Kibaki v Gathuthi Tea Factory (Civil Appeal 20 of 2018)
[2024] KEHC 16737 (KLR) (2 October 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 20 OF 2018

NIO ADAGI, J

OCTOBER 2, 2024

BETWEEN

CHARLES KINGORI KIBAKI ..... APPELLANT

AND

GATHUTHI TEA FACTORY ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Senior Principal P.M. Mutua delivered at the Chief's Magistrates Court at Nyeri CMCC No. 53 of 2013 on 21st February 2013)

JUDGMENT

Introduction

1. The Appellant (Plaintiff) in a Plaint dated 12/02/2013 and amended on 29/4/2015, claimed that he was a member of the Respondent (Defendant) company and supplying tea under his number GH034 No. 041. The Appellant averred that he was stopped from supplying tea to the company from the year 2001 to the filing of the suit and it subsists. The Appellant averred that the decision by the Respondent to stop the supply of tea from him was unlawful and illegal. The Appellant sought for the following prayers: -

    a. An order for mandatory injunction ordering the Respondent to accept the Appellant's tea under number GH034No.041;

    b. General damages for loss of delivery/use of tea at a rate of 500kg per year for 14 years at Kshs.14 per kilogram with monthly and annual bonus for the said number of years;

    c. Costs of the suit.

2. In opposition to the amended Plaint, the Respondent filed an amended Statement of Defence dated 8/5/2015 in which it averred that on 20th July 2001, its team comprising the Tea Extension Services Assistant and Committee members of Gwakanini Leaf Collection Centre were undertaking a tea bush

census in all the farms in the catchment area and that upon the said team visiting the Appellant's land , he refused them access to his farm and used a crude weapon to chase the team away while hurling insults at them. The Respondent further averred that the Appellant together with committee members of Gwakanini Leaf Collection Centre were invited for a special general meeting to discuss the conduct of the Appellant.

3. At the meeting, it was resolved that the Appellant was to be suspended from delivering his green leaf tea for breaching the By-laws of the said Leaf Collection Centre. The conduct of the Appellant led to him being suspended from delivering his tea to the Respondent until he tenders an apology; which he has never tendered at all. The Respondent also averred that the Appellant's claim was misconceived as he had been delivering tea through his wife Gladys Wacheke Kingori's number - GH034-1117 and thus the Appellant was therefore not entitled to general damages

4. The suit then proceeded for hearing.

Appellant's case

5. PW1, Charles Kingori Kibaki (Appellant) stated that he is a tea farmer from Othaya bearing number GH0340041 and had been in contract with the Respondent since 1985. He was delivering tea to the Respondent up to July 2001 and still holds the number. On 20/7/2007 an officer came to count tea bush at his shamba but he was not there. He found his wife and children who informed him I was not around. My wife asked him what he wanted and he said he wanted to count the tea bushes but he left. When he went home, three people came. These were John Muriuki, Wangare Wachira and Kingori Gichohi (who were all deceased according to the Appellant). He stated that Mukiri asked to count the bushes and when he inquired why he had failed to count the bushes he instructed them to go count and they conducted the census. He stated that the three were not from the Respondent's offices.

   He stated that on 24th July 2007 his tea was declined and was informed that his tea was not to be accepted. He then wrote to the Respondent which letters were produced as PEX.1. He stated that the defendant did not explain why they rejected his tea leaves. He stated that it was not true that he funded people to attack the three and neither has he been charged with chasing anybody.

   He denied being called to a special meeting or being required to apologize anywhere. He stated that he was not served with any documents in the Respondent's list of documents. He stated that he was summoned to a meeting which he attended but did not talk about anything. He stated that he was served another letter summoning him to the buying centre but they did address any issues. He stated that he reported the same to the District Officer who then informed him that he had been suspended for three months. He stated that he had nowhere else to take his tea leaves. He stated that his wife had her own tea bushes and that one is not allowed to harvest tea of another and deliver as their own. He stated that he used to deliver about 500kgs of tea leaves per month. He referred to advice slips which showed cumulative weight per year. He stated that the average price per kg by then was Ksh.15/= per month and bonus was paid at the end of the year. He had not been paid bonus since his tea was rejected. Bonus is declared depending on the market. He relied on a slip of one customer showing bonus of Ksh.41.20 per kg in 2013 and invited the court to rely on it. He was not aware how bonus is calculated. He was charged in Othaya court for causing disturbance but was acquitted.

