REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 26 OF 2019

KIAMOKAMA TEA FACTORY CO. LTD. .... 1ST APPELLANT

KTDA MANAGEMENT SERVICES LIMITED. .... 2ND APPELLANT

VERSUS

KIAMOKAMA TEA GROWERS SACCO SOCIETY LTD .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Obina PM dated and delivered on 5th February, 2019 in Kisii CMCC No. 43 of 2017)

JUDGEMENT

INTRODUCTION

1. This is an appeal from the decision of Hon. Obina PM dated 5th February 2019. The 1st and 2nd appellants were the 1st and 2nd defendant before the subordinate court while the respondent was the plaintiff. I shall refer to the parties in their capacities before the trial court for ease of reference unless the context otherwise admits.

BACKGROUND

2. A brief background of this appeal is clear from the plaint filed in the subordinate court on 2nd February 2017. The plaintiff alleged that they entered into an agreement with the defendants which was to allow all growers who were members of the plaintiff to receive payment for green leaves delivered to the 1st defendant through the farmers accounts held by the plaintiff.

3. The 2nd Defendant by a letter dated 2nd March 2016 confirmed to Ms Co-operative Bank Limited ('*the Bank*') that indeed all tea proceeds for growers who have accounts with the plaintiff will be paid through the plaintiff's account number 011xxxxxxxxx00 held at the Bank. Based on the defendants' confirmation of payment, the Bank advanced the plaintiff financial facility and the plaintiff in turn advanced their members loan facilities.

4. The plaintiff was shocked when the defendants unilaterally and without notice changed the mode of payment of her members to another Sacco without the express instructions of the members. The plaintiff advanced that the defendants' acts were fraudulent, illegal and malicious.

5. The 1st defendant claimed that the plaintiff made a request to receive payment on behalf of the growers for green leaves delivered to 1st defendant through the growers account held by the plaintiff. Vide a letter dated 2nd March 2016 the 2nd defendant wrote to the Bank, and it made it clear on the terms and conditions for the plaintiff to receive payments on behalf of tea growers.

6. The 1st defendant avers that the letter dated 2nd March 2016 did not constitute a guarantee, undertaking or pledge by the defendants to meet any of the plaintiff's obligations to third parties in the event of default by the Plaintiff. It was the obligation of the plaintiff to ensure its liabilities against third parties are met. The 1st defendant averred that they received several complaints both oral and written from the farmers who were members of the plaintiff over delayed payment of the bonuses. The growers had sought clearance from the plaintiff but the plaintiff unjustifiably declined to clear them thus violating the Co-operative Principles and guidelines of open and voluntary membership.

7. The 2nd Defendant averred that as an agent of the 1st defendant, the 2nd defendant does not invite any liability in respect of an omission or commission that arises in discharge of contractual duties. It claimed that the plaintiff's suit as laid against the 2nd defendant is therefore legally untenable; hopelessly incompetent and an abuse of the court process. The 2nd defendant pleaded in the alternative that that it adopts the 1st defendant's averments in the statement of defence in response to the plaintiff's plaint.

8. On the basis of the testimony and the documents produced, the trial court declared that the unilateral decision to transfer the mode of payment of members of the Plaintiff from the Plaintiff to a third party without authorization of the plaintiff was illegal. The trial court further made orders that the plaintiff's members who wish to remain with the Plaintiff were at liberty to do so in writing and their proceeds pass through the plaintiff's Sacco while those members who do not wish to remain with the plaintiff were at liberty to signify their intentions in writing and move to a Sacco of their choice.

9. Aggrieved by the judgment the Defendants have lodged this appeal. The appeal was canvassed vide written submissions that both parties filed and exchanged.

SUBMISSIONS

10. In this appeal the defendants submitted that the plaintiff had breached fundamental terms of the undertaking dated 2nd March 2016 and they were entitled to bring their engagement to an end. They submitted that the growers in the plaintiff's Sacco had lodged complaints against the plaintiff and the 1st defendant's board of directors passed a resolution on 24th October 2016 directed that the bonus payment for the year 2015/2016 be paid in cash pending communication of a new pay point. They submitted that the plaintiff was required to remit amounts due to the growers in a timely fashion but they failed to do so. It further submitted that the plaintiff was insolvent because their financial constraint showed it was unable to pay its dues. The defendants advanced that the plaintiff was aware of the transfer and consented to it after their concerns were taken care of. The plaintiff through its letter dated 23rd October 2017 forwarded to the defendants a list of the growers with loans so that the amounts could be cleared after Kenya Achievas Sacco Society had settled Kshs 156,000/-. It was submitted that the plaintiff was illegally operating a Front Office Services Activities (Fosa) and the court cannot possibly sanction an illegal entity.

