



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, OMOLO & LAKHA, J.J.A.)

CIVIL APPEAL NO. 116 OF 2000

BETWEEN

KENYA FARMERS ASSOCIATION LTD.....APPELLANT

AND

CHARLES OTIENO OCHIENGRESPONDENT

**(Appeal from the ruling and orders of the High Court of Kenya at Mombasa (Justice Hayanga)
dated 16th December, 1999**

in

H.C.C.C. NO. 104 OF 1999)

JUDGMENT OF THE COURT

Until 19th July, 1999, Charles Otieno Ochieng, the respondent to this appeal was an employee of the Kenya Farmers Association Ltd, the appellant herein. On the 19th July, 1999, however, the appellant wrote a letter to the respondent and the subject matter of that letter was the dismissal of the respondent. The appellant told the respondent:

"This refers to our letter ref: 44/AF dated 8th June, 1999 in which you were suspended for failure to account loss of cash amounting to Kshs. 10,207,856 in your work. We regret to inform you that a decision has been made to dismiss you from employment with immediate effect for gross misconduct. Please note that our action will not preclude any other action that might be taken against you for the malpractice.

Please take note that any amount of your entitlements realised will first be applied to off-set the loss incurred by you. You are required to hand-over the Association's house/property to Mr. Mohammed Kiruwa.

Yours faithfully,

S.K. CHEROGONY

AG. GENERAL MANAGER."

It would appear that subsequent to this letter the respondent was charged with an offence in respect of an alleged theft of money by him from the appellant but that is really of no moment in this appeal. What is important is that the respondent thereafter filed a suit in the court of the magistrate at Mombasa and in that suit he prayed for orders restraining the appellant "from effecting terms of the letters dated 19th July 1999 and 27th August, 1999 so that the plaintiff [respondent] will continue drawing salary and occupying the house that the plaintiff occupies without any interference on the part of the defendant [appellant]". There was also an alternative prayer for damages.

The plaint was accompanied with a chamber summons under Order XXXIX Rules 1, 2,3,4 and 9 of the Civil Procedure Rules , and in that summons, among the interlocutory orders sought was, one for an interlocutory injunction as set out in the plaint. All we need to say on that point is that the trial magistrate considered the application for an interlocutory injunction and rejected it. The respondent appealed to the High Court against the rejection of the prayer for an interlocutory injunction; he also filed an application for a temporary injunction within the appeal. Hayanga, J. granted that prayer. The appellant was dissatisfied with the orders made by the learned Judge and it has come to us. There are four grounds of appeal.

We entirely agree with Mr. Gikandi for the appellant that Hayanga, J. in granting the motion was exercising a judicial discretion. We can, therefore only interfere with his exercise of discretion if we are satisfied that he:-

- (i)took into account irrelevant matters which he ought not to have considered; or
- (ii)failed to take into account relevant matters which he ought to have taken into account; or
- (iii)that on the reading of his ruling, he was plainly wrong.

It appears to us that the only matter the learned Judge considered was whether, in the circumstance before him, he had jurisdiction to grant an injunction. He found that he had jurisdiction and proceeded to grant an injunction. We agree that the learned Judge had jurisdiction to grant an injunction. But with respect to him, that was not the only issue he was required to consider. He totally failed to consider the fact that whether rightly or wrongly, the appellant had in fact dismissed the respondent. He did not consider what the terms of employment between the appellant and the respondent were i.e. whether the contract between them could be terminated by notice and what the period of notice was and such like relevant matters. He also failed to consider the fact that equity does not normally support the ordering of specific performance of contracts of employment. The learned Judge was under duty to consider all these matters before granting an injunction to the respondent.

The learned Judge failed to consider them. We do not know what decision he would have arrived at had he considered them. Clearly, the learned Judge failed to take into account very relevant matters before deciding to exercise his discretion in favour of the respondent and that being so we are entitled to interfere. We do so by allowing the appeal and setting aside the orders made by Hayanga, J on the 16th December, 1999. We substitute those orders with an order dismissing with costs the respondent's Chamber Summons dated and filed in Court on the 12th November, 1999. We award to the appellant the costs of this appeal.

Dated and delivered at Mombasa this 28th day of July, 2000.

J.E. GICHERU

.....

JUDGE OF APPEAL

R.S.C. OMOLO

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR