

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO E115 OF 2024

PAUL KAHANGARA.....CLAIMANT

VS

JAMES AGGREY ORENGO BOB ORENGO T/A

J.A.B ORENGO ADVOCATES.....RESPONDENT

J U D G M E N T

Introduction

1. Paul Kahangara, the Claimant in this case is an Advocate, who at the time material to this claim, worked as an Associate-Advocate at J.A.B Orengo Advocates.
2. The Claimant's claim as pleaded in a Statement of Claim dated 9th February 2024 is for compensation for unlawful termination of employment and payment of salary arrears.
3. The Respondent filed a Statement of Defence dated 2nd April 2024 but did not attend the hearing, despite due notification. I therefore took the Claimant's testimony *ex parte*. Both parties filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 25th January 2023, as an Associate-Advocate, earning a monthly salary of Kshs. 80,000 which was to be reviewed after 6 months.

5. The Claimant avers that he reported to work on 26th January 2023 upon which he was assigned duties, which he discharged faithfully and diligently. He however complains that during the entire period of service, the Respondent withheld his monthly salary without any explanation. He claims that all the other employees were paid their salaries as they fell due.
6. The Claimant states that the Respondent's failure to pay his salary for three (3) months made his life so difficult that he had no choice but to tender his resignation, which he did on 20th April 2023.
7. The Claimant avers that his resignation was involuntary and was caused by the Respondent's repudiatory breach of a fundamental term of his letter of appointment dated 25th January 2023, being that the Respondent would pay him a monthly salary of Kshs. 80,000.
8. The Claimant further avers that the Respondent's failure to pay his salary, while paying other employees, was calculated to effect a constructive discharge, by forcing the Claimant to resign.
9. The Claimant therefore lays a claim of constructive dismissal and pursues the following remedies:
 - a) Kshs. 240,000 being salary arrears for the months of February, March and April 2023;
 - b) Kshs. 36,000 as house allowance for the months of February, March and April 2023;
 - c) Kshs. 960,000 being 12 months' salary in compensation for unlawful termination of employment;

- d) Kshs. 80,000 being 1 month's salary in lieu of notice
- e) Certificate of service;
- f) Costs plus interest.

The Respondent's Case

10. In his Statement of Defence dated 2nd April 2024, the Respondent admits having issued the Claimant with a letter of appointment dated 25th January 2023. The Respondent however states that the Claimant never assumed the position of Associate-Advocate, as stipulated in the letter of appointment. The Respondent adds that the Claimant failed to report for duty as required under the contract of employment.

11. The Respondent's case is that the Claimant was in breach of the contract of employment and his letter of resignation was a confirmation of his desire and intent not to work for the Respondent.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) *Whether the Claimant has proved a case of constructive dismissal;*
- b) *Whether the Claimant is entitled to the remedies sought.*

Constructive Dismissal?

13. On 20th April 2023, the Claimant wrote to the Respondent as follows:

"Dear Sir,

REF: RESIGNATION FROM THE POSITION OF ASSOCIATE-ADVOCATE

Reference is made to the above matter and to the letter of appointment dated **25th January 2023**.

As you are aware, I have been discharging my professional duties faithfully since my appointment as an Associate-Advocate with the firm, per the above-referenced agreement.

However, for the duration that I have worked for the firm, I have not received my monthly salary of **Ksh. 80,000/-**. Repeated follow ups on the same have been unfruitful.

I am aware that other employees of the firm have been receiving their monthly salaries within the said duration; yet no explanation has been given to me regarding the persistent failure to pay mine.

Therefore, I am unable to continue offering my professional services to the firm.

I hereby tender my resignation from the position of associate-advocate effective **20th April 2023**.

I sincerely thank you for the opportunity to work for **J.A.B ORENGO ADVOCATES**.

Kindly but urgently make arrangements to settle my outstanding salary arrears of **Ksh. 160,000** for the months of February and March 2023.

Yours faithfully

(signed)

PAUL KAHANGARA

14. The Claimant complains that the Respondent withheld his salary for a period of three (3) months, thus making it impossible for him to continue working. He therefore lays a claim of constructive dismissal. **Black's Law Dictionary (Tenth Edition)** defines constructive dismissal or discharge as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

15. In **Nathan Ogada Atiagaga v David Engineering Limited [2015] eKLR** constructive dismissal was defined in the following terms:

“Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”

16. In **Milton M. Isanya v Aga Khan Hospital [2017] eKLR** the Court stated thus:

“In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.”

17. In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal stated the following:

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay-this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment-this is the contractual test.”

18. The Court of Appeal went further to establish the following principles to be applied in adjudicating claims of constructive dismissal:

a) What are the fundamental or essential terms of the contract of employment?

- b) Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*
- c) The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*
- d) An objective test is to be applied in evaluating the employer's conduct.*
- e) There must be a causal link between the employer's conduct and the reason for the employee terminating the contract i.e. causation must be proved.*
- f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
- g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*
- h) The burden to prove repudiatory breach or constructive dismissal is on the employee.*

i) Facts giving rise to repudiatory breach or constructive dismissal are varied.

19. The Claimant's case is that since taking up his appointment as an Associate-Advocate at the Respondent's law firm, he was not paid any salary. While not denying the Claimant's assertion, the Respondent states that the Claimant was issued with a letter of appointment but did not report to work.

20. If indeed the Claimant had failed to report to work, the Respondent ought to have issued him with a show cause letter as to why the appointment should not be revoked. Once a letter of appointment is issued, it acquires a life of its own and its subsistence evidences the existence of an employment relationship.

21. The Respondent's averment that the Claimant did not take up his appointment was not supported by any evidence and the Claimant's claim that he was not paid his monthly salary was not dislodged.

22. By failing to pay the Claimant's salary as it fell due, the Respondent breached a fundamental term of the employment contract and the Claimant was entitled to deem himself as constructively discharged.

Remedies

23. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's short stint in employment but also the Respondent's unilateral decision to withhold his salary.

24.I further award the Claimant one (1) month's salary in lieu of notice plus salary arrears for three (3) months.

25.No evidence was adduced to support the claim for house allowance, which therefore fails and is disallowed.

26.Finally, I enter judgment in favour of the Claimant as follows:

- a) 3 months' salary in compensation.....Kshs.240,000
- b) 1 month's salary in lieu of notice.....80,000
- c) Salary arrears for 3 months.....240,000
- Total.....560,000**

27.This amount will attract interest at court rates from the date of judgment until payment in full.

28.The Claimant will have the costs of the case.

29.Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF OCTOBER 2025

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JUDGE

Appearance:

Mr. Paul Kahangara (the Claimant in person)

Mr. Akide h/b for Mr. Orengo, SC for the Respondent

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