11. The defendants argued that the growers had already moved to Kenya Achievas Sacco Society which had not been made a party to the suit. The trial's court findings had devastating effects and contrary to the rules of natural justice as Kenya Achievas Sacco Society were never made a party to the proceedings. They placed reliance in the case of ***Miscellaneous Civil Application No 226 of 2017 Archdiocese of Nairobi Kenya registered Trustees v The National Land Commission eKLR (2018)*** where the court held that it is a cardinal rule of natural justice that no one should be condemned unheard. It was submitted that no basis were laid for grant of Kshs 1,000,000/-.

12. According to the plaintiff the trial court took into account all relevant factors and applied the law in arriving at its decision. There is no evidence by the defendants to warrant change of the mode of payment to Kenya Achievas and there is no doubt that the defendants were in breach of the said agreement which made the plaintiff to suffer great losses. It was also argued that the plaintiff had proved their case on a balance of probabilities. The plaintiff submitted that as a result of the 2nd defendant's action, it experienced losses and is entitled to an award of damages. They relied on the case of ***Delilah Kerubo Otiso v Ramesh Chaner Ndingra (2018) eKLR*** that cited ***Hadley Baxendale (1854 (9.Exch.341)*** where it was held that;

> *"the measure of damages is such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach."*

ANALYSIS AND DETERMINATION

13. This being a first appeal, I am obliged to re evaluate the evidence and make my independent findings thereon all the while alive to the fact that I never saw nor heard the witnesses and give due allowance in that regard. This legal requirement was well enunciated in **Sielle vs. Associated Motor Boat Co. [1968] EA at page123** where the court stated;

> *"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."*

14. In order to deal with this task it is necessary to outline the evidence as it emerged before the subordinate court. Jackson Maraga Nahashon (PW1) testified that he is the chairman of the Plaintiff which was registered as a Sacco on 16th August 1999. He told court that the court that the plaintiff has about 1,300 members and upon receiving money from the 2nd defendant it pays its members. He told court that they have an account with the Bank where money received from the 1st and 2nd defendants is deposited. He recalled that the 2nd Defendant wrote a letter to the Bank on 2nd March 2016 confirming that they would make payments through the Bank for a period of 1 year. According to the letter a member could only request to change mode of payment upon being cleared by the plaintiff. He testified that the money was deposited to the plaintiff's bank account with the Bank until 24th October 2016. When they asked the 2nd defendant why money wasn't deposited to the plaintiff's account, the 2nd Defendant explained that they had received instructions from the 1st Defendant that the money be paid using a different account. He testified that the bank demanded Kshs 6,881,611 as the plaintiff had taken a facility with the bank. They found out that the money had been paid through Kenya Achievas Sacco because some members had made complaints against the plaintiff. He told court that the members had not followed the procedure of exiting the Sacco by filling the requisite forms. He testified that 1300 members of the plaintiff were moved to Kenya Achievas Sacco including Pw1 without their consent. He testified that the plaintiff has suffered losses as the

plaintiff had given members loan which they could not recover as a result of the Defendant's actions.

15. Zacharia Ongeri Oruke (PW 2) told court that he is an accountant with the plaintiff. He testified that he audited the plaintiff for the year ended December 2015 in which the plaintiff made profits of Kshs 12,850/-.

16. Naomi Nyasimi (DW 1) testified that she is a field service co-coordinator of the 1st defendant. She testified that members of the plaintiff were similar to members of the 1st defendant suffice to add that the 1st defendant also had members from other Saccos. She testified that there were complaints, both oral and in writing, from their members that they had not received their proceeds. She testified that the plaintiff breached their agreement when it failed to remit the proceeds to the growers. She testified that about 300 members requested to be transferred from the plaintiff to other Saccos. On cross examination she testified that other members were transferred without their consent.

