REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NOS. 1192 of 2003 & 26 OF 2004

SAMUEL MUCIRI W'NJUGUNA & OTHERS.....PLAINTIFFS

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD.....1ST DEFENDANT

THETA TEA FACTORY COMPANY LTD.....2ND DEFENDANT

JUDGEMENT

The Plaint

1. The plaintiffs in this suit pleaded that they are small scale tea farmers who supply and sell their green leaf tea to the 2nd defendant, **Theta Tea Factory Company Limited** (hereinafter referred to as Theta), and are paid by the same 2nd defendant through the 1st defendant on monthly, half yearly and end year basis.

2. It was pleaded that with effect from the month of September, 2002 to the time of filing of this suit, the defendants irregularly and unlawfully and without authority or sanction of the plaintiffs made deductions designated by the defendants as project deductions from the amounts of monies due and payable to the plaintiffs respectively and failed to make full payments to the plaintiffs.

3. According to the plaintiffs the cumulative deductions from the plaintiffs in respect of the two suits was Kshs 22,251,925.20.

4. It was the plaintiffs' case that the said deductions were effected unlawfully, capriciously and arbitrarily in complete disregard of the sanctity of the plaintiff's property rights under the Constitution.

5. It was pleaded that despite demand and notice of intention to sue the defendants refused to refund the plaintiffs the said sums of money.

6. The plaintiffs therefore claimed for declaration that the defendants were not entitled to make the said deductions, an injunction restraining the defendants from making further deductions from the plaintiffs' due and refund of the sums deducted. They also prayed for the costs of the suit and any further relief deemed fit and just by the court.

7. Together with the plaint the plaintiffs filed verifying affidavits to which were attached schedules showing the sums due to the each plaintiff.

The Defence

8. According to the defence filed by the defendants, the allegation that the defendant irregularly and unlawfully made deductions from the amounts due and payable to the plaintiffs was untrue as the said deductions were pursuant to a Resolution of the second defendant company at its extra-ordinary General Meeting held on 25th September, 2003. It was therefore contended that the plaintiffs are in law bound by the said resolution hence the suit is a non-starter, bad in law and cannot be sustained against the Defendants.

9. It was pleaded that the said Extra Ordinary General Meeting held on 25th September 2003, was pursuant to a resolution of the 2nd Defendant's General Meeting held on 13th August 2003 and that the resolutions of 23rd September, 2003 are binding upon the plaintiffs as shareholders of the 2nd Defendant Company. It was pleaded that out of the 6,306 members of the 2nd Defendant only 1,007 members are complaining.

10. According to the defendants part of the money deducted had been used towards the acquisitions and development of a new factory for the 2nd defendant to alleviate the congestion in the 2nd defendant and to benefit Theta Catchment Area Tea Growers.

11. It was the defendants' view that since the deductions had been in force since September, 2002, the plaintiffs were acting in bad faith and must be taken to have agreed to the said deductions and were estopped from questioning the said deductions.

12. It was therefore the defendants' case that the suit ought to be dismissed with costs.

The Case for the Plaintiffs

13. On behalf of the plaintiffs, **Samuel Muciri W'njuguna**, who testified as PW1.

14. As part of his testimony in chief PW1 recorded two witness' statements which were filed in this case on 1st November, 2011 and 21st November, 2011 and in which he stated that the plaintiffs are small scale farmers who deliver and sell their green leaf tea produce to the 2nd defendant company which is managed by the 1st Defendant which has delegated the responsibility of processing, selling and making payments to the plaintiffs for their respective green tea deliveries to the 2nd defendant on monthly, half yearly and yearly basis.

15. From the month of September, 2002 the defendants irregularly, unlawfully and without any authority or sanction of the plaintiffs made deductions designated by the defendants as project deductions from the amounts of monies due and payable to the plaintiffs respectively and failed to make full payments to the plaintiffs and continued to withhold the same. The plaintiffs hence filed the suit in November 2003 and the defendants were restrained from making deductions or withholding from the plaintiffs any payments therefrom and pursuant thereto the said deductions were stopped though the withholding continued.