6. In cross examination, he stated that after his suspension of delivery, his tea leaves bushes were harvested by his brother. He stated that his brother took over without his consent and that the tea bushes were in the land given by their father and that he had planted with his brother. He confirmed that indeed there is periodical tea bush census but denied chasing the census officers. He admitted that he saw Muturi and recognized him as an employee of KTDA in the company of people he did not recognize. He stated that it was not true that he chased them away. He stated that indeed it was wrong for one to chase them

away and that he was unaware that such a person would be subject to disciplinary action. He stated that he did not know about By-laws nor had he seen them nor heard of them. He denied that he was served with a notice of suspension until he apologizes. He stated that the District Officer wrote to him informing him that he had been suspended for three months.

7. In re-examination he stated that he did not see the letter the D.O. was referring to about the alleged suspension. He stated that he was not shown minutes of any disciplinary committee meeting. He stated that he planted the tea bushes with his brother and that he has a right over the tea.

Respondent's case

8. DW1, John Mukii Gathuri stated that he is employed by the Respondent as Tea Extension Officer carrying out tea census, recruit growers. He stated that he knew the Appellant as a grower at Gwakanini tea collection centre. He stated that in 2001 they were conducting tea census for the whole catchment area to establish what farmers have to compare with what they have in their records. He stated that he was the one doing it accompanied by two committee members Mr. Kingori and Mr. Wanjeru. He stated that when the Appellant saw them, he came out with a spear and started abusing them so he advised the committee members to leave. He stated that the committee members met and resolved that the Appellant should apologize. He put the decision before the manger that until the Appellant apologizes that they would not accept his tea. He stated that every tea buying centre has its By-laws. He stated that after a month the brother to the Appellant informed him that they had shared the farm between them and that the tea on the Appellant's side fell on his side and that the request to censure the same was legitimate. He stated that the committee advised him to give a month's leeway to his wife and that he censured the same and gave a number to the Appellant's wife. He stated that the whole farm all the tea bushes were censured and tea being picked and that none is wasted. He produced documents D-exhibit 1,2,3,4,5,6 and 7 as listed on the list of documents.

9. In cross-examination he stated that the Appellant's tea has never been accepted again. That the Respondent has By-laws and that they are held by management of tea committee members. That he did not report to the police the Appellant chasing him as the farmers have their own dispute resolution process. That a wife can have a different tea number from her husband. That the Appellant is not obligated to deliver tea to their factory and can deliver elsewhere such as Brooke Bond. That he was not in possession of the letter conveying the decision not to accept his tea. The bonus price differs from year to year. He was not aware of a criminal case at Othaya court.

10. In re-examination he stated that the Appellant's tea was taken by his brother. He stated that the Appellant in his opinion suffered loss. He stated that the by-laws are kept by the management committee of the buying centre who are independent of them to wit, Gathuthi tea factory.

11. The defence was closed and parties were directed to file written submissions

12. Upon considering the evidence and the submissions and delivered a Judgment on 13/3/2018. In the judgment, the trial court framed two issues for determination;

    a) Whether the decision to terminate the Appellant was justifiable;

    b) Whether the Appellant is entitled to the reliefs sought;

13. On the first issue, the court observed that under Clause 26 of the Tea Buying Centre provides that a grower or committee member violating the By-laws can be suspended from green leaf delivery for a period of six (6) months. The maximum suspension period therefore can only be six months and no more. Clause 44 provides for disciplinary process which require among others, the person be given opportunity to be heard, he be given 14 days to remedy the violation, he be given at least the days to

appear and if absent at least be given written communication of the decision. There was no evidence that the above procedure was followed. That makes any decision made unlawful/unjustified. The committee purported to suspend the Appellant indefinitely until he apologizes yet the maximum suspension period can only be six months. This too made the decision unlawful. The Appellant was entitled to a fair hearing.

