



**Leaburia v Dumisha Sacco Limited (Employment and Labour Relations
Claim E002 of 2023) [2025] KEMC 165 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEMC 165 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
EMPLOYMENT AND LABOUR RELATIONS CLAIM E002 OF 2023
AT SITATI, SPM
JULY 23, 2025**

BETWEEN

ISAAC LEABURIA CLAIMANT

AND

DUMISHA SACCO LIMITED RESPONDENT

JUDGMENT

1. The claimant lodged his Memorandum of Claim dated 21st July, 2023 verified by affidavit praying for:-
 - i. A declaration that the unilateral reduction of the claimant's salary by the respondent was illegal and unjustified therefore null and void.
 - ii. 12 months' salary as compensation for unfair termination in the sum of Kshs 943, 152.00
 - iii. One month's salary in lieu of notice in the sum of Kshs 78, 596.00/-
 - iv. Unpaid salary for the period of his compulsory leave Kshs 78, 596.00/-
 - v. Unpaid salary/reduced salary of Kshs 30, 796 for the 14months period he worked before termination in the sum of Kshs 431, 144/-
 - vi. Unpaid leave days for the 3.5years of work (73 days) in the sum of Kshs s191, 250/-
 - vii. Service pay at 15 days for the 3.5years worked in the sum of Kshs 137,543.00/-
 - viii. Issuance of the certificate of service
 - ix. Interests at the court's rate from the date of filing the case till payment in full.
 - x. Any other award that the court shall deem fit to award in the interest of justice.

Accompanying the claim included:



List of witnesses
Witness statement of the claimant
Claimant's list and bundle of documents containing
Internal auditor's appointment letter dated 30th August, 2018
Acting CEO's appointment letter dated 12th July, 2019
Introduction letter dated 23rd September, 2019
CEO's appointment letter dated 24th September, 2019
Suspension letter dated 15th May, 2017
Compulsory leave letter dated 15th August, 2017
Letter to the Cooperative office dated 16th April, 2021
Advocate's letter dated 7th September, 2020.

2. The suit was opposed by way of a Statement of Defence dated 16th August, 2023 and Notice of preliminary objection on limitation of time. The objection was dismissed by a considered ruling of the court.

Accompanying the defence included:

- i. Appointment letter dated 30th August, 2018 as an Internal auditor
 - ii. Appointment letter dated 24th September, 2019 as a Chief Executive Officer
 - iii. Respondent's letter to SACCO Society Regulatory Authority dated 23rd September, 2019
 - iv. Respondent's compulsory leave letter to the claimant
 - v. Probation extension letter dated 16th April, 2020
 - vi. Claimant's apology letter dated 18th September, 2020
 - vii. Respondent's response to apology letter dated 19th September, 2020
 - viii. Warning letter dated 25th September, 2020
 - ix. Last warning letter dated 22nd JULY, 2021
 - x. Letter dated 27th July, 2021
 - xi. Resignation letter dated 27th October, 2021.
3. The plaintiff was represented by Kiriaku & Company Advocates while the respondent was represented by Tobiko Njoroge & Company Advocates.

The Claimant's Case

4. The claimant adopted his witness statement as his testimony. In summary, he told the court that on 30th August, 2018 he was employed as an Internal Auditor on the monthly gross salary of Kshs 47, 800. Later on 12th July, 2019 he was appointed as an Acting CEO with the raised salary of Kshs 78, 596/- monthly. He added that shortly after this latter appointment, the respondent advertised the position of CEO for which he applied and was accordingly shortlisted for an interview dated 21st September, 2019. He topped the interview and was appointed as substantive CEO on 23rd September, 2019 and this appointment was communicated to the SACCO Society Regulatory Authority (SASRA) on 24th September, 2019.
5. His lamented that despite working as the substantive CEO of 8months, the respondent did not remunerate him with the CEO's salary and that he remained on the salary of the Acting CEO of Kshs 78, 596.
6. His grievance is that from 31st July, 2020 to 1st September, 2020 he was placed on compulsory leave and removed from the CEO Position. He was ordered to revert to his previous position. On his reporting back on 1st September, 2020 he was shocked to learn that his salary had been lowered to Kshs 47, 800. This attracted a demand letter from the claimant which the respondent promised to rectify



- and asked the claimant to withdraw the demand letter which he did but the respondent failed to come through hence this suit. this remained the situation for 14months during which he continued earning Kshs 47,800 which deprived him of Kshs 30,796 monthly that he was entitled to.
7. The reduced salary crippled his ability to repay his loan of Kshs 1,500,000 that he was servicing at the time. Consequently, he suffered accumulated bills, dropped work performance and mental anguish. He thus wrote on 16th April, 2021 to the Cooperative Officer his complaint but no assistance came through. Due to the constructive dismissal by the employer, he resigned from the position. In support of the case, he produced the above listed documents.
 8. In cross-examination, the following came to light:- he did not produce any termination letter since he had voluntarily resigned;- he resigned after giving a 4weeks notice;- he resigned after 4weeks notice to the employer- he had acted as CEO for 5months and served as substantive CEO for 8 months.- he was rotated to other sections after being reverted to Internal Auditor- his probation was for 2 months and a further 3months
 9. In his letter to the Cooperative Officer he did not enumerate his salary claims.
 10. In re-examination, he told the court that he resigned because his employer drove him to the wall. He said that as an internal Auditor, the salary was Kshs 47,800 and became Kshs 78,596 as CEO. He affirmed that no notice was served on him for the salary reduction. At that stage, he closed his case.

The Respondent's Case

11. The respondent's Chairman Josph Sawe Koech adopted his written statement dated 22nd October, 2024. In summary, he told the court that the claimant was initially appointed an internal auditor on the monthly salary of Kshs 45,800. Later on 12th July, 2019 he was appointed as Acting CEO with an extra salary of Kshs 32,796. After a successful interview for the position of CEO he was appointed to the position on 24th September, 2019 and the appointment communicated to the SASRA as required by law.
12. During the 6months probationary period, the claimant underperformed and his probation extended for 3months to give him time to improve but he did not improve and he was sent on compulsory leave on June 2020. When sent on compulsory leave, the claimant apologized in writing.
13. He added that the respondent did not confirm the claimant as the CEO when he resumed work at the end of the compulsory leave. Instead, he was reverted to his previous position in which he worked for some months before he voluntarily resigned.
14. The witness told the court that during his employment, the claimant was advanced a Kshs 1,800,000 loan but he refused to service the loan and fell into arrears which stood at Kshs 2, 654, 483. When asked to repay the loans, he filed the present suit.
15. In cross-examination, the following came to light:-The Internal Auditor salary was Kshs 45,800/- and when he was elevated to the Acting CEO he was entitled to Kshs 78,596 monthly for 6months plus 3 months extra during the extended probation period. At the end of the probationary period, the Board of Directors did not confirm the claimant as CEO but reverted him to his previous position as Internal Auditor since his performance as Acting CEO for 9months was unsatisfactory. After his reversion, he earned the previous salary as internal salary. He was given a probationary extension of 3months and this was followed by the compulsory leave. The main reasons for the compulsory leave of the Acting CEO included his failure to offer leadership, failure to secure loss of the income and funds and failing to meet the Sacco deadlines. He also illegally took way classified documents of the SACCO. He was given warning letters to rectify his failings but he did not correct and chose to resign from the SACCO. No



disciplinary hearing was done for him since he had resigned. The Chairman had not brought to court any evidence to show that the claimant had illegally engaged in other income generating activity outside the Sacco during working hours. The loan was secured by collateral and the SACCO was in the process of recovering the arrears. The claimant was entitled to leave days.

16. In re-examination, the witness told the court that the claimant was given warning after the claimant engaged in illegal lobbying amongst employees. He confirmed that the claimant voluntarily resigned after securing a new job elsewhere and the SACCO did not sack him. The parties exchanged written submissions.

The Respondent's Written Submissions Dated 3rd June, 2025

17. The respondent relied on the authority of *Milton M Isanya versus Aga Khan Hospital Kisumu* [2017] KEELRC 571 (KLR), arguing that the Court established the ingredients of constructive dismissal as follows: -
18. The basic ingredients in constructive dismissal are :-
- a. The employer must be in breach of the contract of employment;
 - b. The breach must be fundamental as to be considered a repudiatory breach;
 - c. The employee must resign in response to that breach; and
 - d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.” (See page 22-23 hereof)
19. It was submitted that the Claimant has not established any of the foregoing ingredients. The respondent argued that firstly, the contract between the parties was probationary for a period of six months where the Claimant was required to meet the expectations of the Respondent. The Claimant failed to meet the expectations but the Respondent was gracious enough to extend the Claimant's probationary contract for further three months just to give opportunity to improve.
20. Secondly, the Claimant failed to meet the expectations after three months' probation extension and he indeed on his own volition apologized to the Respondent. He later took his previous position of internal auditor. There was no breach of the contract by the Respondent, it actually failure by the Respondent to meet required standards hence he could not be confirmed as the Chief Executive Officer.
21. Thirdly, the Respondent didn't meet the third ingredient enough which is that the Claimant ought to resign as result of the breach of contract. The Claimant resigned by way of his letter because he had secured employment elsewhere and not because the Respondent breached any contract.
22. Lastly, it was contended that the employee must not delay in resigning after the breach has taken place. In this case, the Claimant took his previous position as an internal auditor and continued to work for the Respondent in that capacity for one year from 16th July 2020 until his resignation on 25th October 2021. The respondent cited the authority of *Geoffrey Alan Tolo v Tobias O. Otieno & another* [2022] eKLR where the court held that:-
39. For constructive dismissal to be inferred, the employee must have resigned within reasonable time from his employment, with or without notice as a result of the employer's hostile treatment or hostile working conditions at his workplace. The employer must also not have expressed the desire to terminate the employee. My analysis of the evidence on record, reveals that the claimant was not constructively dismissed from employment.



40. The evidence points to the fact that the termination of the claimant’s contract was through a mutual agreement on 24th January, 2018. The termination was therefore neither unfair nor unlawful within the meaning of Section 45, of the *Employment Act*. It was not also through redundancy under section 40 of the Act but by consent of the parties. It is an established principle of law of contract that parties to a contract, including a contract of employment, can terminate their relationship voluntarily through mutual agreement. It means therefore that what the parties can voluntarily enter into mutually, they can also walk out of the same voluntarily by consent and upon agreed terms.”
23. The Respondent submitted that the Claimant has not met any of the ingredients to successfully prove a claim of constructive dismissal.
24. On service pay, it was submitted that for 2 reasons it was not merited: the plaintiff was not of the class covered by it as a member of a pension scheme and not being declare redundant. The respondent relied on the case of *Wafula v Fidelity Security Limited* (Cause 24 of 2017) [2023] KEELRC 3418 (KLR) (20 December 2023) (Judgment), where the court held :-
29. Section 35[5] of the *Employment Act* provides for service pay. However, Section 35[6] of the Act, exempts particular classes of employees from the benefit of service pay. Therefore, even agitating for the benefit. The subsection states;
- “This section shall not apply where an employee I member of –
- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than 14 those of the service pay scheme established under this section;
 - and(d)the National Social Security Fund.”
30. The Claimant falls under the categories of those employees contemplated under subsection [6] [d]. In my view, where it is alleged that an employer didn’t fully or at all make due contributions as contemplated under the NSSF Act, the remedy for an offended employee lies under Section 14 of the same Act, which provides;
- “14. If any contribution for which a contributing employer is liable under this Act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution to which it relates falls, a sum equal to five per cent of the amount of that contribution shall be added to the contribution for each month or part of a month thereafter that the amount due remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which is added.
31. Where a Statute has expressly provided for a remedy for a particular situation as the Act mentioned hereinabove has done, it will be inappropriate for the litigants or the Court to version another remedy for the same situation. The provision mentioned above does not contemplate an order of payment of service pay as a sanction for the employer’s default in making remittances duly. There would not be any justification for this Court to make the order.
32. Assuming that the Respondent didn’t make full contributions as alleged by the Claimant, the latter would only find a cause of action under Section 14 above and pursue the remedy thereunder. This the Claimant didn’t do. His claim is for rejection. It is hereby rejected.



33. In the upshot, the Claimant's claim herein is dismissed with costs. (See page 39-40 hereof) 49. The Respondent further submits that the service pay applies only where there is redundancy and not in a situation where Claimant issue termination notice just as in this case. In *Songoni v Weld-Con Limited* (supra), the Court held: -
10. As already found and as submitted for the respondent, there was no severance payment due as there was no established redundancy in terms of section 40 of the *Employment Act*, 2007 to justify such a 15 claim. The evidence was that the contract of service lapsed when the contractual term lapsed. 11. The court has considered all circumstances of the case. In particular, the respondent failed to expressly document the initial consultancy contract which may have averted the filing of the instant suit. each party will therefore bear own costs of the suit."
25. As for the certificate of service, it was submitted that it was not demanded and none could be issued where the employee was not interested in it.
26. The plaintiff filed no submissions.

Issue For Determination

Whether there was constructive dismissal

Whether the claimant is entitled to the reliefs prayed for

Determination

Issue 1: Constructive Dismissal

27. The proved evidence shows that: The plaintiff was appointed as internal auditor on 30th August, 2018. Later on 12th July, 2019 he became acting CEO up to 24th September, 2019 when he was interviewed and formally appointed. For these 3 months he was entitled to his 3 months salary as CEO notwithstanding his acting role. After his formal appointment on 24th September, 2019 he was employed as CEO On Probation for the next 6 months and a further 2 months after it was extended up to June, 2020. Then he went on 3 months compulsory leave while holding the position of CEO. He was also entitled to the CEO salary totaling 14 months during this period and none was paid.
28. In the present case, the respondent showed by the probation extension letter and the 2 warning letters that the Claimant while Acting CEO had acted adversely against the interests of his employer in the following manner: Failure to offer appropriate leadership and supervision of SACCO staff for effectiveness and efficiency in SACCO operations and growth; Failure to handle Board of Directors with decorum by way of casual approach on key matters; loss of member funds due to levies and penalties occasioned by late remittance of payments to relevant regulatory authorities and service providers; Poor delegation of duties and back of in-house consultation and rational decision making; laxity in implementing the Board of Directors decisions and resolutions; Failure to address system breakdown that had paralyzed Baragoi and Wamba Branch operations leading to loss of income and unexpected expenditures; Failure to meet set deadlines for planned activities as advised by the Board of Directors.
29. When served with these issues, the claimant apologized in writing promising to improve. He did not improve and the employer sent him on compulsory leave as the first step towards disciplinary process. The issue of compulsory leave was the prerogative of the employer *Hinga Mbugua v Keroche Industries* [2016] KEELRC 1733 (KLR) (M. Mbaru j.) explained as follows:



7. “It has been the position of this court that an employer has the right to discipline any employee, and such may include sending the employee on leave pending investigations of any nature. Such is a right the employer enjoys. However, such a right must have a basis upon which it can be exercised within reasonable limits. See *Amrick Consales versus Mara Ison Technologies Kenya Limited*, Cause No. 2538 of 2012 and the court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.
8. Work relations require the confidence of the parties involved and hence where any form of investigations becomes necessary, the subject employee once sent out leave or on suspension to facilitate investigations, then such an employee must oblige. As noted above in the case of *Mr Consales*, such compulsory action is the prerogative of the employer.”
30. Having failed to comply with the warnings, the employer opted not to confirm him in his position and reverted him to his immediate previous position as Internal Auditor. The claimant reacted afterwards by writing a resignation letter and left the job after securing new employment.
31. In the court’s view, taking into account the foregoing, the claimant had voluntarily resigned as explained in the principles discussed by Makau J. on what amounts to constructive dismissal or resignation from the authority of *Moses Mulupi Wamalwa versus Bake ‘N’ Bite Ltd* [2016] KEELRC 1624 (KLR) (O. Makau J.) where the learned Judge held as follows:
 6. In view of the evidence adduced, the Court finds on a balance of probability that the claimant misconducted himself by breaching the respondent’s policy regarding sales on credit. He personally authorized supply of bread on credit to the Ng’ombeni school through the sales driver who in turn received credit note from the respondent unlawfully. That when he was put under investigations and suspension, he opted to resign. That the respondent, as the employer had the legal right to suspend, serve a show cause letter and even suspend the claimant while investigating his misconduct. The exercise of such right cannot be deemed to mean breach of contract that amounts to constructive dismissal.
 7. It is now trite that constructive dismissal occurs when an employee is forced to leave his employment on account of material breach of the contract by the employer. In this case, the resignation of the claimant was prompted by suspension and investigations into his admitted misconduct of breaking company policy on credit sales. The action taken by the employer, therefore, did not amount to unfair constructive dismissal of the claimant. He may have been asked by Mr. Twaha to resign in view of the said misconduct, however he was not coerced to write the resignation on 10.2.2015. He was free to decline the request to resign and fight on in the disciplinary process that had already been commenced. Having chosen to resign, he should not now be heard alleging that he was constructively unfairly dismissed. The answer to the first issue for determination is therefore that the claimant terminated his employment through voluntary resignation.”



32. The court finds that the claimant was not sacked or unlawfully terminated as correctly cited in the respondent's authority and submission and further since he resigned to forestall the impending disciplinary process for his underperformance as Acting CEO. The court also finds that it was fair for the employer to revert him to his immediate previous position as Internal Auditor where he had excelled instead of dismissing him from serving for coming short as Acting CEO. The Court is satisfied that the employer had lawful cause to revert him to his previous position and pay him according to that grade. It would have been unlawful for him to earn the CEO salary when in fact he had failed to secure a confirmation to the position of CEO for dismal performance for which he had apologized and promised to rectify but did not rectify but he was entitled to the CEO salary while so acting for 14months

33. Following his voluntary exit from the employment, he was entitled as of a mandatory right to a certificate of service under section 51 of the Employment Act which provides as follows:

51. Certificate of service

(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

(2) A certificate of service issued under subsection (1) shall contain—

- (a) the name of the employer and his postal address;
- (b) the name of the employee;
- (c) the date when employment of the employee commenced;
- (d) the nature and usual place of employment of the employee;
- (e) the date when the employment of the employee ceased; and
- (f) such other particulars as may be prescribed.

34. While the main suit itself was not time-barred under section 90 of the Employment Act, which could have been brought within 3 years of the occurrence of the cause of action, it has been held that failure to pay leave constitutes a continuing injury which as a distinct prayer must be prosecuted within 12 months of the cessation the grievance. In the present case, the leave prayer was filed for after 2 years and this was untenable as explained by Mr. Justice Ongaya in *Exotic Penina Fields Group Limited v Simiyu* [2023] KEELRC 1830 (KLR) :

The 1st issue for determination is whether the cross-appellant is entitled to the unpaid leave days, unpaid public holidays, unpaid overtime and salary underpayment. The termination was on 30.07.2019. The statement of claim was dated 13.03.2021 and filed on that date or shortly thereafter. The time of limitation of such continuing injuries under section 90 of the Employment Act, 2007 is 12 months from the date of cessation thereof. The Court finds that the claims on those headings were time barred as at the time of filing of the suit.”

35. The prayer for service pay remains for consideration. Neither the claimant nor the respondent provided documents to show that the employee had statutory deductions from the salary and that being so he is entitled to service pay at the rate of 15 days for each complete year worked i.e. 3 full years. It was not shown that he was a member of any pension scheme. The issue of redundancy was unrelated since it was an additional category of persons who may apply for this relief.



Appropriate reliefs

36. Following the above findings, the considered judgement of the court is that:

- i. The court dismisses the prayer for the declaration that the unilateral reduction of the claimant's salary by the respondent was illegal and unjustified therefore null and void. When he reverted to internal audit he was correctly paid the salary for that rank.
- ii. There is no merit for the prayer for 12 months' salary as compensation for unfair termination in the sum of Kshs 943, 152.00 since the court has found that he voluntarily resigned without constructive dismissal.
- iii. There is no foundation for payment of One month's salary in lieu of notice in the sum of Kshs 78, 596.00/- since he voluntarily resigned after serving his employer with 4weeks notice of resignation.
- iv. The prayer for the Unpaid salary for the period of his compulsory leave Kshs 78, 596.00/- is merited since he was still on employment as Acting CEO when sent on leave. (78, 596 x3 =235, 788=) because he was still in the employment as CEO pending conclusion of investigation.
- v. The court allows the prayer for payment of the Unpaid salary/reduced salary of Kshs 30, 796 for the 14months period he worked from 12th JULY,2019 to 1st September, 2020 plus compulsory period before termination in the sum of Kshs 431, 144/-
- vi. The specific prayer for the unpaid leave days for the 3.5years of work (73 days) in the sum of Kshs s191, 250/- is time-barred and is dismissed
- vii. Service pay at 15 days for the 3.5years worked in the sum i.e. $\frac{1}{2} \times 47,800 \times 3 \text{ years} = \text{Kshs } 71,700.00$ under section 35(5) of the Employment Act
- viii. There is merit in the prayer for Issuance of the certificate of service under section 51 the Employment Act and the same shall be issued within 30 days of this order.
- ix. Interests on at the 14% from the date of filing the suit till payment in full.
- x. Costs of the case to the claimant.

Right of appeal is 30days.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 23RD DAY OF JULY, 2025

HON.T. A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

Mr. Kiriaku Adv For The Claimant

Mr. Lesikito Adv Hb For Miss Katau For The Respondent