17. Having considered the evidence on record and the parties' submissions in this appeal, I propose to determine the following issues;

1. *Whether the plaintiff/Defendants was in breach of any of the terms spelt out in the letter of 2nd March 2016.*

2. *Whether the plaintiffs were entitled to the orders sought.*

18. It is not disputed that the parties did not have a single document with the terms of the agreement and it appears their agreement was contained in correspondence consisting of letters. **Chitty on Contracts, 24th edition, volume 1 at page 21, paragraph 41** states that –

"In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree."

19. The plaintiff in its letter dated 29th February 2016wrote to the 2nd Defendant stating as follows;

> *"We hereby instruct you to remit our monthly tea payments to Co-operative Bank of Kenya ltd.*
>
> *The payments to Co-operative Bank of Kenya should be paid to Keroka Branch A/c 011xxxxxxxxxx00.*
>
> *…."*

20. This was followed by the 2nd defendant's letter to the Bank in the following terms;

> *"We have been requested by the Management of Kiamokama Tea Growers Sacco Limited to provide confirmation that the tea proceeds from those Growers who maintain accounts with the aforementioned Sacco shall be paid through the Sacco Account No 011xxxxxxxxx00 held in Co-operative Bank –Kisii Branch.*
>
> *We hereby confirm that we shall pay all proceeds from the growers maintaining such accounts with the Sacco, through the account hereinabove stated; provided that:-*
>
> > *i. The Grower(s) is (are) registered as such in one of our managed Tea Factories and so long as he (she/they) remains so registered as a grower in the Factory;*
> >
> > *ii. We received the necessary written authorization from the Grower (s) (sanctioned by the Factory) that his (their) proceeds should be paid through the Sacco and as long as the same remains in effect and is not revoked by the Grower(s);*
> >
> > *iii. The Sacco does not transfer, assign, charge or relinquish to a third party or purport to assign charge transfer charge in part or whole its obligations to the Growers who are its members*
> >
> > *iv. The Sacco continues remitting the amounts due to the Growers in timely fashion, less any authorized deduction and does not become insolvent or bankrupt or enter into contract with any creditor(s) for relief of its debt or take advantage of any law for the benefit of debtors or goes into liquidation or receivership whether compulsory or voluntary*
> >
> > *v. The Sacco maintains all records evidencing payment and provides the same on request.*
> >
> > *vi. The Sacco does not revoke its instructions as hereinabove stated and or seek to amend the same.*
> >
> > *vii. The Sacco settles all fees/charges levied by KTDA*
>
> *This letter does not constitute a guarantee, undertaking or pledge to meet any of the Sacco's obligations to Co-operative Bank in event of default by the Sacco; and it is hereby agreed and understood that KTDA's liability is solely limited to the remitting of the growers proceeds to the account(s) stated which liability shall subsist so long as the provisions hereinabove are complied with; failure to which KTDA shall not be held liable for non-remittance of the proceeds as stated and/or any loss or damage suffered as a result thereof.*

The letter is valid for a period of one (1) year only from the date hereinabove stated and supersedes any other correspondence that had been affected in this regard."

21. The letter by the plaintiff to the 2nd Defendant with instructions on how payments to growers shall be made and the 2nd defendant's confirmation letter to the Bank confirming the plaintiff's instructions show that there was a meeting of minds and an agreement was entered into by the parties. The agreement entered into was of course subject to the conditions set out in the 2nd defendant's letter dated 2nd March 2016 and the dispute between the parties arose in October 2016 after the defendants failed to make payments through the plaintiff's account.

1. ***Whether the plaintiff/Defendant was in breach of any of the terms spelt out in the letter of 2nd March 2016?***

22. The defendants submitted that according to DW1's testimony there were complaints from the growers that they had not received their proceeds. On 1st September 2016, 40 growers wrote to the 2nd defendant informing them that they had discussed and agreed that the plaintiff's manager that they would be issued with clearance/transfer letters. The 1st defendant held a meeting on the 25th August 2016 where it was discussed that a few members of the plaintiff had agreed to transfer their accounts from the plaintiff to Irianyi Sacco and it was resolved that their bonuses be paid through Irianyi Sacco. Similarly there were minutes of a meeting held on March 2017 where 100 growers agreed that they should pull out from the plaintiff's Sacco. In the said meeting four committee members were present. The number of growers/members who showed their dissatisfaction with receiving payment through the plaintiff were therefore one hundred and forty growers.