14. On the second issue, the court found that the issuance of a Mandatory injunction would serve no purpose considering that the Appellant had no tea leaves to deliver after his were taken over by his brother who was now delivering.

    The trial court also awarded the Appellant Kshs.56,000/- being loss for 4 months (Kshs.14 x 500 x 4) and Bonus of Kshs.28,000/- (Ksh.14 x 2000). The Appellant was also awarded costs of the suit and interest.

15. The Appellant being dissatisfied by the said judgment filed a Memorandum of Appeal herein which raises the following grounds:

    1. That the learned trial magistrate erred in law and in fact in that despite finding that the application/membership and/or denial of delivering of tea leaves to the Defendant was illegal and unlawful he nevertheless failed to grant a mandatory injunction to enable the Plaintiff to deliver his tea leaves to the Defendant.

    2. That the learned trial magistrate erred in law and in fact in wrongly finding that a mandatory injunction would serve no purpose.

    3. That the learned trial magistrate erred in law and in in that despite finding that under the depend anti-by laws one could only be suspended for a period of 6 months he nevertheless wrongly found that the appellant was only entitled to 4 months damages.

    4. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant had proved that he was entitled to the full damages for the entire period under suspension.

    5. That the learned trial magistrate erred in law and in fact in failing to and that the Appellant was entitled to payment relating to bonus at the rate prayed for and period prayed for which the Appellant had proved on a balance of probabilities.

    6. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant was entitled to lost earnings at the rate prayed for and period prayed for which the Appellant had proved on a balance of probabilities.

16. The Appellant prayed that the Appeal be allowed and the judgment be entered in terms prayed for in the Plaint.

Analysis and Determination

17. This being the first appellate court, its role of is settled; to subject the whole evidence to a fresh and exhaustive scrutiny and make its own conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witness first hand. (See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).

18. I have carefully considered the record of appeal, the evidence presented, the rival submissions and authorities cited by each counsel and the issues that the court framed for determination.

19. Before I proceed further, I must pause here and deal with a significant issue that has captured my attention to the entire suit. From the pleadings, the cause of action is founded on a contract for delivery

of green leaf tea between the Appellant and the Respondent. The suit was initially filed in court on 12/2/2013 whereas the cause of action occurred in 2001 or rather on 24/7/2001. This was almost 12 years after.

20. Clearly the suit was statute barred. It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action. It does not require the probing of evidence. All that the Court is expected to do is determine what the law says.

Section 4 (1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides:

> " 4
>
> (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:
>
> (a) actions founded on contract;
>
> (b) .....
>
> (c) .....
>
> (d) .....
>
> (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

21. It is my finding that the cause of action accrued in 2001 and that is the time that time started running. As per section 4 of the *Limitation of Actions Act* the causes of action founded on Contract have time limit of 6 years, time having begun to run in 2001, naturally it would mean it lapsed in 2007.

In the circumstances, the Appellant's claim was statute barred as per Section 4 (1) of the *Limitation of Actions Act* and the trial court did not have jurisdiction to hear and determine it.

Having so held, it, therefore, follows that the hearing and determination of the suit by the trial court was in error. The suit ought to have been struck it out in the first instance.

22. Notwithstanding the above finding, I will examine the merits of the appeal by considering the issues that were framed for determination by the trial court.

Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope. The importance of the need to frame issues for determination was emphasised in Rukidi vs. Iguru and Another [1995-1998] 2 EA 318 .

22. A perusal of the record shows that the learned trial Magistrate framed the following 2 issues for determination: - -

a) Whether the decision by the Respondent to suspend the Appellant was justifiable

b) Whether the Appellant is entitled to reliefs sought.

23. The first issue in my view is an extraneous issue not based on a prayer sought in the claim. The trial court needed to determine whether a mandatory injunction ought to be issued in the circumstances whether or not the suspension was justified.

24. In the case of Kenya Commercial Bank Ltd vs Mwa Nzau Mbaluka & Anor (1998) eKLR where the court stated as follows:-

> "by raising and determining the suit on an issue which was neither pleaded nor evidence adduced on thereby introduced a new cause of action against the Appellant. He clearly went astray and his judgment cannot be left to stand on that account."

