



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 9 OF 2018

BETWEEN

JOEL OTOIGO NYASINGA.....APPELLANT

AND

KENYA TEA DEVELOPMENT AUTHORITY.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. K. Onjoro, SRM

dated 22nd December 2017 at the Magistrates Court in Kisii

in Civil Case No. 524 of 2010)

JUDGMENT

1. The appellant appeals against the judgment of the subordinate court dismissing his claim. For ease of reference, I shall refer to the parties in their capacities before the trial court save where the circumstances otherwise dictate.

2. The plaintiff's case was that at the material time, he was a farmer and shareholder of the defendant number KK 430 – 192. He stated that since 1983 he was selling his tea leaves to the defendant and receiving payments including salaries and bonuses until 2008 when the defendant stopped paying him on the ground that he did not have letters of administration for the estate of his father, Marko Nyasinga Miyianda ("the deceased"), who was the owner of **NYARIBARI/CHACHE/B/B/BOBURIA/412** ("Plot 412"). The plaintiff contended that he did not require a grant of letters of administration for the deceased estate as he had been allocated part of the property by his father and had developed it by growing tea which fact the defendant acknowledged. He averred that one Annah Kwamboka Nyansinga obtained the grant of letters of administration for the deceased's estate in **Kisii HC Succession Cause No. 320 of 2002** but the grant was nullified and the matter is still pending in court. In the plaint, he claimed the following reliefs:

- (i) *Salaries and bonus unpaid from July 2008 to 2010 June 30th.*
- (ii) *Salaries from the months of July 2008 to date.*
- (iii) *General damages.*
- (iv) *Costs of the suit.*
- (v) *Interest.*
- (vi) *Any other remedy that the honourable court deems fit and just to grant.*

3. In its statement of defence, the defendant admitted that the plaintiff was registered as a KTDA Grower Number KK430192 but with Kiamokama Tea Factory Company Limited. It averred that it was only the managing agent of the said factory. In the alternative, the defendant stated it suspended tea payments and bonuses following a dispute between the plaintiff and his brother, Geoffrey Nyasinga, concerning payments of tea deliveries realized from Plot 412 after the death of the registered owner of the land. It also contended that since the plaintiff's registration as a tea grower flows from the ownership of Plot 412, it was entitled to demand the grant of letters of

administration.

4. The defendant maintained that the plaintiff's suit was defective because the plaintiff lacked *locus standi* to sue on behalf of the deceased's estate and that the suit was barred by reason of **section 82** of the **Law of Succession Act (Chapter 80 of the Laws of Kenya)** and that the plaintiff had no cause of action against the defendant.

5. In the Reply to Defence, the plaintiff contended that as a shareholder of the defendant he had been receiving payments from the plaintiff since 1983. He denied that there was any dispute between him and anyone else that would disentitle him to the payments from the defendant.

6. At the hearing, the plaintiff (PW 1) testified and called Senior Chief Nemwel Mainya (PW 2) and Charles Nyang'au Wako (PW 3) while the defendant called Sylvester Maticha Onsario (DW 1) and Anna Kwamboka Nyasinga (DW 2). In the judgment, the trial magistrate found that since the defendant is the one who initiated the process of stopping payments to the plaintiff, it was the proper party to be sued but declined to award any damages as the damages sought were in the nature of special damages which were not specifically pleaded and proved to the required standard.

7. The thrust of the appellant's memorandum of appeal dated 25th January 2018 is that the trial magistrate erred by failing to hold that the plaintiff had proved his case on the balance of probabilities. In his oral submissions, Mr Sagwe, counsel for the appellant, contended that the appellant was a registered grower and the respondent had always paid him for delivery of tea leaves despite the fact that land had been owned by his father. He contended that the claim was properly pleaded as the particulars of payment were within the knowledge of the respondent.

8. The respondent opposed the appeal on the ground that the appellant did not prove the claim and that the appellant was obliged to plead and prove special damages which he did not.

9. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd [1968] EA 123***).

10. The facts giving rise to case between the plaintiff and defendant are not really in dispute. Although the respondent denies that it had a contractual relationship with the appellant, it admits that the appellant was registered as a tea grower with Kiomakama Tea Factory and that he made deliveries where upon he was paid salaries and bonuses until July 2008. The payments were stopped by the respondent on account of a dispute between the appellant and his brother. Following the dispute, the accounts of the appellant and his brother were duly suspended and the parties advised to furnish a grant of letters of administration for the deceased's estate which has not been done to date.

11. Although the appellant contends that there was no dispute between him and anyone else, his advocates, *Nyabera Omari and Company Advocates*, wrote to the Manager, Kiamokama Tea Factory, a letter dated 1st September 2009 in which it stated, inter alia, that:

That between September and November 2008, you registered Geoffrey Bosire Nyasing'a and gave him growers No. KK 430-616 Kiamokama Tea Factory Wrongfully and illegally without proper investigation or discovery whether the person real owns Land where Tea is grown

.....

*That the Tea farm which was used by the aforesaid person belongs to Joel O. Nyasing'a ID No. ***** growers KK 430 – 190 was transformed into growers No. KK 430 – 616. That the aforesaid person has been picking Tea from our above client's Tea farm wrongfully and illegally for the so called Geoffrey Bosire Nyansing'a is not a member of our above named client's family but a mere stranger.*

12. At about the same time, the advocates for the said Geoffrey Bosire Nyansing'a, *C M Ayienda and Company Advocates*, also wrote a letter dated 6th October 2009 to the Manager of Kiamokama Tea Factory on, inter alia, the following terms;

Our client is your Grower No. KK043 0161. We are instructed without any colour of right or reason whatsoever, you are illegally withholding out client's bonus dues as per the annexed herewith pay slip for September 2009. In spite of our client's several requests for payment of the same, you have arbitrarily and deliberately decline to do so

13. The reason I have quoted the two conflicting demands by the appellant and his brother, or stranger, as the case may be, is that they provided a basis for the defendant demanding the grant of letters of administration for the deceased's estate. It was not in dispute that the land belonged to the deceased and following his death there were conflicting claims on the land which are yet to be resolved by the court dealing with the succession cause. These claims were buttressed by the testimony of DW 2. The tea on the land cannot be dealt with apart from the land. At the appropriate time, the administrators of the deceased's estate are entitled to demand an account of moneys withheld by the appellant or its principal. I will say no more on that matter.

14. As regards the claim for the salaries and unpaid bonus, I agree with the trial magistrate that such a claim is specific and it is the nature of special damages which must be pleaded with particularity and proved. This clear statement of this principle from the Court of Appeal is to be found in several decisions including ***Provincial Insurance Co East Africa Ltd v Nandwa [1995-1998] 2 EA 288, 291*** where the Court expressed the need to plead specifically a claim that is ascertainable and quantifiable thus, "*It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.*"

15. Although Mr Sagwe submitted that the particulars of the claim were within the respondent's knowledge, I hold that the appellant is not relieved of its duty to plead its claim specifically. It has prior to setting down the suit for hearing, the right to seek discovery of any documents in the respondent's power or possession or seek an account where a sufficient basis is laid.

16. It must now be clear that this appeal is for dismissal. It is dismissed with costs to the respondent which I assess at Kshs. 20,000 exclusive of court fees.

17. The appellant had also filed another appeal in respect of the same judgment and decree namely; **Kisii HCCA No. 95 of 2018**. It is struck out with no order as to costs.

DATED and **DELIVERED** at **KISII** this 9th day of **MAY** 2019.

D.S. MAJANJA

JUDGE

Mr. Sagwe instructed by Sagwe and Company Advocates for the appellant.

Mr Ndege instructed by Nyachiro Nyagaka and Company Advocates for the respondent.