23. It was the plaintiff's case that the withdrawal of members was done contrary to its bylaws. PW 1 testified that they have rules and regulation applicable to members who seek to withdraw their membership from the Sacco. He explained that it is only after making an application to withdraw from the plaintiff's membership using the requisite forms and upon the member paying his loan in full, that member can be cleared. PW 1testified that all their 1,300 members were moved to Kenya Achievas Sacco yet none of their members applied to withdraw from the Sacco.

24. It is opportune at this stage to restate the law on the burden of proof in civil cases. That burden lies on the plaintiff and the same is not lessened even where the defence evidence may be weak or nonexistent. In **Charterhouse Bank Ltd –vs- Frank N. Kamau [2016] eKLR**, the Court of Appeal citing its decision in **Karugi –vs- Kabiya and 3 Others [1987] KLR 347** held that the burden of proof on a plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended and the burden of proof is no way lessened because the case is heard by way of formal proof.

25. The Evidence Act is clear enough upon whom the burden of proof lies. Section 107 provides;

> "**S 107** *(1) 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.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

26. On matters evidence Madan JA (as he then was) in **CMC Aviation Ltd –vs- Crusair** *Ltd (NO1) [1987] KLR 103 stated;*

> *"Proof is the foundation of evidence. As stated in the definition of **"evidence"** in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth which is submitted for investigation is proved or disproved. Averments are matters the truth of which is submitted for investigations. Until their truth has been established or otherwise they remain unproven…"*

27. I have re evaluated the evidence. The terms of agreement arising from the letter dated 2/3/2016 are clear. It is trite law that the court cannot rewrite a contract for parties.

28. Of note is that the said agreement involved the growers/members of the plaintiff Sacco. It is important to, at the outset to draw clear lines in so far as the relationship between the parties was concerned. On the one hand we have the plaintiff Sacco with members (growers) certainly within their own rules and regulations governing their relationship including how a member would join or cease being a member. On the other hand we have the 1st and 2nd defendant where particularly the 2nd defendant bound itself to pay the growers proceeds from tea through the plaintiff.

29. I have painstakingly considered the evidence on record. For the plaintiff to succeed in its action, it had to demonstrate full compliance with the terms of the letter dated 2/3/2016. It was PW 1's evidence that the defendants without any instructions from the plaintiff or her members made payments through a 3rd party. This included his own payment. He states in his statement that neither him nor any other members revoked the earlier authorization of payment through the plaintiff. The plaintiff had taken a loan with Co-operative Bank of Kenya Ltd which was now not serviceable due to the change of payment and that some members had taken advances which cannot be recovered since the members have been taken elsewhere.

30. PW 1 speaks for himself and other members. No other member was called to confirm that the transfer of payment to another body was without sanction.

31. DW 2 testified about a plethora of complaints by members of the plaintiff over delayed payments, unauthorised deductions and at other times total none payment of members tea dues. There is evidence of this at pages 294 to 307 of the record.

32. These complaints are given credence by the holding of a meeting on 25/8/2016 by members as seen at page 300 of the record of appeal.

33. Among the terms of the letter dated 2/3/2016 was clause (iv) which provides;

> *"(iv) The Sacco continues remitting the amounts due to the Growers in timely fashion, less any authorised deductions and does not become insolvent or bankrupt or enter into contract with any creditor(s) for relief of its debt or take advantage of any law for the benefit of debtors or goes into liquidation or receivership whether compulsory or voluntary."*

34. The evidence of the complaints by the growers and the resolution reached to change the pay point is a clear demonstration of breach of clause (iv) by the respondent. Granted, the appellant had no control over the relationship between the respondent and its members. One wonders whether it would be tenable for the appellants to continue making payments in respect of the members through the respondent when there was clear discontent by the members over the management of the affairs of the respondent.

35. The respondent had the opportunity to respond to this allegation of breach at the trial. Clause (v) of the letter required the respondent to maintain all records evidencing payment and to provide the same on request. Confronted with the above evidence, nothing would have been easier than for the respondent to produce the records of payment to members to dispel any doubts over the matter. No attempt was made so to do and the court can only draw an adverse inference in regard to this non production.