25. See also the case of John Kisaka Masoni v Nzoia Sugar Co. Limited [2016] eKLR where the court observed as follows:-

> The Claimant prayed for several remedies during the hearing including some that were not pleaded in the Plaint. Obviously, those prayers that were not contained in the plaint cannot be considered by the court. The only prayers in the plaint which the court has considered are for general damages for unlawful dismissal, costs and interest.

26. I find that the learned magistrate arrived at an erroneous consideration on a prayer that was not pleaded in the Plaint.

The Appellant in his prayers did not seek for any relief or a declaration on whether the suspension was unjustifiable or not. All the Appellant sought for was a mandatory injunction ordering the Respondent to accept the Appellant's tea under number GH034 No.041. The court's duty therefore was to determine whether the Appellant was entitled to that prayer or not. This court will pick up this as an issue for determination in this appeal.

27. The Appellant submits that the moment the trial Court found that the decision to suspend the Appellant and deny him the right to deliver his tea under his number it was natural to follow that to remedy the wrong and the court ought to have found that he was entitled to the mandatory injunction sought and that there was no room for the trial court to advance reasons why it should not remedy that right that was infringed.

28. Having found that the trial court erred in determining an extraneous issue in this matter, the Appellant cannot ride on the trial court's error to claim that which he never sought in his prayers. As already stated, the Appellant did not seek for any prayers regarding the process of his suspension. It would have been prudent for the Appellant to seek appropriate orders regarding his suspension including a declaration order and may be seek for the mandatory injunction thereafter.

29. In my re-evaluation of the evidence on record, I have established that the Appellant admitted in evidence that his brother had taken over his green tea which he was now delivering to the Respondent. Although the Appellant alleges that his brother took over the tea without his consent, he has not disclosed when the brother took over the same and why the Appellant silently sat back and took no action against the brother for such along period. From when the suspension was made on 24/7/2007 and the date of delivery the judgment on 13/3/2018 is almost 11 years and the circumstances might not have been the same. To me the Appellant did not make out a clear case or establish special and exceptional circumstances to enable the court grant the mandatory order sought.

30. I would therefore agree with the trial court's finding that the issuance of a mandatory injunction would serve no purpose considering that the Appellant had no tea leaves to deliver after his was taken over by his brother who had now delivering it for quite a long period now. DW1 also stated that the Appellant's tea had been delivered to the Respondent through his wife Gladys Wacheke Kingori's number - GH034-1117. The Appellant's recourse would rest with him pursuing the issue with his said brother and wife.

Whether the Appellant is entitled to reliefs sought

31. The Appellant sought for General damages for loss of delivery/use of tea at a rate of 500kg per year for 14 years at Kshs.14 per kilogram with monthly and annual bonus for the said number of years.

    This relief as crafted is more of a special damage claim which has to be specifically pleaded and strictly proved. Having perused through the record of appeal, I have not come across any evidence that the Appellant adduced to prove the claim as pleaded.

32. In addition, the Appellant did not also demonstrate any loss he suffered as a result of the suspension. In any event the Appellant waited for over 11 years from the date of the alleged suspension before he even instituted the claim in court.

33. In the judgment, the learned magistrate went ahead and made calculations on the awardable damages for loss and bonus based on figures that were neither pleaded nor specifically proved thereby erroneously arriving at an award of Ksh.56,000/= which was never pleaded or proved. In the case of World Explorers Safaris Limited v Cosmopolitan Travel Limited & another [2021] eKLR, the court held that:-

    > " It is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. This being the case, there was no basis for the court to award sums which were not pleaded in the Plaint. On this ground alone, the appellant's appeal collapses".

34. Accordingly, it is my finding that:

    1. The Appellant failed to prove his case on a balance of probability and the judgment of the lower court is hereby set aside in its entirety and substituted with an order dismissing the suit.

    2. Each party to bear its own costs of this appeal.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF 0CTOBER 2024

NOEL I. ADAGI

JUDGE