



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 2038 OF 2001**

MANILAL ENTERPRISES LIMITED.....1<sup>ST</sup> PLAINTIFF

PATEL JITENDRAKUMAR CHANDUBAHL.....2<sup>ND</sup> PLAINTIFF

- V E R S U S -

SMITABEN ARVINKUMAR PATEL

T/A AXAR ENTERPRISE.....1<sup>ST</sup> DEFENDANT

ASHWIN MARU.....2<sup>ND</sup> DEFENDANT

HELEN WANGARI MWANGI.....3<sup>RD</sup> DEFENDANT

MUTHEE GORO.....4<sup>TH</sup> DEFENDANT

BONIFACE K. KARUKARU.....5<sup>TH</sup> DEFENDANT

**JUDGEMENT**

1) Manilal Enterprises Ltd and Patel Jitendrakumar Chandubhai, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs herein, filed an action against Smitaben Arvindkumar Patel t/a Axar Enterprises and three other defendants vide the plaint filed on 29.3.1999 whereof they sought for *interalia* judgement against the defendants for:

*i. Ksh.480,000/=*

*ii. Loss of earnings of kshs.25,000/= per month from November, 1997 until full payment.*

*iii. Damages for breach of contract*

*iv. Damages for loss of business*

*v. Damages for conversion*

*vi. Interest at court rates*

*vii. Costs of the suit.*

2) The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a defence but the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not enter appearance nor file a defence despite having been served hence a default judgment was entered against them on 4.7.99. However, when this suit came up for hearing, Ashwin Maru the 2<sup>nd</sup> defendant herein, was the only defendant who turned up to defend the suit.

3) In the plaint dated 29.3.1999, Manilal Enterprises Ltd stated that it was operating a general shop in plot no. 209/4917/2 Mfangano Street, Nairobi. It is also averred that the 2<sup>nd</sup> plaintiff was a director of the 1<sup>st</sup> plaintiff company. It is the plaintiffs' assertion that at all material times, the 2<sup>nd</sup> defendant was an agent, employee or servant of the 1<sup>st</sup> defendant and that the duo colluded with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to threaten and forcibly lock out the 2<sup>nd</sup> plaintiff from the business premises. The plaintiffs further alleged that the 1<sup>st</sup> and 2<sup>nd</sup> defendants

illegally remained in possession of chattels belonging to the 1<sup>st</sup> plaintiff forming part of the stock of the 1<sup>st</sup> plaintiff.

4) The plaintiffs' evidence is captured in the testimony of Patel Jitendrakumar Chandubhai (PW1), the 2<sup>nd</sup> plaintiff, who testified in his capacity as the director of the 1<sup>st</sup> plaintiff company. PW1 adopted the contents of his witness statement dated 14.5.2015 as his evidence in chief. He claimed that he has a business by the name Manilal Enterprises Ltd which he has owned since 1996. He produced in evidence as an exhibit a notification of change of directors which indicated that Mrs. Vinodray Fulchand Jankharia and Mrs Bhanumati Hasraj Jankaria had resigned and in their place appointed new directors namely Patel Jitendrakumar Chandubhai and Miss Bharna Chandrakant Amin. PW1 stated that he used to file annual returns of the 1<sup>st</sup> plaintiff company and that on 4.11.1997 the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered his business premises and carted away goods worth ksh.480,000/= which action also made him lose a monthly income of ksh.25,000/=. In cross-examination PW1 admitted not to have any minutes and resolutions passed in order to have him allotted shares in the 1<sup>st</sup> plaintiff company though he claimed he was given shares from the Hasraj Jankaria, deceased on 25.3.1997. PW1 was hard pressed to show the sale agreement nor the share certificate.

5) The 2<sup>nd</sup> plaintiff also failed to produce financial statements to show how the business performed. PW1 stated in his testimony that the 2<sup>nd</sup> defendant threatened to lock him up but he however admitted that there were neither gangs nor any person welding weapons. PW1 admitted that he did not book a report with the police concerning his eviction from the business premises.

6) Ashwin Maru (DW1), the 2<sup>nd</sup> defendant, adopted the contents of his witness statement as his evidence in chief. DW1 told this court that his tribulations begun when he answered a distress call by his neighbour, Smitaben Patel, the 1<sup>st</sup> defendant herein. He said he was told by Smitaben that she had invested her money to the tune of ksh.950,000/= to purchase the business in Nairobi along Mfangano Street. DW1 further stated that Smitaben Patel told him she dealt with one Bhavin Shukla and one Jignesh who later turned out to be the 2<sup>nd</sup> plaintiff herein. He also stated that she was told by him that she went to the business premises where she discovered that her business premises had been mismanaged by the 2<sup>nd</sup> plaintiff who took goods on credit without her permission yet she was the one who capitalized the business. DW1 said he went to meet the 2<sup>nd</sup> plaintiff after hearing the narrative of the 1<sup>st</sup> defendant. DW1 stated that he managed to convince the 2<sup>nd</sup> plaintiff to willingly hand over the keys to the business to the 1<sup>st</sup> defendant. He also said that he thereafter managed to organise a meeting between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> plaintiff in his house where one Bhavin confirmed that the business belonged to the 1<sup>st</sup> defendant since the 2<sup>nd</sup> plaintiff had no money to put into the business nor refund the 1<sup>st</sup> defendant. In the meeting, DW1 said, the 1<sup>st</sup> defendant would manage the business as the defendant and Bhavin surrendered the business to her fully seeing that they had no money to refund to her. The 2<sup>nd</sup> defendant has stated that he was surprised when he found himself enjoined to the suit yet he is not a shareholder nor an employee of the 1<sup>st</sup> defendant.

7) Upon considering the evidence and the rival submissions, the following issues arose for the determination of this court

***i. Whether the 2<sup>nd</sup> defendant is rightfully enjoined to this suit.***

***ii. Whether the 2<sup>nd</sup> plaintiff is a proper party to this suit.***

***iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants are liable for conversion.***

8) On the first issue as to whether the 2<sup>nd</sup> defendant is rightfully enjoined to this suit, it is the submission of the plaintiffs that the 2<sup>nd</sup> defendant in his testimony indicated that though he did not have any interest in the business, he threatened the 2<sup>nd</sup> plaintiff forcing him to surrender the keys to his business premises to the 1<sup>st</sup> defendant thus occasioning the plaintiffs loss of earnings. It is the defendants' submission that the 2<sup>nd</sup> defendant is not a proper party to this suit since he has no interest in business in dispute. I have carefully considered the pleadings and the evidence and it is apparent that the plaintiffs have accused the 2<sup>nd</sup> defendant of colluding with the 1<sup>st</sup> defendant to forcibly take over the suit premises from plaintiffs. The evidence tendered by the 2<sup>nd</sup> defendant shows that the 2<sup>nd</sup> defendant played a role in the dispute. In my view, I think that the 2<sup>nd</sup> defendant is a necessary party in this suit therefore he is properly enjoined in this action.

9) The second issue is whether or not the 2<sup>nd</sup> plaintiff is a proper party in this suit. It is the submission of the defendant that the 2<sup>nd</sup> plaintiff is not a proper party in this suit since the wrong complained of, was committed against a company and not him as an individual. With respect, I agree with the submissions of the defendants. Manilal Enterprises Ltd, is a limited liability company which is a distinct legal entity from its directors and shareholders. The plaint shows that the 2<sup>nd</sup> plaintiff is in the suit as a director of the 1<sup>st</sup> plaintiff company. In the plaint, the 1<sup>st</sup> plaintiff is clearly stated to be operating a general shop. The nexus between the dispute and the 2<sup>nd</sup> plaintiff has not been established. The right party to sue is Manilal Enterprises Ltd and not Patel Jitendrakumar Chandubhai. The 2<sup>nd</sup> plaintiff cannot purport to be the company at the same time. It is clear from the evidence of PW1 that the 1<sup>st</sup> plaintiff company did not authorise the 2<sup>nd</sup> plaintiff through its board of directors to file this suit through its general meeting. There is also no evidence that the 2<sup>nd</sup> plaintiff obtained leave from court to either file or continue with the derivative action consequently this action is invalid for want of authority and leave of court.

10) The third issue is whether the plaintiffs have established any liability against the defendants. It is the submission of the plaintiff that they presented evidence showing that the 1<sup>st</sup> and 2<sup>nd</sup> defendants forcefully evicted the 2<sup>nd</sup> plaintiff from his business premises and continued it as if the same were theirs. The defendants are of the contrary view that the plaintiffs miserably failed to prove their claim based on conversion. I have considered the evidence tendered and it is clear to me that the evidence presented by the 2<sup>nd</sup> plaintiff did not establish any liability against of the defendants. The plaintiffs were unable to show that any money was due for stocks allegedly supplied in the sum of kshs.480,000/=. The 2<sup>nd</sup> plaintiff also failed to produce any evidence to suggest that there was forceful eviction from the business premises. I am also convinced that the 2<sup>nd</sup> plaintiff failed to show that he received a salary of ksh.25,000/= per month from the business. The evidence tendered does not include records of receipts for payments to the suppliers nor records of evidence of ownership of the business.

11) Having considered the pleadings, the evidence and the rival written submissions together with the submissions, I have come to the conclusion that the plaintiffs failed to prove their case against the defendants on a balance of probabilities. Consequently this suit is found to be without merit. The same is dismissed with costs to the 2<sup>nd</sup> defendant.

**Dated, Signed and Delivered in open court this 12<sup>th</sup> day of April, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant