

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 259 OF 2018

GEORGE JOHN CARDOVILIS.....CLAIMANT

VERSUS

SIMBA CORPORATION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking to recover on account of his unpaid April 2017 salary as well as expenses he had incurred on behalf of the Respondent. He averred that at all material times to this suit, he was employed by the Respondent as a regional sales consultant based in Nanyuki on a one year contract commencing 1st September 2016 to 31st August 2017 earning a monthly salary of Kshs. 350,000/-. He averred that he gave the requisite 3 month notice of intention to terminate his services and that the Respondent failed to pay the salary for April 2017 as well as the expenses he had incurred which were Kshs. 13,540/-. He thus sought payment of Kshs. 363,540/- being his salary plus expenses incurred as at April 2017. He sought the certificate of service as well as interest at court rates.

2. The Respondent filed a defence in which it averred that the Claimant was indeed employed as a consultant primarily based in Nanyuki earning a basic salary of Kshs. 350,000/- plus sales commission well as other benefits. The Respondent averred that the contract provided for 3 months' notice and that the Claimant issued a 3 months' resignation notice effective 1st February 2017. The Respondent averred that the Claimant did not in fact serve the entire period of notice but instead the parties negotiated a variation in the resignation terms with the parties mutually agreeing that the Claimant exits earlier at the end of February 2017 instead of serving the full notice period to the end of April 2017 but be paid the salary for February and March 2017 without working in March. The Respondent averred that it was agreed that the Claimant would neither work nor be paid for the month of April 2017. The Respondent averred that having resigned on those agreed negotiated terms and fully paid as agreed he was not entitled to claim salary for April 2017. The Respondent thus sought the dismissal of the Claimant's claim with costs.

3. The Claimant testified as did the Respondent's witness Isabel Ndunge Ngugi. The Claimant stated that he had worked for the Respondent and opted to resign. He stated he gave the requisite notice and was entitled to pay until April 2017. He claimed he was not paid for the month of April. He testified that he was asked to move to Nairobi and he declined as that would mean getting a house and moving there. The Respondent's witness testified that the Claimant agreed to a variation in his resignation notice with him getting payment for February and March 2017 without him working in March 2017. She stated that the Claimant was notified of the handover he was required to undertake in April 2017. She stated that he did not work in April and was not entitled to salary in April 2017.

4. The Claimant filed submissions in which he stated that the Claimant's notice of resignation accepted by the Respondent was to end of April 2017 and that the Respondent's assertion there was a variation was not backed up by evidence. He submitted that there was no agreement exhibited that showed the variation sought or minutes evidencing the said variation. The Claimant sought the payment of the sums due on the claim.

5. The Respondent submitted that the Claimant's last working day was 28th February 2017 and that he would be paid salary for March 2017. The Respondent submitted that the meeting was followed up with the letter dated 21st February 2017 confirming what had been agreed upon. The Respondent submitted that the Claimant was dishonest in denying receipt of the letter as the email used was the email he used while working for the Respondent. The Respondent submitted that the Claimant confirmed handing over in March and that he was therefore not entitled to salary for April 2017.

6. The Claimant resigned and the resignation notice dated 24th January 2017 gave the effective date of resignation as 1st February 2017. In his email, the Claimant stated that he should be released end April 2016. I believe he meant end April 2017. He sought to know who he was to hand over to. He confirmed that he received the letter acknowledging his resignation. The Respondent and the Claimant engaged in subsequent correspondence as shown by emails exchanged between them. The Respondent exhibited a letter that was emailed to the Claimant stating that the Claimant's last working day would be February 2017 as discussed and agreed. It was indicated in the letter that the final dues would be paid on 7th March 2017 on the date he was expected to hand over the company vehicle. He was to be paid dues inclusive of March 2017 salary upon satisfactory hand over of the company laptop, printer and vehicle. It is clear the Claimant handed over the vehicle on Friday 10th March 2017. He received payment for March 2017 as well as refunds that had been factored in of Kshs. 58,906/-. The Respondent queried the claim for Kshs.13,340/- and required the Claimant to avail the receipts. In his claim he seeks the sum of Kshs. 13,540/- particulars whereof he avers are well within the knowledge of the Respondent. He did not avail proof of the sums he claims and this portion of his claim would fail. Having tendered his resignation and seemingly agreeing to a variation from the correspondences exchanged including the emails between him and the HR Manager John Ikinya, it is apparent the Claimant accepted to vary the last working day and ensured the handover was effected in early March 2017. There was no work he performed for the Respondent as he did not present any evidence that he worked beyond March 2017. The certificate of service was dated 31st March 2017 keeping with the Respondent and Claimant's timelines in regard to the last working period. The Claimant was less than honest when he tried to deny receipt of emails sent to him by the Respondent. The Claimant's claim is unproved on a balance of probabilities and I accordingly do hereby dismiss the suit but

order each party to bear its own costs.

It is so ordered.

Dated and delivered at Nyeri this 16th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar