the licensing covers not only supply but also the number of tea bushes. Producing more than is scientifically possible leads to a conclusion of breach of the agreement between the parties. This is either through result inflation or unauthorized tea. The Appellant did not dispute the finding that only number CH 0050329 had 1,287 as against the registration of 2,337. The other two numbers had no single tea bush, but they produced tea leaves.
40. In the case of *Michael Rono v Tirgaga Tea Factory Ltd & another* [2021] eKLR, R. Lagat-Korir posited as follows regarding excess tea leaves.
55. At the time of the execution of the lease agreements, Section 14 of the Act provided for the registration of a tea farmer with the tea factory that he/she intends to deliver tea to. The Appellant had himself registered as a tea farmer then had his 875 bushes verified and registered. This court finds that the Appellant was aware by conduct, of the requirement for registration and verification of tea bushes.
56. With regard to the lease agreements, there is no evidence on record to show that the 6000 tea bushes that the Appellant produced were verified and registered. There are no verification certificates to show that the 1st Respondent indeed went to the farms and counted the tea bushes to ascertain their number. There is also no evidence on record to show that the



forementioned bushes were registered so that the said tea bushes could be debited to the Appellant's account. The Appellant also confirmed during cross examination that he did not have verification certificates with respect to the tea bushes in the leased farms.

57. The doctrine of privity of contract applies in this case. A Contract cannot confer rights or impose obligations on any person other than the contracting parties, a contract cannot be enforced by or against a third party, which the 1st Respondent clearly is. The effect of this legal principle is that only parties who are privy to a contract can sue to enforce its terms. This position was held in the Court of Appeal case of *Agricultural Finance Corporation Vs Lengetia Limited and Another* (1985) eKLR where the court held that:-
- “As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person nor a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it”.
41. The only tea bushes the Appellant had were 1,287, with a maximum yield of 1,634.5 kg. There was no registration of the other bushes or evidence of their existence. I find and hold that the Respondent was thus correct in finding that the excess tea was unexplained. The purpose of the audit is to ensure that there is no falsification of weights. Further, it avoids theft of tea from other farmers. The Appellant failed in his bid to introduce what he called new evidence. It is thus evident that the Appellant's claim was untenable.
42. The end result is that the Appellant was bound both by the *Crops Act* and the contract to register specific tea bushes. There was no evidence of the source of the extra bushes. The appeal is thus untenable, having found that the court below properly exercised its discretion.
43. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
44. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such



discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

45. In the circumstances of this case, an award of costs of Kshs. 75,000/- to the Respondent is just and proper.
46. In the upshot, I make the following orders: -
  - a. The appeal lacks merit and is dismissed.
  - b. The Respondent shall have costs of the appeal assessed at Ksh. 75,000/-.
  - c. 30 days stay of execution.
  - d. File is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7<sup>TH</sup> DAY OF APRIL, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Magua for the Appellant

Ms. Lucy Mwai for the Respondent

Court Assistant – Michael

