



**Bajaber v Planning Systems Services Limited (Cause E871 of 2021)
[2025] KEELRC 2846 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2846 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E871 OF 2021
CN BAARI, J
OCTOBER 23, 2025**

**BETWEEN
TAIB ABDULHADI SHEIKHAMED TAIB BAJABER CLAIMANT
AND
PLANNING SYSTEMS SERVICES LIMITED RESPONDENT**

JUDGMENT

Introduction

1. This judgment relates to the Claimant’s claim dated 25th October 2021, wherein, the Claimant seeks amongst others, an order compelling the Respondent to remit Kshs.3,795,772 to the Claimant, a declaration that the Claimant was constructively dismissed, costs of the suit and interests thereon.
2. The Respondent responded to the claim through its Memorandum of Reply and Counterclaim dated 8th December, 2021. It further filed its Witness Statement dated 22nd March 2023, a List of Documents dated 28th September 2022, and a Supplementary List of Documents dated 1st July 2024.
3. Subsequently, the Claimant filed a reply to the Statement of Response and Defence to Counter Claim dated 16th December, 2021.
4. The matter proceeded for hearing on 21st November, 2024, with the Claimant testifying in support of his case. He adopted his witness statement and produced the documents filed as exhibits in the matter.
5. The Respondent’s case was subsequently heard on 28th April, 2025, when one Mumo Musuva testified in support of the Respondent. He adopted his statement and produced the Respondent’s list and bundle of documents as exhibits in the matter.
6. Submissions were filed for both parties.



The Claimant's Case

7. The Claimant's case is that he was employed by Planning Systems Services Limited (the Respondent) as a Design Architect through a letter of employment dated 23rd May 2016, and confirmed after probation in January 2017.
8. It is his case that his employment terms were later revised when he was promoted to Design Lead, but the Respondent failed to hold the promised salary review discussions, and further delayed confirmation of his employment.
9. He avers that despite repeated reminders between the years 2017 and 2019, the Respondent did not honour the agreed salary increments or provide a payment plan for arrears totalling to KES.1,350,000, which were later acknowledged in various correspondences.
10. It is his case that in the year 2019, the Respondent unilaterally reduced his salary from Kshs.420,000 to Kshs.336,000, and later to Kshs.273,800, citing operational changes and furloughs. He avers further that several furlough extensions followed from 2019 through 2020 without proper communication or agreement, contrary to earlier assurances.
11. It is his case that although he proposed reduced working hours to match the pay cuts, the Respondent failed to restore full employment or salaries after the furlough period. He states that he repeatedly raised concerns about the unpaid salary increments, and their wrongful classification as "ex gratia," which the Respondent admitted was an error, but never corrected.
12. It is his case that in 2021, after he continued to demand payment and fairness, the Respondent retaliated by issuing him with multiple warning and termination letters, creating a hostile work environment that ultimately forced him to resign. The Claimant states that he also experienced discrimination in the application of the company's leave policy, as the Respondent held him to stricter standards than other employees.
13. The Claimant avers that following his resignation, the Respondent issued him with documents showing improper deductions, altered employment records, and inconsistencies in his salary and employment dates. He states further, that the company failed to remit deducted taxes to the Kenya Revenue Authority, leaving him with a tax liability and depriving him of due tax refunds.
14. The Claimant states that despite handing over all company property and repeatedly demanding settlement of his dues, the Respondent has refused to address or resolve the outstanding salary arrears, tax issues, or procedural violations. The Claimant states that the Respondent also failed to consistently provide itemized salary statements unless he specifically requested them.
15. The Claimant prays that the court allows his claim.

The Respondent's Case

16. The Respondent's case is that it employed the Claimant as a Design Architect on 23rd May 2016 on a monthly salary of Kshs.350,000, initially on a 3 month probation period.
17. It avers that his employment was confirmed on 25th January 2017, and was later promoted to Design Lead on 23rd November 2018, with the salary increased to Ksh.420,000 effective 1st January 2018.
18. It is the Respondent's case that it agreed to pay the Claimant Ksh.700,000 in backdated salary arrears, and an ex-gratia payment of Ksh.650,000 for the years 2016–2017, subject to business performance.



19. The Respondent avers that from early 2019, the company faced severe financial difficulties due to reduced work and debt collection problems, and that staff meetings were held in August 2019 which resulted in cost-cutting measures, including salary reductions and furloughs.
20. The Respondent further states that during COVID-19 (2020), revenue declined further, leading to salary delays and continued furloughs, which the Claimant accepted.
21. It avers that between 1st and 15th March 2021, the Claimant was absent from work without permission, and that despite attempts to contact him, he failed to justify his absence from duty, and later only cited bereavement without proof.
22. The Respondent states that a warning letter dated 16th March 2021 was issued for gross misconduct (absenteeism).
23. It is the Respondent's case that it paid the Claimant all salaries from 2016–2021, except Kshs.700,000 which was salary arrears from Jan–Oct 2018, Kshs.273,800 salary for August 2021, Kshs.101,095.38 being salary for 4 days worked in September, and Kshs.214,827.69 owed on account of 8.5 unutilized leave days.
24. The Respondent avers that the thirteenth month salary claimed by the Claimant of Ksh.1,309,502 was not contractual, but a discretionary performance bonus that was never declared by the Board. It states further, that the ex-gratia payment of Kshs.650,000 was conditional and was forfeited upon the Claimant's resignation on 13th September 2021.
25. It is the Respondent's case that on 8th September 2021 it invited the Claimant to discuss new employment terms due to the company's ongoing financial strain, but instead of attending the meeting, the Claimant resigned on 13th September 2021, effective immediately, without giving one month's notice.
26. The Respondent objects to the production of other employees' personal leave records, citing privacy rights under the [*Data Protection Act, 2019*](#).
27. On enforcement of leave, the Respondent avers that it applies and enforces its leave procedures across board and denies enforcing leave in a discriminatory manner.
28. It avers that the PAYE obligations owed to KRA are being settled through an agreed payment plan with the KRA.
29. On re-examination, the Respondent clarified that the salary arrears arose from the effective date of employment 1st January, 2018. And further claims that by 23rd November, 2018, when the salary was increased, the Claimant was paid his salary in full.
30. In its counter claim, the Respondent claims a set-off of Kshs.273,800 on account of notice pay owed as against the Claimant.
31. The Respondent avers that final dues are pending completion of the exit and clearance process, including return of company property by the Claimant.
32. The Respondent prays that the Claimant's claim be dismissed with costs, and that the court allows it counter claim.



The Claimant's Submissions

33. On whether the Respondent withheld the Claimant's salary, the Claimant submitted that the Respondent unlawfully withheld his salary amounting to Kshs.1,350,000/= and later attempted to disguise it as an ex-gratia payment. He contended that a salary remains a salary regardless of the label applied to it. He referred to Section 17 of the *Employment Act*, 2007, which requires an employer to pay the full amount of wages due for work performed, subject only to statutory deductions such as PAYE under the *Income Tax Act*. The Claimant sought to rely in *National Bank of Kenya Limited v. Devji Bhimji Songhoni & Another* [1995] KECA 101 (KLR) to submit that ex-gratia payments have no place in an ordinary commercial transaction where legal relations exist. He therefore maintained that the Respondent's reference to the withheld salary as ex-gratia was a calculated attempt to evade its contractual and statutory obligations.
34. The Claimant submitted that the Respondent had expressly admitted owing him part of the claimed amount. He cited the case of *Choitram & Another v. Nazari* [1984] KECA 47 (KLR), to argue that admissions must be clear and unambiguous, and that once made, judgment may be entered on that basis. He pointed out that while he sought Kshs.3,795,772/=, the Respondent admitted in its witness statement to owing Kshs.1,289,724.07/=. He therefore urged the Court to enter judgment for the admitted sum.
35. It is the Claimant's submission that the Respondent's alleged financial difficulties could not excuse its failure to honour contractual obligations. He relied on *Halsbury's Laws of England* (Contract, para. 890) to argue that a party cannot escape liability merely because performance has become difficult or onerous.
36. It is the Claimant's submission that the Respondent subjected him to discriminatory treatment in the implementation of leave entitlements. He relied on *Black's Law Dictionary* (10th Edition), which defines discrimination as the effect of a law or practice that confers privileges on one class while denying them to another. He submitted that while other employees were allowed to take leave under favourable terms, he alone was subjected to a restrictive and prejudicial leave procedure.
37. The Claimant submitted that the Respondent's conduct amounted to constructive dismissal. Relying on *Coca Cola East & Central Africa Limited v. Maria Kagai Ligogo* [2015] KECA 394 (KLR) and *Halsbury's Laws of England* (Contract, para. 997), he argued that the Respondent had fundamentally breached the contract of employment by unilaterally reducing his salary, introducing an indefinite system of unpaid leave, and withholding his salary for over three years.
38. It is the Claimant's further submission that the Respondent's actions were a repudiatory breach of contract, leaving him with no option but to resign. The Claimant maintained that his resignation, communicated on 13th September 2021, was justified and that he duly surrendered all company property thereafter. He therefore urged the Court to find that he was constructively dismissed and to award appropriate reliefs.
39. The Claimant urged the Court to grant the reliefs sought in the claim and dismiss the counterclaim with costs.

The Respondent's submissions

40. Conversely, the Respondent submitted that it did not unlawfully withhold the Claimant's salary. The Claimant had alleged that the Respondent withheld Kshs.1,300,000/= purportedly being part of his contractual entitlements. However, as admitted during cross-examination, this amount comprised two



- distinct elements: Kshs.700,000/= in salary arrears and Kshs. 650,000/= being an ex gratia payment conditional upon continued employment.
41. The Respondent relied on the letter dated 23rd November, 2018, which expressly stated that the ex-gratia sum was payable only if the Claimant remained in employment at the time of payment. The Respondent argued that this was the operative forfeiture condition, which the Claimant had accepted.
 42. It was further submitted that the Claimant had the freedom to accept or reject the offer of 23rd November, 2018, and having not accepted it, he could not seek to enforce a proposal that never crystallised into a binding contractual obligation.
 43. The Respondent admitted liability for Kshs.700,000/= in salary arrears arising from the backdating of a pay increase to January 2018, and confirmed willingness to pay the same.
 44. The Respondent urged the Court to reject the Claimant's attempt to invoke the *Employment Act, 2007* to convert a discretionary ex gratia benefit into a statutory entitlement, submitting that ex gratia payments are not enforceable unless expressly incorporated into a contract. Reliance was placed on *Nicholas Wachira Koigia v NCR Kenya Limited* [2013] KEELRC 860 (KLR), where the Court held that an ex gratia payment is purely discretionary and not a matter of right.
 45. The Respondent also cited *Musau & Another v Microsoft East Africa Limited* [2023] KEELRC 578 (KLR), where it was held that a discretionary bonus is one given solely at the employer's discretion. The Respondent stated that no bonuses were declared between 2016 and 2021, and the Claimant had not proved entitlement to any.
 46. On the 2nd issue of whether the Respondent has admitted any wrongdoing, the Respondent denied any wrongdoing, maintaining that it had only acknowledged sums legitimately due to the Claimant, namely Kshs.700,000/= in salary arrears for January to October 2018; Kshs.273,800/= for August 2021 salary Kshs. 101,095.38/= for 4 days worked in September 2021; and Kshs.214,827.69/= for accrued leave of 8.5 days.
 47. The Respondent submitted that the Claimant resigned without giving the mandatory one month notice as provided in the letter of employment dated 23rd May, 2016. It submits further that in terms of Section 36 of the *Employment Act*, it was entitled to deduct one month's salary in lieu of notice from amounts payable.
 48. It was further submitted that the Claimant failed to complete the exit and clearance process necessary for the computation of his final dues, relying on *Kanyagi v University of Nairobi Enterprises & Services Limited* [2025] KEELRC 566 (KLR), where the Court emphasized that clearance processes are legitimate mechanisms for reconciling final liabilities upon termination of employment.
 49. The Respondent submits it was explained to the Claimant that the warning letter dated 16th March, 2021 was issued after the Claimant absented himself from work between 1st and 15th March, 2021 without permission or notice. It submits further, that the Claimant was summoned to explain his absence and given an opportunity to respond at a meeting held on 7th April, 2021, where he cited bereavement but failed to produce supporting documentation as required under the Staff Handbook.
 50. The Respondent argued that it could have summarily dismissed the Claimant under Section 44(4)(a) of the *Employment Act* for absenteeism without leave, but opted instead for a written warning which was fair and proportionate.



51. The Respondent submits that the Claimant never challenged the warning during his employment and only raised the issue after resignation, and therefore his allegation of being condemned unheard was baseless.
52. The Respondent submitted that the Claimant failed to prove discrimination as required under Section 5 of the *Employment Act* and Article 27(4) of *the Constitution*. Citing *Bakhoya v Chane & Another* [2024] KEELRC 293 (KLR), the Respondent emphasized that the burden lies on the Claimant to demonstrate less favourable treatment on a prohibited ground, supported by specific evidence.
53. The Respondent further submitted that its evidence showed that leave policies were uniformly applied to all employees based on operational requirements, and not biasness.
54. The Respondent denied that the Claimant was constructively dismissed and submitted that his resignation on 13th September, 2021 was voluntary. It was explained that the resignation followed a proposal dated 8th September, 2021 inviting the Claimant to renegotiate his terms of employment as part of an ongoing restructuring process, which was lawful and transparent.
55. Relying on *Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited* [2014] eKLR and *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR), the Respondent submitted that constructive dismissal requires proof of a fundamental breach that renders employment intolerable, which was not demonstrated.
56. The Respondent noted that the Claimant did not lodge any grievance or complaint before resigning and continued to work normally even after receiving the warning letter, showing that the employment relationship remained intact.
57. It was further submitted that the Claimant's resignation was a personal choice rather than a reaction to any intolerable conduct by the Respondent.
58. The Respondent submitted that the Claimant had not proved entitlement to any of the reliefs sought. Relying on the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, it was argued that parties are bound by their pleadings and the Court cannot grant reliefs not specifically pleaded or proved.
59. The Respondent contended that the claim of Kshs.780,330/= for leave and terminal dues was not itemized; and further that the claim for Kshs.1,350,000/= allegedly withheld salary included a forfeited ex gratia sum; and the claim for Kshs.1,309,502 /= for thirteenth-month salary was unsubstantiated.
60. The Respondent therefore urged the Court to dismiss the claim in its entirety and find that the Claimant had failed to prove his case on a balance of probabilities.

Analysis and Determination

61. I have considered the pleadings, the witnesses' testimonies and the submissions by both parties. The issues for determination are: -
 - i. Whether the Claimant was constructively dismissed.
 - ii. Whether the Claimant is entitled to the reliefs sought
 - iii. Whether the Respondent deserves the remedies sought under the counter-claim
 - iv. Who bears the costs of the suit.



Whether the Claimant was constructively dismissed.

62. The Claimant's contends that he was constructively dismissed on the basis that the Respondent took retaliatory action against him when he demanded to be paid his withheld salaries, which situation he asserts left him no choice but to resign.
63. It is his position that the Respondent served him with a warning letter dated 16th March, 2021 without affording him prior opportunity to defend himself. He contends that he received an email at about 1708HRS on 16th March, 2021, and that shortly at 1825HRS on the same day, he was served with the warning.
64. The question is whether the Respondent's actions aforesaid, amount to constructive dismissal of the Claimant. Lord Denning in *Western Excavating ECC Ltd v Sharp (1978) 2 WLR 344*, described constructive dismissal in the following words:-

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
65. The Respondent maintains that the Claimant by conduct had accepted reduced working hours and reduced pay, and did not resign in protest of the reduced working hours or pay.
66. The Claimant told court on cross-examination that he indeed was told and was thus aware that the Respondent's company was facing financial difficulties. It is also evident from the record, that the Respondent invited him for a meeting scheduled for the 8th September, 2021, to agree on future working modalities, but which the Claimant responded with his resignation of 13th September, 2021.
67. On the issuance of a warning letter, the Claimant admitted on cross-examination that he was indeed absent from duty from 1st March, 2021 to 15th March, 2021 and that all he received were missed calls and an email from the Respondent. The Claimant confirmed that though he saw missed calls and emails from the employer, he did not bother to speak to anyone at the Respondent's company, but that he subsequent to the calls and the email, wrote an email seeking emergency leave.
68. In my considered view, nothing in the chronology of events herein shows circumstances that would warrant an employee's resignation. Granted, the Claimant seem to have been disillusioned and unmotivated to go to work due the delays and reduction in salary, but which circumstances, the Claimant was aware of and actually acquiesced to.
69. I concluded by holding that nothing in the conduct of the Respondent showed that it no longer intended to be bound by any of the terms of contract, as to amount to constructively dismissing the Claimant.
70. I therefore find and hold that the Claimant has not proved a case of constructive dismissed.



Whether the Claimant is entitled to the reliefs sought

71. The Claimant's claim herein is for an order compelling the Respondent to pay him a total of Kshs.3,795,772.00 comprising of withheld salary, unpaid salary for August, 2021, salary for 2.5 days worked in September, 2021, annual leave and terminal dues and thirteenth month salary for the years 2016- 2020.
72. For starters, the Respondent acknowledged owing the Claimant certain final dues in the sum of Kshs.1,289,724.07/= comprising of salary arrears from January to October, 2018, August, 2021 salary, four days salary for the month of September 2021 and 8.5 days' pay on account of leave not utilized. In the case of *Choitram & Another v. Nazari* [1984] KECA 47 (KLR), the court stated that admissions must be clear and unambiguous, and that once made, judgment may be entered on that basis.
73. On account of the Respondent's admission, I start by entering judgment on admission for the sum of Kshs.1,289,724.07/=.
74. On the claim for payment of ex-gratia, the Respondent contends that by tendering resignation, the Claimant forfeited claim to the ex-gratia payment which it states was a discretionary payment offered by the Respondent/employer.
75. On its part, the Claimant contends that salary is earned after the work is done and that since he had already earned the salary, the issue of forfeiture does not arise.
76. In my considered view, the Respondent having already admitted that it made an offer of an ex-gratia payment to the Claimant, but was not in a position to immediately make the payment, cannot be justified to now purport that the offer was forfeited by reason only that the Claimant resigned. The offer in my view is property that had already crystalized, and is in no way bound by whether or not the Claimant continued to work for the Respondent.
77. Further, the letter to the Claimant by the Respondent's Directors and dated 12th June, 2020, acknowledged the amount owed to the Claimant on account of ex-gratia as Kshs.1,350,000 and not just the Kshs.700,000 that the Respondent has admitted.
78. In light of the foregoing, I find and hold that the Claimant is entitles to the full sum of the ex-gratia payment, being the balance of Kshs.650,000 in addition to the Kshs.700,000 that was already admitted.
79. On the claim for thirteenth month salary, the Claimant did not lead any evidence to show that he was entitled to a 13th salary other than the ex-gratia that was partly admitted and partly proved. This claim therefore fails.
80. On the claim for leave, I note that the Claimant sought to be paid for leave not taken for the entire duration he was in the service of the Respondent (2016-2020). I note further, that part of this claim has been admitted by the Respondent in the sum of KShs.214,827.69, and has been allowed as forming part of the judgment on admission.
81. The rest of the claim for leave has not been proven given that the Claimant admitted the changes in working hours, and furlough program which extended from 2019 to 2021, and which then means that the Claimant worked for lesser time.

The Respondent's Counter-Claim

82. The Respondent lodged a Counter-claim together with his memorandum of reply to claim, contending that the Claimant did not issue it with resignation notice.



83. The resignation letter by the Claimant is dated 13th September, 2021 and at its paragraph three (3), the Claimant states “.....the undersigned hereby issues its counternotice of resignation WITH IMMEDIATE EFFECT.”
84. The letter was in response to one by the Respondent inviting the Claimant to a meeting, ostensibly to review the terms of his employment contract and where no agreement on new terms is reached, the letter was expected to also serve as notice of either termination or amicable separation.
85. By the wording of the Claimant’s letter, it is clear that the Claimant severed his employment with the Respondent immediately without any notice whatsoever. In the case of *Saro v Evans Sunrise Centre* [2024] KEELRC 977 (KLR) and *Gold Crown Beverages (Kenya) Limited v Ngugi* [2023] KEELRC 2345 (KLR), it was held that employees who resign without serving or paying for the contractual notice period are in breach of their employment terms.
86. Further, having found that the Claimant’s resignation did not meet the threshold for a constructive dismissal, it follows that he was bound to issue one month notice to Respondent or pay one month salary in lieu thereof.
87. For the reasons foregone, I hold that the Respondent is entitled to recover one month salary from the Claimant on account of notice.
88. The Counter-Claim thus succeeds as prayed.
89. In whole, both the Claimant’s claim and the Respondent’s Counter-Claim succeed in terms of the following orders:-
- a. An order that the Respondent pays the Claimant the admitted final dues in the sum of Kshs.1,289,724.07/=
 - b. An order for payment of additional ex-gratia payment in the sum of KShs.650,000
 - c. The Respondent to deduct one month salary being Kshs..273,800 from the sums herein awarded on account of the Counter-Claim.
 - d. The Respondent shall bear half the costs of the suit, the Counter-Claim having succeeded.
90. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 23RD DAY OF OCTOBER, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Rosana present for the Claimant

Mr. Nyaga h/b for Mr. Mueke for the Respondent

Esther S - C/A