36. As per the terms of agreement, the respondent was to maintain financial health. It was not to become insolvent or bankrupt. It was not to go to liquidation or receivership whether compulsory or voluntary. In cross examination, PW 1 was referred to page 5 of the Business Operations Review Report by Ms Co-op Consultancy & Insurance Agency Ltd where he confirmed that the major areas of concern in the Sacco were;

i)The Sacco relies solely on external funding.

ii)Poorly maintained records

iii)Insufficient internal controls

iv)Inadequate cash flow and debt management

v)Lack of Management Information System.

37. This state of affairs was counter the terms of the agreement as seen in the letter of 2/3/2016.

38. It is pleaded at paragraph 9 of the Plaint that;

> *"It was important for individual farmers to revoke authorization of payments made through the defendant. The plaintiff avers that there was no revocation by farmers before the transfers were done."*

39. Whoever alleges proves. No evidence of a single farmer was called to support this allegation. As stated earlier on, it is the duty of the plaintiff to prove his case. In the absence of evidence from the plaintiff, that pleading remains what it is, a mere allegation.

40. A look at the evidence will further show that the trial court was invited to adjudicate on a dispute that affected other persons or bodies that were not made party to the suit. In his witness statement PW states;

> *"The plaintiff was shocked when the defendants without instructions from the plaintiff or her members made payments through a 3rd party. .... Neither myself nor any of the other members revoked the earlier authorization of payment through the plaintiff."*

41. This statement has the effect of making the members complainants in the matter. PW 1 cannot possibly purport to speak o behalf of the other members without either evidence from them or joining them as parties to the suit. This when put in light of the evidence about a members resolution to move account renders the plaintiff's assertion weak and unproven. In my view, the plaintiff needed to call evidence from at least one member who would affirm that his payments had been paid through a 3rd party without his (member's) revocation of the earlier authorisation of payment through the plaintiff. The general statement by PW 1 on this alone cannot suffice.

42. It is cardinal rule of natural justice that no one should be condemned unheard. The trial court's findings would certainly have profound effects on the members/farmers involved and indeed the Sacco they had joined, Achievas Sacco. Neither the farmers nor this Sacco were made party to the proceedings. This is against the cardinal rule of natural justice; the right to be heard. (See **Misc. Civil Application No. 226 of 2017 Archdiocese of Nairobi Kenya Registered Trustees v. The National Land Commission [2018] eKLR**).

43. The 1st defendant's Board resolution dated 24/10/2016 directing that the growers of the plaintiff Sacco should not be paid through the Sacco and that the 1st defendant was to communicate future pay points for growers in the plaintiff is worth of note. This followed representations by the growers over fears over their dues should they go through the Sacco. This resolution having been issued, the 2nd defendant cannot be blamed for failure to channel the dues through the plaintiff.

44. The defendants submitted that there was no basis for the grant of Kshs 1,000,000/- awarded as damages. The defendants further submitted that the law on special damages is well settled; special damages must not only be specifically pleaded, but must also be strictly proved. The award of Kshs 1,000,000/- by the trial court was in respect to general damages, the trial court held as follows;

"The prayer of general damages is justified and it is my considered opinion that an award of Kshs. One million only Kshs 1,000,000 should be adequate compensation being general damages payable by the defendants to the plaintiff for disrupting their activities. The same Kshs 1,000,000/- is hereby awarded to the Plaintiff. The prayer for exemplary damages is hereby dismissed"

45. As a general rule, general damages are not recoverable in cases of alleged breach of contract. The Court of Appeal in **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** held that;

*"With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In **DHARAMSHI vs.KARSAN [1974] EA 41**, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also **SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR.** The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.*

46. The plaintiff in its plaint failed to quantify the losses it suffered as a result of the breach. It is clear that the damages sought were in the nature of special damages. Special damages must not only be pleaded but must be strictly proved. The plaintiff failed to plead and prove special damages claimed and I hereby find that the trial court thus erred in awarding the plaintiff Kshs 1,000,000/= as general damages.

47. In the end, I find the appeal meritorious and is consequently allowed. The judgment and order of the trial magistrate dated 5th February, 2019 are hereby set aside forthwith and substituted thereof with an order dismissing the suit.

48. Costs of the appeal is awarded to the appellants.

Dated, signed and **delivered** at **Kisii** this **13th** day of **May, 2020.**

A. K. NDUNG'U

JUDGE