16. It was contended that the effect of the said deductions was not only illegal but in disregard of the plaintiffs' property rights which action occasioned the plaintiffs loss and prejudice.

17. It was stated that by virtue of being residents of the tea catchment area a factory known as **Kuri Tea Factory Company Ltd** (hereinafter referred to as Kuri) was allegedly built using the said deductions yet the said company is not owned by the 2nd defendants but is wholly owned by **Kuri Tea Factory Company Ltd** whose shareholders were **Bernard Njinu**, **Patrick Muiru Kamungana**, **Patrick Kungu Kimata**, **Samuel Wamuruo**, **James Maina Ngunjiri** and **Ben Achode Malingu**.

18. It was stated that there was a suit against the Defendants herein and others by the said Kuri being HCCC No. 504 of 2010 (Nairobi) in which one of the dispute is the fact that the Defendants fraudulently tried to allot shares of the said Kuri to the 2nd Defendant herein.

19. According to the witness the whole process of deductions and buying parcels of land where Kuri was built was not transparent and was not meant to benefit the farmers and that there was also a conflict of interest in the sale thereof.

20. Apart from relying on his statements filed on 31st October, 2011 and 21st November, 2011 confirmed that the figures mentioned in the schedules filed with the plaints were the figures illegality deducted by the 1st and 2nd defendants.

21. According to the witness the plaintiffs were claiming the sums stated in the said schedules together with interests. He however clarified that there were two extra months deducted before coming to the Court.

22. The witness testified that though the Articles and Memorandum of Association provided for 21 days notice no such notice was given and that they did not waive the requirement for such notice as required under the said Articles. He asserted that he only came to know of the existence of Kuri the previous year when the plaintiffs were being forced to receive or take up shares in the Factory by the 1st Defendant's staff.

23. Referred to the returns, he stated that the consideration for the shares was indicated as "cash" and the allotment was dated 13th March, 2003. According to him Case No. 1192 of 2003 was filed in 2003 while Case No. 26 of 2004 was filed in 2004. However, the return was purportedly made after 8 years. He disputed that they paid cash to Theta for the allotment of the said shares and insisted that they did not take share certificates from Kuri though they were being forced to do so.

24. Referred to the Articles and Memorandum of Association of Kuri, he stated that the same indicated that apart from employees/former employees, the number of shareholders was limited to 50. However from the register, it was indicated that the number of members were 5,265. The witness insisted that not all of them were shareholders of Kuri since they had never taken any shares. According to him, Kuri's position was that it had never authorised the issuance of any shares to anybody and that this was evidenced by the pleadings in HCCC No. 504 of 2010.

25. According to the evidence, it was testified that the land on which Kuri was constructed being Ndurugu/Karatu/ 789 and 2574buwhich was transferred to Kuri on 24th December, 2002 was by one **Bernard Kiarie Njiru** who according to the witness was a director of Theta at the time the deductions commenced and from the defendants' bundle he was indicated a s a Director of the Company. This was however despite the fact that there was no resolution for the acquisition of the said properties. It was contended that in the circumstances, the said **Bernard Njiru** had a conflict of interest yet his interest was not indicated in the minutes

26. On cross-examination by **Mr Thangei**, learned counsel for the Defendants, PW1 confirmed that the second defendant was a registered company. He confirmed that there was a time he bought shares in the 2nd defendant and was still a shareholder. According to him, the deductions took place sometimes in October, 2003. According to him, the 2nd defendant is one of the factories in the catchment areas and when there is an overproduction a decision is made by the 1st defendant for another factory to supplement. However, Theta and Matara are the main factories though there was another factory. According to the witness therefore, there was no need to construct another factory to supplement them.

27. Referred to a letter dated 17th May, 2004, addressed to the Manager Commercial Bank of Africa, he stated that since he does not sit in the Board of Theta, he could not comment on the letter. He however testified that he had come to know that the Directors who authored the said letter utilised the money in buying land from one of them to build a factory which they then registered in their names. He testified

that the Factory was known as Kuri Tea Co. Ltd. This information however came to his knowledge the previous year. In his evidence Kuri is near to Theta Tea Factory.

