



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO 43 OF 2013

(Appeal from Decree in Murang'a SPM civil Case No 391 of 2005 - J. Gathuku, PM)

PAUL MUNA GATHURI.....APPELLANT

VERSUS

1. KIRU TEA FACTORY CO. LTD

2. KIAMA HINDU TEA BUYING CENTRE.....RESPONDENTS

J U D G M E N T

1. This appeal is against the decree of the lower court, issued after a full trial, by which the Appellant's suit against the Respondents was dismissed with costs. The Appellant (as plaintiff) had sued the Respondents (defendants) for refund of some KShs 38,000/00 odd that had been deducted from his green leaf proceeds by the 1st Respondent at the instance of the 2nd Respondent. It was the Appellant's case, both as pleaded and as stated in his testimony, that this deduction was entirely unlawful and unjustified. The Respondent's main defence, both as pleaded and as presented through their five witnesses, was that the deduction was lawful and justified under the by-laws of the 2nd Respondent, and that an inquiry had been duly made under the aforesaid by-laws which found that the Appellant had stolen or misappropriated funds belonging to the 2nd Respondent equivalent to the sums deducted from his green leaf proceeds. There was the additional plea that the 2nd Respondent was non-suited as it had no legal capacity to be sued, and further, that its chairman through whom it was purportedly sued, was not named.

2. The Appellant testified and did not call any other witness. The Respondent called a total of five defence witnesses. In its considered judgment the trial court held that the 2nd Respondent (2nd defendant) was non-suited and dismissed the case against it. It also dismissed the claim against the 1st Respondent (1st defendant) upon the basis that an inquiry had been duly conducted under the 2nd Respondent's by-laws in which the Appellant was accorded opportunity to be heard, and was indeed heard, which inquiry found that the Appellant had stolen or misappropriated from the 2nd Respondent the sum claimed in the suit. The court therefore found that the Respondents were entitled to deduct from the Appellant's proceeds with the 1st Respondent to recover that amount.

3. The grounds in the Appellant's memorandum of appeal attack these findings of the trial court. The appeal was canvassed by way of written submissions. I have read the respective submissions of the parties. The Appellant's learned counsel agued all the grounds of appeal together. Learned counsel for the Respondent addressed each ground of appeal.

4. This was a fairly simple case. The Plaintiff's claim was clear and unambiguous. KShs 38,000/00 odd

had been deducted by the 1st Respondent at the instance of the 2nd Respondent from his green tea leaf proceeds. His case was that this deduction was unlawful in that it was not pursuant to any decree or order of a competent court of law; or upon any admission or consent on his part; or through any lawful process of arbitration or inquiry. The Respondents admitted that the deductions were made.

5. Although the overall burden of proof remained with the Appellant to prove his case on a balance of probabilities, with the admission of the deductions and the plea of lawfulness or justification for the same, it was the Respondent's burden to demonstrate on a balance of probabilities that the deduction was lawful. The Respondent's case was that the deductions were made following a legitimate process of inquiry duly conducted under the by-laws of the 2nd Respondent. Those by-laws were not produced in evidence before the court. It was not sufficient that the Appellant may have known of the by-laws as he was a member of the 2nd Respondent. The importance of production in evidence of those by-laws lay in the fact that it was vital for the trial court to establish that the process claimed by the Respondents by which the Appellant's alleged liability to the 2nd Respondent in the sum deducted from his proceeds was indeed provided for in those by-laws. Secondly, if indeed that process was provided for in those by-laws, it was important for the trial court to establish whether the process had been fairly conducted as would be expected to be provided for in the by-laws. The Respondents' entire defence having been founded upon those by-laws, it was vital that they produce them in evidence. They did not.

6. It will be noted that the Respondents' conduct of their own case during the trial pointed to a possible doubt in their minds about the legitimacy of the deduction. DW 5 in fact stated in his testimony that the 1st Respondent decided at some point after the deduction to refund the amount deducted to the Appellant. It will be further noted that the calling of DW 3 and DW 4 was an attempt on the Respondents' part to establish that indeed the Appellant had stolen or misappropriated the sum deducted. This angle of the case was coming too late as the court here was not dealing with a counter-claim by the Respondents duly pleaded. The main issue before the court was simple: Was there any lawful justification for the admitted deductions made by the 1st Respondent at the instance of the 2nd Respondent from the Appellant's proceeds? That lawful justification would ordinarily take the form of a decree or order of a competent court of law; due consent or agreement by the Appellant for the deduction; or a finding of liability following a legitimate inquiry duly made under the by-laws of the 2nd Respondent. None of these scenarios obtained in the circumstances of this case.

7. The trial court therefore gravely erred in dismissing the Appellant's claim. The Respondents did not provide any lawful justification for the admitted deduction made from the Appellant's proceeds. In these circumstances the Plaintiff had proved his case against the Respondents on a balance of probabilities.

8. The plea that the 2nd Respondent was non-suited is a mere technicality. It is clearly stated in the title of the suit that the 2nd Respondent was sued through its chairman. It was not necessary to name the chairman as that was a public office whose occupant could change from time to time. The suit against the 2nd Respondent was therefore wrongly dismissed.

9. In the event I will allow this appeal in its entirety. The decree of dismissal of the lower court is hereby set aside. There is substituted thereby judgment for the plaintiff against the defendants jointly and severally for the sum claimed plus costs and interest. The Appellant shall also have the costs of this appeal. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 9TH DAY OF SEPTEMBER 2016