



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.291 OF 2000

JAPHETH NZILA MUANGI PLAINTIFF

VERSUS

KENYA SAFARI LODGES & HOTELS LTD. DEFENDANT

R U L I N G

JAPHETH NZILA MUANGI (the Plaintiff) is still giving evidence in- chief in this suit which he instituted against KENYA SAFARI LODGES & HOTELS LTD. (the defendant) for KSh.3,411,004/45 and interest thereon at 15% p.a. for summary dismissal by the defendant from his employment. He is being led through his evidence-in-chief by his advocate Mr. Musinga.

The plaintiff is contending that by a letter of appointment dated 27th February 1974 sent to him by the defendant he agreed to serve the defendant in accordance with the terms and conditions of that letter, which he has tendered into evidence as exhibit 1. This letter contained express termination of employment Clause No.5. He also produced an agreement executed between the defendant and African Tours and Hotels Ltd. (Exhibit 2) and Terms and Conditions of Service of African Tours and Hotels Ltd. (Exhibit 3) both of which further spell out termination clauses and benefits payable upon termination of employment.

He has gone further to demonstrate that on 22nd November 1979 he was moved to Mombasa Beach Hotel vide exhibit 5 as an Accountant of the defendant company. But then, he stated that African Tours and Hotels Ltd. Began to perform poorly due to poor marketing strategies and this affected Mombasa Beach Hotel profits. This did not please the Directors of the defendant company who began planning to get rid of AFRICAN TOURS & HOTELS LTD.

The Plaintiff went on to explain that on 29th June 1998 or thereabouts African Tours & Hotels Ltd. was put under Receivership and Mr. Abdul Zahir Sheikh and Andrew Douglas Gregory were appointed Receiver Managers by Kenya Commercial Bank Ltd. And Kenya Commercial Finance. In no time the management of Kenya Tourist Development Corporation took over the Management of the defendant company. This was also the beginning of his problems as well.

In February one Mr. Steve Njoroge Kamuyu was appointed as the Sales and Marketing Manager, to be his immediate boss. Their relationship did not somehow click for reasons which he said were unclear to him. He received a report on 20th April 2000 from Mr. Kamuyu on alleged fraudulent false accounting in the accounts Department which he was heading. That report led to his dismissal. It is exhibit 10.

The plaintiff's contention is that he had given Mr. Kamuyu a detailed response to the Investigation Report vide his letter Exhibit 11 which ought to have been accepted.

Somehow three employees of the defendant company who worked in his department were arrested and charged with false accounting in Criminal Case No.3249 of 1999. These were Zakayo W. Osapiri, Richard Thoya Saidi and Omar Mwenda Ndeke. They were charged with stealing Sh.17,194,392/- He said that he was in fact a prosecution witness, not an accused, in that case.

The plaintiff now seeks to produce as his exhibit criminal proceedings in that case, (criminal case No.3249 of 1999), and judgment to demonstrate that he had nothing to do with the theft of Sh.17,194,392/- or with any fraudulent acts within his Department.

Miss Osino, advocate representing the defendant company has objected on grounds that they are not relevant to any issues in this case and are therefore inadvisable under Section 46 of the Evidence Act. In any case Miss Osino submitted that they have not been pleaded.

Mr. Daniel Musinga, relies on Section 44 of the Evidence Act and has submitted that judgment in Criminal Case No.3249 of 1999 is a judgment "in rem" and is admissible.

It is trite law that ordinarily a judgment binds only the parties to it. This is known as Judgment in **personem**. A judgment may also be conclusive not only against the parties to it but also against all the world. This is known as a **judgment in rem**. This is a judgment which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.

As provided in Section 44 (1) of the Evidence Act –

“A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character, to be entitled to any specific thing, not as against any specified persons but absolutely is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible”.

The plaintiff contends that Mr. Kamuyu virtually held him responsible for the false or fraudulent accounting which allegedly existed in the Accounts Department at Mombasa Beach Hotel. To demonstrate Mr Kamuyu's intentions, the three accused, who were employees in that Department, were charged with theft. But the court pronounced a final judgment about their character and found them innocent. Through the acquittal of these accused the plaintiff seeks to demonstrate that there was no false accounting or any criminal activity going on in his Department which would have justified his dismissal. I think, in the light of the above, it is correct to say, and I do so hold, that the judgment in criminal case No.3247 of 1999 was a judgment in rem is admissible.

As to the issue of pleading, it is trite law that matters of evidence ought not to be pleaded in a plaint. The prosecution of and acquittal of the said three accused was a matter of evidence. For the above reasons I overrule the objection raised by the defendant company.

It is so ordered.

Dated and delivered this 30th July 2003.

A.G.A. ETYANG

JUDGE