28. Referred to the resolutions of Board of Directors of Theta, PW1 stated that he could not tell whether they were the same directors. In his evidence the deductions the plaintiffs were claiming were made between 2003 and 2004.

29. In his evidence Kuri is owned by some of the same directors who signed the resolution. Referred to the Memorandum and Articles of Association of Kuri Tea Factory Co. Ltd, he confirmed that they were the same people who own Kuri. Referred to the Director's Resolution of Kuri, he said that the contributions of Theta growers was converted into shares as well as the costs of the construction of the Factory. He further confirmed that the growers for both Kuri and Theta are from the same catchment area.

30. Referred to the returns of Kuri Tea Factory Company Ltd dated 31st December, 2011, he said that as a shareholder of Theta, he had no control as to what they wanted to allocate though the returns indicated that Kuri was not owned by the Directors. In the said returns, PW1 stated that it was purported that he held 26,992 shares though according to him, he cannot be forced to own shares. He was however aware that farmers were being forced to take shares after the Court order issued in 2004 stopping the deductions.

31. Although in case no. 26 of 2004, the claim is for Kshs 11,588,988.00, PW1 stated that the figure is slightly higher because the figure claimed was before the plaintiffs came to court. He however confirmed that the figure claimed was the cumulative figure. He however confirmed that his name did not appear in the schedule attached to the said case and that he did not have his payslips in Court to show the deductions. He however testified that he was giving evidence on behalf of the 1153 members in the case that is all the plaintiffs in both cases though he did no have the payslips for the plaintiffs in both cases.

32. The witness testified that he was opposed to the allotment of shares because no one ought to be forced to take shares.

35. According to him he was deducted Kshs 131,409.30 which according to him was the sum in the payslips. He clarified that he was not claiming ownership of Kuri and that when he was being forced to take the shares of Kuri he made inquiries. According to him the maximum number of shareholders of Kuri is 50 which was the position as at the time of the incorporation though he was unable to ascertain the current position.

34. Referred to HCCC No. 504 of 2010, he said was neither a party thereto nor was he aware whether his co-plaintiffs were parties to the same though on the face of the pleadings they were not. According to PW1, there was an attempt to allocate the shares. He however denied having seen the notice of the meeting in the Newspapers and asserted that he was told by the other plaintiffs that they similarly had not seen any such notice. In his view the failure to receive the said notice rendered the minutes unlawful. In his view it is a legal requirement that the minutes be signed though in this case the same were only signed by one person and the resolutions signed by all the directors.

35. In re-examination by **Mr Havi**, learned counsel for the plaintiffs, PW1 reiterated that in Case No. 1192 of 2003, 1154 farmers were affected by the deductions totalling Kshs 11,528,986 while in Case No. 26 of 2004 the number affected by the deductions was 1,007 with a total of Kshs 10,662,939.20. The combined number of farmers affected according to him was 2,161 not all of whom were shareholders since some were shareholders while others were suppliers of tea and inputs.

36. The witness in reference to the minutes of the meeting held on 25th September, 2002 stated that he did not attend the said meeting and that the number of growers/shareholders indicated to have attended was approximately 1,500. However the date of the execution of the said minutes was indicated as 28th January, 2003 which was 4 months after the date of the alleged meeting. Further he said the minutes were not signed by the growers and there was no list of the growers who attended the said meeting of 25th September, 2002p b

37. PW2 was **Patrick Ndiguri** who was the 1st plaintiff in Case No. 26 of 2004 in which the claimants were 1,007.

38. As part of his testimony in chief PW2 recorded his witness statements which was filed in this.

39. Apart from his statement which he filed in these proceedings, he also produced the documents which were filed in the said proceedings as exhibits.

40. In cross-examination by **Mr Thangei**, he asserted that he was a Tea Grower staying in Gatundu and was selling Tea to Theta. He confirmed that he knew Kuri Tea Factory which was about 3 Kilometres from Theta. According to him there were people who were selling Tea to Kuri Factory which was operational. He however insisted that the plaintiffs in this suit were not selling their Tea to Kuri.

41. In his evidence, he had not been allocated shares at Kuri and his claim was for the sum of Kshs 26,000/= which arose from monthly deductions. The other claims were in respect of bonuses though he was not possessed of any documents showing the said deductions.

The Case for the Defence

42. In the defence of their case the defendants called **John F K Kenneth Omanga** as DW1. According to him, he was the Group Company Secretary of the defendants.

43. As part of his testimony in chief DW1 recorded his witness statement which was filed in this case on 9th November, 2011 and in which he stated the deductions complained of were made pursuant to a resolution of the 2nd defendant company at its extra-ordinary General Meeting held on 25th September, 2003 hence all the plaintiffs were bound by the same. According to him the said meeting was held pursuant to a resolution of the 2nd defendant's General Meeting held on 13th August, 2003 and at the extra ordinary General Meeting it was resolved that a new factory be built which resolutions were endorsed and verified by the 2nd Defendant's Board.

44. According to him the money deducted had been used towards acquisition and development of a new factory for the second Defendant Company in order to alleviate the congestion at the 2nd defendant's catchment area. It was contended that the deductions were applied to the benefit of the farmers including the plaintiffs who were now deriving gain from the new facilities built using the money.

45. Apart from relying on his statement filed in these proceedings on 24th November, 2011 he testified that there was a need for a new factory as a result of congestion at Theta Tea Factory. According to him, it was resolved that the shareholders would be deducted Kshs 1.20 per kilogramme which are the deductions the subject of these proceedings. According to him these resolutions were ratified by the Board which reflected the Shareholders' resolutions.

46. Apart from the contributions of the farmers, the balance was to be borrowed for financial institutions hence the 2nd defendant did borrow.

47. In his evidence the 1st defendant was the Managing Agent which was owned by 54 companies amongst which was the 2nd defendant. He testified that the owners are the farmers who in turn own the factories which they put up to which they deliver tea leaves and are also shareholders.

48. In his evidence the manner in which Kuri Factory was constructed is the normal way of constructing other factories. He said that the shares were allocated to the shareholders and that was the basis upon which the deductions were made and the shares issued. In his evidence there was a resolution allotting the shares worth Kshs 62,701,136.35 being equity contributed to by the growers of the 2nd defendant and which were converted to 12,540, 277 ordinary shares at the rate of Kshs 5.00 each which were the equity contributions to Kuri Tea Factory for Construction. This resolution according to him was signed by he

directors and that by this time the Factory was up and running.

49. It was stated that all the contributors of equity were allotted shares which included the plaintiffs and returns were filed with the Registrar of Companies with the last return reflecting allotment of 67,017,087 and not the 95,196,668 for the 2nd defendant based on the fact that the authorised shares had been exhausted. However the full allocation for the farmers was made and the plaintiffs were duly allocated the shares. Although PW1 had been issued with the shares, the witness said that the witness had not picked up his share certificate. Similarly PW2 had not picked up his shares in respect of he shares allocated though there were some shareholders who had already picked up their certificates. The failure to pick the certificates, according to him does not affect the shareholding status of the said shareholders.

50. Although under the Companies Act, one can object to allotment of shares, the witness was not aware of any such objections and that no steps had been taken to challenge the allocations to the plaintiffs.

51. He said that in HCCC No. 504 of 2010, which was filed by Kuri Tea Factory, against the 1st Defendant and KTDA Holding Co. Ltd, he was sued as the 3rd Defendant with the other Defendants being the Commercial Bank of Africa and Theta Tea Factory. In the said suit the plaintiff was challenging the shares issues to Theta and to the farmers who had contributed equity.

52. In cross-examination by **Mr Havi**, DW1 confirmed that Theta is a public limited liability company registered as such as confirmed from its Articles and Memorandum of Association in which it is indicated to be a private company. He however said that there had been a change in the particular Article though he was unable to recollect when that change was effected since the evidence was in his office. Similarly the Articles and Memorandum of Association of Kuri indicated it to be a private company and that the same prohibited invitation to allot the shares. In his evidence Kuri was similarly a Public Limited Company though he had no evidence when it was so converted.

