



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 433 OF 2017

(Formerly Kisumu HC Civil Suit No.135 of 2006)

(Before Hon. Justice Mathews N. Nduma)

LEVA TIMBER HARDWARE LIMITED.....CLAIMANT

VERSUS

KAMAL L. VAGHELA.....RESPONDENT

J U D G M E N T

1. The suit was filed at the High Court of Kenya at Kisumu on 4th December 2006, being HCC. Civil Suit No. 135 of 2006. The suit was dismissed for want of prosecution at the High Court but the counter claim was subsequently reinstated and matter transferred to E & LRC for hearing.
2. The counter claim was canvassed by way of written submissions.
3. The Respondent filed their submissions on 26th March, 2018. The Claimant represented by Ken Omolo Advocates did not file any.
4. The counter claim set out in the statement of defence dated 11th December, 2006 is for payment of Kshs.1,303,000 being the total salary withheld by the Plaintiff at Kshs.135,000 per month and a refund of Kshs.1,167,000 paid out by the Defendant to the Plaintiff being a refund of monies stated to be a shortage or deficit from the proceeds on the goods sold by the Defendant – Counter Claimant on behalf of the Plaintiff.
5. The Defendant pleads that the said money was taken from him under duress and coercion and ought to be refunded since the alleged loss from sale of hard ware was not substantiated by the Plaintiff.
6. Equally, the Defendant claims refund of his salary without any justifiable cause.
7. The employment of the Defendant was subsequently terminated by the Plaintiff without payment of the arrear salary in June, 2006. This suit was only filed as a cover up for monies unlawfully taken and/or withheld from the Defendant. The suit was hence not prosecuted and was dismissed.
8. Demand letter dated 13th August, 2006 was written to the Plaintiff by Onsongo and Company Advocates to make good the loss incurred by the Defendant – counter claimant to no avail hence this suit.

Reply to Defence and Defence to Counter – Claim

9. The Plaintiff filed a reply to defence and defence to counter claim on 20th December, 2006 in which it joined issues with the Defendant.
10. The Plaintiff stated that the Defendant sold goods at “under costs as shall be demonstrated at the hearing hereof.”
11. The Plaintiff while admitting that it received money in the sum of Kshs.167,000 from the Defendant – Counter Claimant, denies that the said money was obtained via duress or coercion and puts the Defendant to strict proof thereof.

Onus of Proof

12. In terms of section 107 and 108 of the Evidence Act, the person who wishes the court to find in his favour must prove the facts on a balance of probabilities.
13. The Defendant has the onus of rebuttal once a prima facie case has been shown by the Claimant.
14. In the present instance, the Defendant – Counter Claimant has placed the facts of his case before court in the statement of defence and counter claim.
15. The said claim was denied in the reply to defence and counter claim and the Defendant – Counter Claimant was put to strict proof thereof.
16. The Defendant – Counter claimant had the onus to prove the two claims for salary arrears and for refund of monies obtained from him by the Plaintiff under duress and/or coercion.
17. The Defendant – Counter Claimant chose not to tender any oral evidence in support of the averments before court, which averments were expressly denied by the Plaintiff in the reply to the defence and defence to Counter Claim.
18. The counter – claim was not substantiated by any evidence before court. The Plaintiff had no obligation to answer unsubstantiated claim in the circumstances of this case.
19. Pleadings do not constitute evidence and parties who wish to be believed fail to tender evidence before court at their own peril.
20. Accordingly, the court finds that the Defendant - Counter Claimant has failed to prove the Counter Claim on a balance of probabilities.
21. The Counter Claim is therefore dismissed in its entirety. Since the Plaintiff's case was dismissed for want of prosecution by the High Court each party to bear their own costs of the suit.

Judgment Dated, Signed and delivered this 6th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Onsongo for Defendant – Counter Claimant

Mr. Ken Omolo for Plaintiff

Court Clerk - Chrispo