



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL NO. 39 OF 2014

BETWEEN

JOSEPH GICHERU MUCHIRI APPELLANT

AND

THE CHAIRMAN KIANGIMA TRADING CENTRE.....1ST RESPONDENT

LEAF BASE MANAGER..... 2ND RESPONDENT

KENYA TEA DEVELOPMENT AGENCY..... 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 21st February, 2014

in

H.C.C.A No. 173 of 2002)

JUDGMENT OF THE COURT

1. By a Plaint filed in the Chief Magistrate’s Court at Nyeri the appellant sued the respondents seeking *inter alia* general damages for loss of earnings due to him when his tea was rejected and was suspended from selling his tea to the 1st respondent. The appellant averred that the 3rd respondent was vicariously liable for the conduct of the 1st and 2nd respondents who were its agents.
2. At all material times the appellant was a tea grower licensed by the 3rd respondent; he used to take his tea to Kiangima trading centre which was under the jurisdiction of the 2nd respondent. It was the appellant’s evidence that on 2nd January, 1999 he took his tea to the trading centre; the clerk on duty did not properly weigh the tea and recorded a shortfall; the appellant complained but the said clerk refused to confirm the weight of the tea and to correct the error. Thereafter, on 4th January, 1999 the appellant took 70 kilograms of tea to the trading centre wherein the clerk refused to receive the same; this was the clerk to whom the appellant had previously complained about the above mentioned shortfall.
3. Subsequently, the appellant was banned for six months from taking his tea to the Tea buying centre vide a committee meeting which was held on 19th January, 1999. As a result the appellant

- testified that he suffered loss since the trading centre was the only avenue through which he could sell his tea. He gave evidence that he used to sell an average of 500 kilograms of tea each month; he had taken 8 Kilograms fertilizer worth Kshs 8,624/= which was to be deducted from his monthly payment by the 3rd respondent; he also spent Kshs. 23,000/= to rehabilitate the tea bushes which also went to waste. He maintained that the aforementioned ban was illegal and without basis.
4. In their defence the respondents filed a joint statement of defence denying the appellant's allegations. The respondents averred that there was no agency relationship between the 1st and 2nd respondents' on one part and the 3rd respondent on the other part. They maintained that if any loss was suffered by the appellant it was due to his own conduct. DW1, Peter Wagura Waiganjo (Peter), a clerk at the Tea buying centre, testified that on 6th January, 1999 the appellant brought his tea to the centre; he advised the appellant to sort out his tea before he could receive the same. The following day the appellant came to the trading centre with a metal rod and threatened to beat him up because he had refused to receive his tea. Peter maintained that the tea which was brought by the appellant was not good; if he had received it as it was he would have been surcharged or suspended from duty; he directed the appellant to select the tea in accordance to the trading centre's regulations.
 5. DW2, Jerevasio Kihara Muchiri (Jerevasio), testified that he was a committee member of the Tea buying centre; On 19th January, 1999 a meeting was held to discuss the appellant's misconduct; the appellant was in attendance. It was resolved that the appellant should apologize for his conduct; the appellant refused to apologize and he was banned for six months from delivering tea to the centre. According to Jerevasio, the ban was in accordance to the Tea buying centre's rules and regulations which were enacted in the year 1997.
 6. After considering the foregoing evidence, the trial court partially allowed the appellant's claim by finding that he was only entitled to payment for 5 ½ kilograms of tea which was delivered to the 3rd respondent. The trial court also found that the appellant's conduct was contrary to the Tea buying centre's rules and regulations. Dissatisfied with the trial court's decision, the appellant filled an appeal in the High Court which was dismissed vide a judgment dated 21st February, 2014. It is that decision that has provoked this second appeal based on a total of 12 grounds that can be aptly summarized as follows: -
 - ***The learned Judge erred in law by failing to consider the appellant's submissions.***
 - ***The learned Judge erred by failing to consider that the respondents had admitted in their statement of defence that the appellant had delivered 70 Kilograms of tea on 4th January, 1999 which was rejected by the 1st respondent.***
 - ***The learned Judge erred by failing to consider that as a result of rejection of the tea the same perished.***
 - ***The learned Judge erred by failing to consider that from the evidence there were no by-laws for the Kiangima trading centre hence the appellant had not breached any of the centre's regulations.***
 - ***The learned Judge erred in failing to consider that in the absence of rules and regulations of Kiangima tea buying centre, the centre was entirely run through the provisions of the Tea Act Chapter 343 of the Laws of Kenya which does not sanction banning of tea delivery.***
 7. By consent of the parties the appeal herein was disposed by way of written submissions and oral highlights. The appellant appeared in person while the respondents were represented by Miss Mwai.
 8. The appellant submitted that the learned Judge (Sergon, J.) failed to consider that he suffered irreparable loss as a result of the illegal ban from delivery of tea by the 1st and 2nd respondents for onward transmission to the 3rd respondent. He was forced to sell his land Othaya/Kihungiru/1282

in order to feed and pay school fees for his children as well as meet other expenses. The appellant argued that 1st respondent rejected to receive 70 Kilograms of tea which he had delivered for no reason. According to him, at all material times the Kiangima Tea buying centre had no by-laws in force. Therefore, the trading centre was governed by the Tea Act which does not sanction the banning of tea delivery to the respondents.

9. The appellant submitted that he was forced to apologize after he had complained that the 1st respondent had refused to receive 75.5 kilograms which he had delivered. He argued that since the respondents advocate had drawn the sale agreement for the sale of his land, this Court ought to dismiss her submissions on behalf of the respondents. The appellant maintained that the ban was illegal and actuated by malice. The appellant tabulated that he entitled to special damages to the tune of Kshs. 552,040.60/=. He urged us to allow the appeal.
10. It was submitted on behalf of the respondents that none of the grounds of appeal raised issues of law. It was argued that the trial court did not err in rejecting the appellant's claim because firstly, he failed to prove the alleged losses to the required standard and secondly, the evidence on record proved that the appellant was banned in accordance to the laid down rules and regulations. It was further submitted that the appeal lacks merit and ought to be dismissed with costs.
11. We have anxiously considered the record, the grounds of appeal, submissions by parties and the law. This being a second appeal we caution ourselves that we are restricted to considering only matters of law. In *Kenya Breweries Ltd. –vs- Godfrey Odoyo- Civil Appeal No. 127 of 2007*, Onyango- Otieno, J.A held,

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

12. Taking into account the foregoing we are of the view that the following issues fall for our consideration:-

- ***Whether the Kiangima Trading Centre had rules and regulations (by-laws) at the material time;***
- ***If so, whether the appellant breached the said regulations;***
- ***Whether the ban imposed on the appellant was legal;***
- ***Whether the appellant was entitled to the damages sought.***

13. The appellant contended that at the time his cause of action arose Kiangima Tea buying centre did not have its own rules and regulations in force; the rules and regulations which were tendered in the trial court were enacted thereafter and fraudulently backdated. From the record, we note that DW2 (Jerevasio), a member of the trading centre's committee testified that the said regulations were enacted in the year 1997; he was present at the annual general meeting that passed the said regulations. This position was further confirmed by DW5, Daniel Mania Muchiri (Daniel), who was the secretary of the committee between the years 1997 to 1999. We have also looked at the said regulations which are on record and we note that the same indicate they were unanimously passed during the trading centre's annual general meeting which was held on 25th November, 1997. There was no evidence to support the allegations of the appellant. Consequently, we concur with the two lower courts that at all material times the trading centre's regulations were in force.

14. Having found as above the next issue that falls for our consideration is whether the appellant breached the rules and regulations of Kiangima trading centre. Regulation 5 of the said regulations provide in part as follows: -

“5. Conduct of growers at the tea buying centre:

- a. ***All growers should respect the leaf collection clerk or any person authorized by the leaf base***

management to act on his behalf.

- b. *It is an offence to interfere with the smooth buying of tea leaves.*
- c. *All growers should channel their grievances through the committee for peaceful settlement.*
- d.
- e. *All members present agreed unanimously that abusive language should be discouraged.”*

15. In this case DW1 (Peter) testified that on 7th January, 1999 the appellant went to the Tea buying centre armed with a metal rod and threatened to beat him up because he refused to receive his tea leaves the previous day; the appellant insulted him. We also note that DW5 (Daniel) testified that on 9th January, 1999 the appellant’s son had taken the weighing scale at the trading centre disrupting the business therein. The appellant never denied the foregoing. We are of the considered view that the appellant did in fact violate the aforementioned rules and regulations.

16. Therefore, was the ban imposed on him illegal? We note that regulation 5(h) provides:-

“If a grower persistently misbehaves to the extent of making the affairs of the tea buying centre unmanageable, he will be suspended from selling his tea forthwith. He will then be accorded a chance to sort out his differences with the farmers.”

DW2 (Jerevasio) testified that during the meeting which was held on 19th January, 1999 to discuss the appellant’s conduct, the appellant was given an opportunity to apologize for his conduct but he refused to do so and he was therefore banned from taking his tea to the Tea buying centre. Based on the foregoing we find that the ban imposed on the appellant was in accordance to the trading centre’s rules and regulations.

17. The appellant herein sought both general and special damages of Kshs 31,648/= against the respondents. The burden of proof of damages lay with the appellant. See this Court’s decision in ***Abdalla Hussein Kilo –vs- Kombo Kassim Omar & another- Civil Appeal No. 49 of 1984.*** As illustrated herein above the ban imposed on the appellant by the 1st respondent was legal and hence the appellant cannot claim damages against the respondents for the said ban. Lastly, it is trite law that special damages ought to be specifically pleaded and proved. In ***James Mwangi –vs- Alex Njuguna & 2 others –Civil Appeal No. 41 of 2007*** this Court held,

“The law requires that special damages be specifically pleaded and also strictly proved, failing which they are not for granting. See Mwai –vs- Kenya Tourist Development Corporation [1983] KLR 358. The record shows that all that the appellant did as far as special damages were concerned was to simply specify them in the plaint without proving them. He moreover never led any evidence in proof of them. In our view, the learned Judge cannot be faulted for not granting them.”

18. In this case the appellant claimed in his Plaint special damages to the tune of Kshs. 8,648/= for fertilizer and Kshs. 23,000/= for rehabilitation of his tea bushes. We concur with the two lower courts that the appellant never proved the said special damages. We cannot help but note that the appellant in his submissions filed before this Court adjusted his claim for special damages upwards to Kshs. 552,040.60/=. This figure was never pleaded in the Plaint neither was it proved to the required standard.

19. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 14th day of April, 2015.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

*I certify that this is a true
copy of the original*

DEPUTY REGISTRAR