53. He confirmed that the number of plaintiffs in Case No. 1192 of 2003 was 1,154 and that the amount claimed was Kshs 11,588,986 which according to him was the figure that was deducted in total. With respect to Case No. 26 of 2004, the plaintiffs were 1,007 claiming a figure of Kshs 10,662,939 though he was unable to tell whether this was the deducted figure. Referred to the minutes of 25th September, 2002, he confirmed that the number of shareholders who attended the meeting was approximately 1,500 though he was unable to tell their names. He however said he knew some of them though he was unable to say whether the rest attended the meeting. According to him, the plaintiffs were notified of the meeting by public invitation though he did not have evidence of the same before the Court. In his view there was compliance with Article 61 of the Articles though he had no evidence of such compliance.

54. According to the witness the meeting of 25th September, 2202 was a members' meeting but he was unable to tell the total membership as at that time though it included more that 2,161 plaintiffs. Referred to the resolution, he confirmed that apart from the chairman's signature, there were no other signatures and that it was signed on 28th January, 2003 4 months after the meeting. The Directors' resolution however was dated 2nd October, 2002 about a week after the meeting. The subscribers' signature of Kuri was however dated 26th November, 2002 which was after the resolution.

55. Referred to HCCC No. 504 of 2010, the witness denied that the people mentioned therein as the original subscribers were the people behind that suit though he admitted that at that time these were the directors and shareholders of Kuri. He admitted that Kuri was incorporated as a private liability company and there was a prohibition on invitation to the public though this prohibition was removed when the company converted to public company around 2005 after the filing of the suit but he had no such evidence.

56. According to the witness in the year 2010 the plaintiffs were not members of Kuri but were invited by allotment but were invited since they were contributing to the construction of Kuri. In his evidence the allotments were done in 2010after the filing of the suits and it was only the certificates which had not been collected and there were no objections made under the Companies Act. Therefore his view was that

this amounted to acceptance. He however testified that in the event that the members do not take the shares the directors can dispose of the same.

57. According to DW1, in HCCC No. 504 of 2010 he was sued as an employee of the 1st Defendant and the Company Secretary of the 5th Defendant, Theta and the complaint against him was that his appointment had been revoked and what was sought was an injunction prohibiting him from conducting affairs of the plaintiff in the said case, Kuri. While confirming that some of the orders sought were granted, it was his view that the interlocutory orders had since lapsed. He however confirmed that there was a ruling confirming the grant of the injunctions pending the hearing of the suit which suit is still pending. In his view whereas the Court orders restrained deductions, it did not deal with the share certificates. He however confirmed that the consideration for the shares were the deductions though he was unable to confirm whether they were the same deductions the subject of these proceedings.

58. In re-examination by **Mr Thangei**, DW1 reaffirmed that the deductions were effected in 2002 on 24th September, and the order was made in 2004 after the deductions had been effected and finalised.. In his view, the order may have been in reference to future deductions. To him the order was dealing with allotment of shares to the 5th Defendant, Theta and not to the plaintiffs herein.

59. The witness confirmed that the resolution which authorised the allotment to the plaintiffs was made on 15th March, 2010 which resolution is the subject of HCCC No. 504 of 2010 though the claim does not refer to the allotment of shares to the plaintiffs but to the 5th Defendant therein. In his view the outcome of that case would have no bearing to the allotments made to the plaintiffs. In his view, at the time of the said allocations, the plaintiffs were strangers though they had knowledge of Kuri Tea Factory since they were contributors to its construction and authorised allocation of their shares. In the witnesses' view, once the allocation was done their monies was capitalised and shares allocated to the contributors and there is no provision for buying back the shares by Kuri and the sums cannot be refunded since their contributions are part of the assets. The plaintiffs' only option, according to DW1 is trading the said shares which can be done within the 1st defendant's framework.

60. While admitting that some deductions were made, the witness said he could not tell how much was deducted from the individuals which could only have been determined from the payslips.

Plaintiff's Submissions

61. It was submitted that though the defendants contended that the plaintiffs were notified of the meeting at which the resolution to allot the plaintiffs shares was made, there was no evidence of such notification hence the plaintiffs did not attend. Since the defence witness himself was not at the meeting, it was submitted that his evidence was at best hearsay. Without any legal basis for the deductions, it was submitted that the deductions were irregular and unlawful.

62. According to the plaintiffs the deductions were admitted in the pleadings, witness statements and through evidence. It was submitted that as the deductions were based on a flawed Special General Meeting the deductions were wrongfully withheld.

63. It was therefore submitted that the plaintiffs were entitled to the judgement on the sum claimed together with interest as well as the costs of the suit.

Determinations

64. I have considered the pleadings, the evidence and the submissions of the parties herein.

65. The following issues were agreed by the parties to be the issues which fall for determination by the Court in these consolidated suits:

1. **Have the 1st and 2nd defendants irregularly, unlawfully and without the authority of the**

plaintiffs effected deductions designated by the defendants as project deductions from the amounts of money due and payable to the plaintiffs respectively in respect of green tea leaf delivered by the plaintiffs to the defendants and wrongfully withheld them from September, 2002 as set out and claimed in the plaint?

2. Are the plaintiffs entitled to judgement against the defendants jointly and severally for the amount so withheld plus interests at Court rates?

3. Who should bear the costs of the suit?

66. The plaintiffs' case was that the defendant unlawfully and irregularly without their authority effected deductions from the proceeds of the tea leaves delivered by the plaintiffs to the defendants.

67. That these deductions were actually effected is not denied. It was however the defendants' case that the deductions were effected pursuant to resolutions made by the plaintiffs as members of the 2nd defendant with a view to constructing another Tea Factory known as Kiru Tea Factory and hence the deductions were properly done and the plaintiffs allotted shares in the said Kiru Tea Factory Ltd as is customarily done in the Tea Industry.

68. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides:

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.

69. This provision provides for what is known as the legal burden of proof. However section 109 of the same Act provides for what is commonly referred to as the evidentiary burden of proof and states:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

70. This position was re-affirmed by the Court of Appeal in **Maria Ciabaitaru M'mairanyi & Others vs. Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280** where it was held:

"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

71. As was held in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334:**

"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."

72. In this case the plaintiffs' case was that they were never notified of the meeting at which the resolution was passed. The Defendants while insisting that there was in fact such a notice were unable to produce the same. In effect the plaintiffs were alleging a negative. Since it was the Defendants who were alleging a positive, pursuant to section 109 of the Evidence Act, it was upon them to prove that there was in fact such a notice. As was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence...The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson At Para 95.**

88. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA No. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

73. In the absence of any evidence that there was in fact such a notice which notice would have been exclusively within the knowledge of the Defendant this Court would be entitled to make adverse inference to the effect that such a notice if it ever existed would have been adverse to the case as presented by the Defendants. However as there is no evidence of the existence of such a notice I find that in fact there was no such notification of the meeting and that the meeting which was purportedly convened if at all there was in fact such a meeting was not binding on the plaintiffs and the resolutions which flowed therefrom could not similarly bind the plaintiffs.

74. Apart from the foregoing it is clear from the evidence on record that the allotment of shares to the plaintiffs was allegedly done in the year 2010. The deductions in question however took place before the allotment of the shares. In my view the said deductions could only be said to have been loans borrowed by Kuri Tea Factory unless and until the same were ratified. There was no evidence of such ratification.

75. I have also considered the fact that both the 2nd Defendant and Kuri were registered as private limited liability companies. Although the Defendant contended that these positions later changed, no evidence was adduced to that effect. Being private liability companies their operations could only be undertaken pursuant to their constitutions i.e. Articles and Memorandums of Association. Since the said Constitutions prohibited floating of the shares to the public one then wonders how the shares of Kuri in question could lawfully be allotted to the plaintiffs who were not members of Kuri at least until 2010. It is therefore not surprising that Kuri sued Theta, KTDA, KTDA Holdings and DW1 in respect thereof. In my view the allotment of shares of Kuri to the plaintiffs was a belated attempt to sanitise what was in effect an illegal and unlawful deduction. The Defendants simply had no powers to effect deductions based on what they deemed was a practice in the Tea Industry which was contrary to company law.

76. With respect to the amount which was deducted, the law was clearly laid down in **Shabani vs. Nairobi City Council [1985] KLR 516; (1982-1988) 1 KAR 681** where it was held that:

> **"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the Court saying: 'This is what I lost; I ask you to give me these'. They have to prove it."**

77. In his evidence DW1 confirmed that the number of plaintiffs in Case No. 1192 of 2003 was 1,154 and that the amount claimed was Kshs 11,588,986 which according to him was the figure that was deducted in total. With respect to Case No. 26 of 2004, while admitting that the plaintiffs were 1,007 claiming a

figure of Kshs 10,662,939 he was unable to tell whether this was the deducted figure. It therefore follows that there was an express admission by the defence on the amount deducted with respect to case No. 1192 of 2003. That being the case there was no need to prove the amount claimed therein since a fact that is admitted need not be proved. See **H M B Kayondo vs. Somani Amirali Kampala HCCS No. 183 of 1994.**

78. However as there was no express admission by the Defence on the actual figure claimed in case No. 26 of 2004, it was incumbent upon the plaintiffs to prove the actual amounts deducted. In the absence of such an admission the plaintiffs in that case had to adduce evidence to show the actual deductions. This could be proved either by way of documentary evidence which the plaintiffs must have had or by way of an implied admission in the pleadings where specific allegations are not expressly denied.

79. Though the plaintiffs contend that the sum claimed in HCCC No. 26 of 2004 was admitted I have looked at the defence and I am not satisfied that the same was either expressly or pursuant to the rules of pleadings impliedly admitted. To the contrary the defendants expressly denied the paragraphs in which the sums were claimed and the plaintiffs were put to strict proof thereof. Therefore whereas the deductions were admitted by the defendants, since the exact sums deducted in respect of HCCC No. 26 of 2004 was never admitted, the issue of the actual amount of deductions became a contested issue and had to be proved. Such claims as these ought not only to be expressly and specifically pleaded but must be strictly proved unless admitted either expressly or by legal implication.

80. It is therefore not without some sympathy to the plaintiffs in HCCC No. 26 of 2004 that I have to decline to grant their claim as sought. The plaintiffs seem to have opted for a short-cut. However as was held by the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220**, the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch.

81. Accordingly it follows that I can only enter judgement in respect of the claim that is proved to the required standards.

82. With respect to interest, in **Later vs. Mbiyu [1965] EA 392** it was held:

> **"The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judicially exercised, and where no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown…It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."**

83. Similarly in **Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another [2006] eKLR** it was held:

> **"The justification for an award of interest on principal sum is to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant."**

84. In the same vein it was held in **Lwanga vs. Centenary Rural Development Bank [1999] 1 EA 175 that:**

> **"The award of interest prior to the institution of the suit is rationalised in two ways: (1). that the plaintiff is thereby being compensated for being kept out of his money. He has been deprived of the use of his money from the time he incurred his loss. On that basis, interest is to run from that date. (2). that the defendant wrongfully withheld the plaintiff's money. The emphasis here is on the Defendant's wrongful withholding of the Plaintiff's money. On that**

basis, interest is to run from the date when the Defendant ought reasonably to have settled the plaintiff's claim. This is rather punitive."

85. It is therefore clear that an award of interest is a form of reimbursement or compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, by the party who has wrongfully deprived him of the use of goods or money.

Order

86. In the result, I enter judgement for the plaintiffs in HCCC No. 1192 of 2003 in which 1,154 plaintiffs claimed Kshs 11,588,986 as particularised in the schedule annexed to the said plaint together with interests at Court rates from the date of filing this suit till payment in full.

87. The said plaintiffs will also have the costs of this suit.

Dated at Nairobi this 9th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ojwang' Agina for the plaintiffs

Mr Kamau for the Defendants

Cc Patricia