



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**

**CAUSE NO. 163 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**GULZAR DARVESH.....CLAIMANT**

**-Versus-**

**TRICON INTERNATIONAL LIMITED.....RESPONDENT**

**J U D G E M E N T**

This suit is filed by Gulzar Darvesh, the Claimant seeking the following orders against the Respondent Tricon International Limited.

- a) Unpaid house salary of Kshs.1,159,353/-.
- b) Cost of the suit.
- c) Interest on (a) above.
- d) Any other relief the court may deem fit to grant.

The Respondent filed a Statement of Response to the Claim in which it admits employing the Claimant as Director and Chief Executive Officer but avers that the Claimant left its employment on or about May 2012 when he stopped reporting for duty and further avers that the Claimant negligently recklessly performed his duties, thereby causing the Respondent substantial loss. The Respondent further avers that the Claimant colluded with the Respondent's former Director and Chief Executive Officer to sabotage the Respondent's operations and further that the Claimant is currently in the employ of the said former Director and CEO of the Respondent carrying on business in direct competition with the Respondent and operating from premises within the vicinity of the Respondent's site of operations.

The Respondent denied that the Claimant has any valid claim against it and prays that its claim be dismissed with costs.

At the hearing the Claimant testified that he currently runs a glass shop in Paul Mboya Street within Kisumu City, that he was employed by the Respondent between January 2009 and June 2014. His salary was a gross of Shs.100,000. He was not paid salary from January 2013 until the month he left employment. Before he left he wrote several emails to the Respondent seeking payment and also went to Kisumu County Labour Officer who wrote a demand letter to the Respondent but there was no response. He further wrote to the Respondent several letters demanding payment on 14th March and on 1st April

2014 but the Respondent did not settle his claim even after the Labour Officer directed it to clear with the Claimant. The Claimant prayed for payment of salary arrears as prayed in the claim.

He denied owing the Respondent any money as pleaded in the Response.

Under cross examination the Claimant stated that he was originally employed as General Manager but was redesignated to Managing Director in 2014 when the former Managing Director Mr. Vipul Amin left employment of the Respondent. He stated that when he left he handed over to an accountant by the name Jadip Mopar, but did not retain any copy of the handing over records, that he was directed to hand over then told that he was no longer an employee.

The Claimant stated that he was aware about a report to the police on fraudulent misappropriation of the Respondent's assets. He stated that he recorded a statement with the police in which he stated that the assets were removed by the former Managing Director a year before he left. He denied that he took the assets.

The Claimant stated that he did not have an employment contract. He stated that statutory deductions were made from his salary from Nairobi Head Office and he did not have copies of yearly returns.

For the Respondent RW1 MIRAN VIPUL AMIN the Managing Director of the Respondent testified that the Respondent carries on the business of shipping transportation on Lake Victoria and the Claimant was the Administration Manager of the Respondent at Kisumu. He testified that the Claimant was employed by the previous management of the Respondent but without an employment contract. He testified that there was theft at the shipping yard and a report was made to both Port Police Office and Central Police Station regarding misappropriation of Assets which the Respondent did not find. The Claimant had stated that some of the assets were not there at the time of his appointment but the Claimant failed to give details sought from him. Following investigations the Respondent learnt that the Claimant may have been involved in the misappropriation of the assets but no conclusive report was given by the police. RW1 testified that he was aware the claimant was owed some money but the Respondent had not received the wages registers. RW1 testified that the value of assets it lost is about Shs.5 million and the Respondent should be allowed to offset the amount owed to the Claimant from the value of the lost assets.

Under cross-examination RW1 confirmed that the Respondent owed the Claimant the amount prayed for in the Memorandum of Claim.

## **Determination**

The Respondent having admitted owing the Claimant the sum prayed for in the Memorandum of Claim, the only issue for determination is whether the Respondent should be allowed to off-set the same from the value of assets it alleges were misappropriated during the Claimant's tenure as the person in charge of the Respondent's office in Kisumu.

I have specifically used the words "person in charge" because the claimant testified that he was the Managing Director of the Respondent in Kisumu while RW1 testified that the Claimant was the Administration Manager of its Kisumu Office.

The Respondent has in its written submissions urged the court to find that it is entitled to offset the amount claimed by the Claimant from the loss it incurred. The Respondent relied on section 19(1) (b) of the Employment Act and on the case of **Gilbert M. Muchina v Scarce Commodities Limited Cause No.7 of 2013** in which the court held that an employer is allowed to deduct from the wages of an employee such amount to cover loss or damage to the employer's property due to the negligence of the employee. The Respondent further relied on the case of **Edwin Nyamanga v Silver Holdings Ltd [2014]eKLR** wherein the court held that the Respondent was entitled to deduct the cost of the vehicle repairs arising from damage to the vehicle caused by the claimant from the Claimant's final dues which resulted in the claimant's final dues being in deficit.

For the Claimant it is submitted that the amount claimed having been admitted and there having been no counter claim, there is no basis for the Respondent withholding the Claimants dues. It was further submitted for the Claimant that the defence of the Respondent is a sham.

For the Respondent to become entitled to a set off, it must first make the plea of set off in its pleadings, and secondly it must prove that the claimant owes it money. In the present case the Respondent's plea in the statement of Response was that -

*The Respondent states in further answer to paragraph 3, 4 and 5 that the claimant was first employed by a director and CEO of the respondent who left the employ of the respondent in or about May, 2012 from which date the claimant failed and or refused to report to work regularly as required, absconded from duty without permission or authority and even when he did report to work carried out his duties in so negligent and reckless a manner, in breach of his contract, causing substantial loss and damage to the respondent in particular with the theft or loss of the respondent's valuable equipment and of its business records the custody of all of which the claimant was responsible for. **Details of the extent of the loss and damage the respondent has suffered are still coming to light wherefore the respondent reserves the right to institute a counter- claim herein against the claimant and shall seek leave of the court to amend its response accordingly;***

*(emphasis added)*

At the hearing RW 1 testified that a report of loss was made to the police around June 2014 and that, to quote him, "...we were given an initial report by the then inspector that he (claimant) may have been involved in the misappropriation. To date we have not got a conclusive report from the police." From the foregoing, it is clear that there is no proof of the Claimant's involvement in misappropriation of the Respondent's assets. The value of such assets as were misappropriated was also according to RW1 only an estimate. No prayer has been made to court for set off and even if such a prayer was made, there is no proof of the value of what was lost or the Claimant's involvement in the loss. Indeed during cross-examination of the Claimant he categorically denied involvement in any misappropriation of the assets of the Respondent and stated that whatever was removed was by Mr. Vipul Amin, the Managing Director whom he succeeded.

The Respondent made a feeble attempt to amend the statement of Defence to include a counter-claim but this attempt was made too late, after the claimant had closed his case and the court promptly rejected the same.

From the foregoing there is no basis upon which the court can grant the order of set off to the Respondent. The Result is that Judgement is entered for the Claimant in the sum of Shs.1,159,353 as prayed and as admitted by the Respondent, together with costs and interest. Since the amount is admitted the interest will accrue from date of filing claim as it was unnecessary for the Respondent to file a sham defence only to admit the claim at the hearing. I am inclined to agree with the Claimant's submissions that the defence was an abuse of court process.

Orders accordingly.

**Dated, Signed and Delivered this 24th day of November, 2016**

**MAUREEN ONYANGO**

**JUDGE**