



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 428 OF 2000

SIMON GITHUI PLAINTIFF

VERSUS

KENYA NEON & SIGNS LTD DEFENDANTS

RULING

The application dated 25th and filed herein on 27th September 2001 seeks this courts, order to strike out the defendants' defence and for entry of judgment for the plaintiff against the defendant as prayed in the plaint. There is also a prayer for the costs of the application.

The grounds upon which the application is based as stated thereon is that the defence filed herein is not a defence to the plaintiff's claim and that the defendant is justly indebted to the plaintiff as pleaded in the plaint.

The supporting affidavit to the application avers, amongst others, that by letter dated 20th April 1994 the defendant offered to the plaintiff employment on terms set out therein and that on 13th March 1996, the latter was confirmed in employment.

That prior to confirmation, the defendant had agreed to sell to the plaintiff some shares in the defendant company and that between May 1994 and July 1997 the plaintiff had procured sales for the defendant to the tune of Kshs.15,822,676/- in addition to duties as General Manager for which he was entitled to a commission of Kshs.316,453/=.

That the managing director, one Mr. Maara promised to pay the plaintiff the above sum when money was received from National Social Security Fund but that though this sum was received, no payment was made to the plaintiff.

The plaintiff wrote a letter dated 4th September 1997 requesting payment of this money but instead of paying it, the defendant wrote to the plaintiff a letter dated 30th March 1998 terminating his services summarily and this is why the plaintiff filed a case in court which is the subject of this application.

Attached to the application was a letter of appointment dated 20th April 1994, a letter of confirmation in appointment as the General Manager dated 13th March 1995, the memorandum of understanding between George A. Maara and the plaintiff over allocation of shares by the defendant to the former, a letter by the plaintiff dated 4th September 1997 requesting the defendant to pay him the agreed commission and the dismissal letter dated 30th March 1998.

In the plaint, the plaintiffs' complaint is over his unlawful dismissal from employment and payment of special damages arising therefrom. (See paragraphs 6 and 8 of the plaint).

The defence denies paragraph 6 of the plaint and says in paragraph 3 of the defence that the dismissal was

lawful and/or that all dues to the plaintiff were settled on termination of his employment or that there were no leave days due, hence no leave allowance was payable or that all the claims made in paragraph 8 of the plaint were not payable and so forth.

To my mind there are two main issues for determination of the plaint, namely whether the termination of the plaintiffs' services with the defendant was unlawful and, if so whether he is entitled to all or some of the damages claimed. This then turns on terms of employment and in particular paragraph K of the letter of appointment which provides as follows:-

“During the probationary period your employment may be terminated by giving one months notice or one month’s salary on either side. On successful completion of the probationary period, you will be confirmed to serve the company on permanent terms.

Termination of permanent terms will be by giving three months notice or three months salary in lieu of notice”.

The letter terminating the plaintiffs' services with the defendant is dated 30th March 1998 and terminates his said services with effect from 31st March 1998. This is clearly in contravention of paragraph K of the letter of appointment aforesaid unless, of course, notice period was paid for.

But by copy of the above letter to one John Gathingira, I do not know what his role in the defendants' company was, dues and commissions were to be worked out for the plaintiff.

Yet while in paragraph 7 of the defence it is alleged that the plaintiff was not entitled to any of the claims made in the plaint, paragraphs 6 and 7 of the replying affidavit to this application confirm that a sum of Kshs.128,272/50 was owed to the plaintiff before this suit and/or application was filed and that after the application was filed a sum of Kshs.50,000/= had been paid.

In the circumstances, while there may be very little to be said about the unlawful nature of the termination of services of the plaintiffs services with the defendant I cannot say so about the damages claimed.

Thus the issue of damages appears to be under contest and I cannot say with certainty that the defence is a sham in view of the applicants silence over it after the replying affidavit was filed.

After going through the supporting and replying affidavits to which both counsel relied and on my consideration of the entire case, I am inclined to allow the defendant leave to defend the suit but that costs of this application either agreed or taxed should be paid by the defendant to the plaintiff as well as the admitted figure of the outstanding dues, put by the defendant at Kshs.78,272/50. The latter amount to be paid to him within 7 days from today, failing which the leave granted to lapse the defence to be struck out and the suit to proceed ex parte.

Delivered this 9th day of October, 2001.

D.K.S AGANYANYA

JUDGE