



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, AKIWUMI & O'KUBASU J.J.A)
CIVIL APPEAL NO. 100 OF 1999

BETWEEN
HANS RAJ AGGARWAL APPELLANT
AND
MUNSHIRAM & COMPANY LIMITED RESPONDENT

(Being an appeal from the judgment of the High Court of
Kenya at Nairobi (The Hon. Mr. Justice Ole Keiwua)
dated 19th day of March, 1999
in
H.C.C.C NO. 4909 OF 1991)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (Ole Keiwua, J. as he then was). There are three grounds of appeal:

- "1.THAT the learned Judge erred in law in failing to appreciate sufficiently or at all that the counterclaim was not proved to the degree required by law.
- 2.THAT the learned Judge erred in law in failing to appreciate sufficiently or at all that there was no basis in law upon which he could properly set off the amount claimed in the counterclaim as against the amount due to the appellant from the respondent.
- 3.THAT the learned Judge erred in arriving at a decision which was against the weight of evidence adduced at the hearing of the case".

The dispute herein was commenced by way of a plaint in the Resident Magistrate's Court at Nairobi as the plaintiff's claim was for Shs.69,830/-. The defendant filed a defence and a counter claim for Shs.205,161/85. In view of the counterclaim, the suit was then transferred to the High Court.

Mr. Odera for the appellant argued that the counterclaim was not proved since the documents produced by the respondent showed a total of Shs.45,915/15 only and so there was no any other evidence to increase that figure to Shs.124,842/95 as awarded by the High Court.

Mr. Sehmi for the respondent was of the view that as this was a family dispute the judgment of the High Court should be upheld as the respondent proved its case.

This appeal was actually confined to the issue of counter-claim. The plaintiff who is the appellant herein filed a plaint claiming Shs.69,830/- against the defendant company (now the respondent). The respondent filed a defence denying the claim and put in a counter-claim in the sum of Shs.205,161/85. After hearing evidence adduced by the parties, the learned judge came to the following conclusion:-

"In all, the defendant has so far managed to prove the counterclaim to the tune of Kshs.124,842/95. On the other hand, the plaintiff has shown that so much of the sum sued for Kshs.69,000/ - had been collected by the defendant. As the defendant claims to have lost all records in relation thereto. It is not possible to ascertain what portion of this admittedly owing rent relate to 1979. Accordingly, the defence of limitation cannot be applied with certainty as the offensive portion is not identifiable. In that case Kshs.69,000/ - shall have to be set off against the defendant's claim of Kshs.124,842/95 which leaves a balance in favour of the defendant's counterclaim in the sum of Kshs.55,842.45 with costs of the counterclaim to be paid by the plaintiff."

After careful perusal of the proceedings in the High Court, we find that the counterclaim was to be proved by the evidence of Krishan Kumar Aggarwal (DW1) who described himself as Managing Director of the defendant company. In a bid to prove the counterclaim, this is what this witness stated in his evidence:-

"The plaintiff was not entitled to receive 1979 rent. He did collect and we claimed it back in the counterclaim. Also claiming kshs.17,040 for rates. There was no written agreement between the plaintiff and the defendant. We had earlier paid rates for year 1979 vide Exh. D4 - April, 1979 Kshs.16,507/50 for 1979 paid Kshs.18 to the Commissioner of Lands as annual rent Exh.D.5. The claim for Kshs.3481/ - which plaintiff paid for his son Exh. D.7 we claim. It should have been paid by him. Water Bill she paid for his son Exh.D8, Kshs.1,745/65 Overseas telephone calls, Kshs.2,622/ - Exh. D.9 we claimed it. The insurance amount Kshs.4,476/ - Exh. 10. We paid and claim refund thereof. Had no obligation to pay Exh. D.6 repairs - plaintiff's handwriting . Repaired his building Kshs.800/ -, Kshs.17,065 Repairs of plaintiff's building. We paid his claim. kshs.789 petrol bill for his son.

The grand total Kshs.124,842/95. We counterclaim from the plaintiff. Though counterclaim comes Kshs.205,161/85. But we limit it to Kshs.124,842/95. His claim is Kshs.69,000/ - for rent 1979, 1980, 1981. He is the one the plaintiff collected rent for all these years".

From the foregoing, we find that the appellant's claim as per the plaint was admitted. The respondent, however, gave what appears to be a disjointed story in a bid to prove the counterclaim. In the filed defence and counterclaim, the respondent put its counterclaim at Shs.205,161/85. In the evidence of Krishan Kumar Aggarwal (DW1) reference is made to "The grand total Kshs.124,842/95". But from our own calculations of what was stated by Krishan Kumar Aggarwal (DW1), the total comes to Shs.63,755.15.

Having considered the evidence adduced in the Superior Court and making our own independent assessment of the same, we are of the view that the learned judge erred in his finding that the defendant had proved its counterclaim to the tune of Shs.124,842/95 as there was no basis for such a finding. We, therefore, accept Mr. Odera's contention that the counterclaim was not proved.

In view of the foregoing, the judgment of the Superior Court is set aside and we substitute it with an order that judgment be entered in favour of the appellant as prayed for in the plaint. Costs of this appeal and in the Superior court are awarded to the appellant.

Dated and delivered at Nairobi this 5th day of May, 2000.

J.E. GICHERU

.....

JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR