

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
ELRC CAUSE NO. E1040 OF 2021

DUANE JOHN FERNANDESCLAIMANT

- VERSUS -

**THE LORDSHIP AFRICA GROUP OF
COMPANIES.....1ST RESPONDENT**

**LORDSHIP AFRICA FUND MANAGEMENT
LIMITED.....2ND RESPONDENT**

EIGHTY EIGHT NAIROBI LIMITED.....3RD RESPONDENT

LORDSHIP SQUARE LIMITED.....4TH RESPONDENT

LORDSHIP AFRICA LIMITED5TH RESPONDENT

POLPANE PROPERTIES LIMITED.....6TH RESPONDENT

PURSLANE PROPERTIES LIMITED.....7TH RESPONDENT

**KAREN HILLS MANAGEMENT
LIMITED.....8TH RESPONDENT**

KAREN HILLS LIMITED.....9TH RESPONDENT

BLACKSTEID PROPERTIES LIMITED...10TH RESPONDENT

AZILE LIMITED.....11TH RESPONDENT

NORTHERN STAR INVESTMENT

LIMITED.....12TH RESPONDENT

SPACE INVESTMENT LIMITED.....13TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 17th

December,2025)

JUDGMENT

1. The claimant’s claims against the respondents are set out in the claimant’s amended memorandum of claim dated 4th October 2022 filed through RONN LAW Advocates LLP (“the amended memorandum of claim”). Some parts of the amended memorandum of claim were re-amended orally before the Honourable Court during the hearing of the case on 10th December 2024. The claimant prayed for judgment against the respondent for:

- a)A declaration that the claimant was an employee of all the respondents jointly and severally.

b) A declaration that the respondents terminated the claimant's employment unfairly and unlawfully through constructive dismissal.

c) An order compelling the respondents to return the claimant's money (KES. 33,000/=) and the Claimant's personal property and items (listed in prayer (a) of the Amended Memorandum of Claim) within a period of 7 days from the date of Judgment (the listed items being:

- i. A black pierre cardin super180s suit.
- ii. A business card holder, black in colour branded with the claimant's name.
- iii. A wooden mobile phone holder from Turkey.
- iv. Samsung buds plus - black earphones and case.
- v. A glass beaded rosary.
- vi. A black leather desk organiser.
- vii. Assorted personal documents.
- viii. An original Samsung fast phone charger.

ix. A black coffee travel mug branded with Emirates logo.

d) As an alternative to (c) above, an order for payment of the claimant's money (KES. 33,000/=) and general damages for conversion of claimant's personal property and items (listed in prayer (a) of the amended memorandum of claim -as now listed above).

e) General damages for unfair labour practices.

f) General damages for both direct and indirect discrimination and harassment of the claimant in respect of terms and conditions of employment and matters arising out of employment (including but not limited to payment of salaries, payment of bonuses, the awarding and implementation of salary increments, provision of medical cover, payment of NHIF and NSSF contributions,

payment of PAYE and provision of work tools) and termination of employment.

g) The equivalent of 12 months' salary as compensation for unfair and unlawful termination of employment through constructive dismissal - KES. 18,137,140.20.

h) 3 months' salary in lieu of notice - KES. 4,534,285.05.

i) Accrued but untaken leave (75.6 working days) - KES. 5,441,140.08.

j) Unpaid basic salaries for the period between 1st June 2020 and 22nd June 2021 (12.7 months) - KES. 12,700,000/=.

k) Unimplemented salary increments as follows:

i) For the period between 1st February 2019 and 31st July 2019 - KES. 857,142.00. and,

ii) For the period between 1st August 2019 and 22nd June 2021 (22.7 months) - KES 7,134,282.00

- l) Unpaid housing allowance in relation to the period between 17th July 2017 and 22nd June 2021 (48 months) - KES 9,462,854.40.
- m) Unpaid annual bonuses for each of the 4 years in which the claimant was in employment with the respondents (2017/2018, 2018/2019, 2019/2020 and 4 2020/2021) calculated at the rate of KES. 15,771,426.60 per year, less the bonus of KES. 1,000,000/= that was paid to the claimant in December - KES. 62,085,706/=.
- n) Medical expenses incurred between December 2020 and May 2021 - KES. 190,931/= and motor vehicle fuel expenses incurred up to 22nd June 2021 - KES. 91,050/=.
- o) An order compelling the respondents to remit all outstanding statutory deductions including

NSSF, NHIF and PAYE, plus any penalties arising from non-remittance.

p) An order directing the respondents to issue the claimant with a Certificate of Service in compliance with section 51 of the Employment Act.

q) An order directing the respondents to issue duly signed P9 Forms for the years 2020 and 2021 duly signed by the respondent to facilitate the filing of the claimant's income tax returns in respect of the period between the January and December 2020 and the period between January and December 2021.

r) An order compelling the respondents to pay all penalties (and interest thereon) arising from the Claimant's failure to file income tax due to the respondents' failure to provide P9 Forms in the manner required by law on full indemnity basis.

s) Costs of the suit.

t) Interest (as specifically sought in prayer (u) of the amended memorandum of claim).

2.The amended memorandum of response and counterclaim was dated 11.11.2022 and filed through J.A. Guserwa & Company Advocates. The respondent prayed that the suit be dismissed with costs and judgment entered against the Claimant for:

a) A finding and a declaration that the allegation of unlawful termination of the Claimant's employment is misplaced and lacks merit therefore should be dismissed.

b) A judgment in favour of the 1st and 2nd respondents for the sum of Kshs 9,845,658.05/= together with interest at prevailing commercial rates from the respective payment dates tabulated as hereunder till payment in full. The Court has

observed that the tabulation was actually in paragraph 2 of the counterclaim as follows:

- i. Motor vehicle KBW 400F -2006 Toyota Land cruiser V8 Model CBA-UZJ 200W Kshs.5,000,000.00.
 - ii. Lap Top HP Spectre x360 SCD52825ZL Kshs.75,0000.00.
 - iii. Lap Top Dell XPS 13 9343 60WMR32 Kshs.75, 000.00.
 - iv. Phone Samsung Galaxy Note 9 Kshs.35, 000.00.
 - v. 3 months' notice pay Kshs.4, 534,285.05.
 - vi. Mother's Health Insurance Premium Kshs.126, 373.00.
 - vii. Total amount counterclaimed Kshs.9, 845,658.05.
- c) In the alternative an order directed to the claimant to surrender forthwith the respondent's properties in his possession in

the same condition as they were when he took them.

d) Damages for defamation and character assassination.

e) Costs and any other relief.

3. The claimant's case was that at all material times he was an employee of the respondents having been employed as such by Epix Investments Limited, the 1st respondent acting on its own behalf, on behalf of the 2nd respondent Lordship Africa Fund Management Limited and on behalf of the other respondents. He was employed as Group Finance & Operations Director by an employment contract dated 04.05.2017. The respondents consider themselves a group of companies which refer to themselves interchangeably as The Lordship Africa Group of Companies or The Lordship Group of Companies

4. The Claimant's case was that he was employed through an employment contract dated 04.05.2017 as the Respondent's Group Finance & Operations Director, and that the employment contract was issued by Epix Investments Limited.

5. It is the claimant's case that Epix Investments limited in issuing the employment contract was acting on its own behalf, and on behalf of Lordship Africa Fund Management Limited as well as the entire Lordship Africa Group of Companies.

6. The claimant pleaded that the terms of employment included as follows:

a) That he was appointed on a permanent basis.

b) The employment was to commence on 01.08.2017.

c) Probation was to be for a period of three months.

- d) The claimant would report directly to the respondent's Chairman Jonathan Jackson (Mr Jackson).
- e) Termination of the employment post confirmation would be by either party giving to the other 3 months calendar notice in writing or cash in lieu of the notice.
- f) The employment was for a monthly basic salary of Kshs 1,000,000/=.
- g) Annual leave of 21 working days in addition to gazetted public holidays and any unutilized leave days would be paid as leave pay.
- h) The claimant would be paid bonuses based on his and the respondent's performance which was to be an annual minimum bonus of 1 year's salary.
- i) A healthcare package for the claimant and his immediate family, and the respondent would

ensure that the healthcare package would not lapse at any time for any reason.

j) Tools and equipment for business use for the performance of his duties.

k) An annual performance appraisal review of the claimant would be conducted and his salary reviewed accordingly.

7. The claimant states that it was an express term of his employment that the employment contract would be read together with the Lordship Africa Human Resources Employee Handbook as well as the Lordship Africa Group Finance and Operations Director Scope of Work.

8. The claimant maintains that he offered the respondent invaluable, excellent and dedicated service from 17.07.2017 to 22.06.2021. Some of the highlights of his dedicated service, as pleaded for him, include:

- a) In or about the year 2019, he used his contacts and relationships with various banks to get the respondent group companies and their directors de-listed from the Credit Reference Bureau.
- b) He managed to improve the respondent's cash flows by reducing monthly costs by about Kshs 8,000,000/= per month.
- c) He managed to obtain an extension of the lease held by Eighty Eight Nairobi limited over its flagship property located along 4th Ngong Avenue.
- d) He negotiated and obtained a reduction of the respondent's land rent arrears in respect of the property known as Lordship Square - LR Number 209/10666 from Kshs 47,000,000 to Kshs 1,000,000 as well as procured the reduction of the land rent payable for the

same property to only Kshs 160,000/- per annum.

e) He used his personal networks and connections to make the respondent's operations efficient, secure and professional.

f) After the former head of sales and marketing was terminated and former development director for Karen Hills resigned, the claimant was actively involved in sales and marketing from about September 2017 and drove sales upwards to an average of 8 apartments per month. In January and February 2019, 11 apartments and 9 apartments respectively were sold, when a director of sales was eventually employed and took over this responsibility, the claimant alleges that the sales dropped to zero apartments per month.

g) The claimant states that in 2017 the respondent had extremely severe cash flow

issues and Mr Jackson was not in Kenya at the time, and he consequently had to pay Equity Bank a sum of Kshs 1,067,818/= from his personal funds to prevent the respondent's property from being auctioned due to loan repayment default.

h)As at May 2020 he had single-handedly rendered all the respondent's financial accounts, including accounts dating back to 2013, ready for audit. However, despite his work in getting the financial accounts ready for audit, the claimant states that some of the said accounts were not audited, the reason for this being that Mr. Jackson failed and/or refused to approve his director's accounts, which contained expenditure that Mr. Jackson wished to have passed as deductible company expenses but which were, according to the

claimant, by their nature, illegal and/or non-deductible for taxation purposes.

9. The claimant states that despite his stellar work, going above and beyond the call of duty and being a decent human being to the respondent and indeed Mr. Jackson, the respondent progressively singled him out and treated him with blatant discrimination, harassment, unfairness, unlawfulness and hostility.

10. He asserts that he raised his grievances in relation to the discriminatory, harassing, unfair, unlawful and hostile treatment that he received but none of his grievances were addressed. Eventually putting him in such an unbearably difficult situation that he was unable to continue his employment.

11. As set out by the Claimant, the particulars of the blatant discriminatory harassing, unfair,

unlawful and hostile treatment that he received, the grievances he raised and the unbearably difficult situation he was put in by the respondent, are as follows;

- a) In January and February 2019, the respondent actively made efforts to replace him as Group Finance and Operations Director by advertising his position and carrying out interviews while he was still in employment and without giving him any form of termination notice.
- b) In March 2019, Mr Jackson as an agent of the respondent hired Ms Wang to take over the claimant's responsibilities while he was still employed as the Group Finance & Operations Director and not serving any form of termination notice.
- c) In March/April 2020 the respondent created and added to its staff structure the role of Chief Operating

Officer (COO). The respondent then appointed Gurjeet Phul Jenkins to this position. This new position overlapped with the claimant's existing position. When the changes aforesaid were made, the claimant noted as follows:

- i. The duties of the COO role matched the duties assigned to him as Group Finance and Operations Director.
- ii. Subordinate staff who previously reported to him were in the new structure, required to report to the COO. This created confusion and an overlap of duties, which lead to conflict and a hostile work environment for the claimant and his subordinates.
- iii. The title of his position was then unilaterally changed to Financial Director and his reporting line was altered without any reference to him. He was

then required to report to the COO despite the provisions of clause 3.1 of the Employment Contract which stated that he was to report directly to the chairman of the respondent.

d) As from March 2020, the claimant states that he was deliberately excluded from email correspondences and meetings where other staff members were discussing matters that related to his department.

e) In June 2020, the respondent took active steps to replace the claimant while he was still in employment and not serving any form of termination notice. The respondent sought for, received and considered curriculum vitae for candidates for the position of Finance Director.

f) On the 11.06.2020, Mr Jackson acting as the respondent's agent, met and interviewed a

potential candidate for the position of Finance Director.

g) On 15.06.2020 Mr Jackson met and interviewed another potential candidate for the position of Finance Director.

h) On 28.05.2020 the claimant held a meeting with Mr Jackson and presented him the payroll and draft RTGS instructions for payment of the respondent's staff salaries for May 2020 for his approval, signature and issuance, only for the respondent to issue the RTGS instructions to ABSA Bank plc with the exclusion of the claimant's May 2020 salary.

i) The claimant states that he did not receive his May 2020 salary payment until later in the month of June 2020 after making several requests for the payment to be made.

j) After June 2020 the respondent did not make any salary payments to the claimant despite his continued service.

- k) That no NHIF and NSSF statutory contributions for the period June 2020 to June 2021 were made by the respondent on the claimant's behalf.
- l) The claimant states that according to his i-tax account, the respondent failed to remit PAYE tax amounting to Kshs 293,079/= on his behalf to the Kenya Revenue Authority in respect of the period between January 2019 and December 2019, and interest of Kshs 52,754.22 had accrued on the principal tax amount as at 07.12.2021.
- m) The claimant made repeated requests for payment of his salary arrears, however, the same were met with promises by Mr. Jackson, indicating that he would respond at an uncertain time in the future. In October 2020, the claimant caused his advocates to issue demand letters dated 12.10.2020 and 21.10.2020 to the respondent, which letters the respondent did not respond to.

n) On or about 06.06.2020 the respondent's i-tax passwords as well as the administrator and user passwords of the respondent's accounting system were reset and changed and he was locked out of the accounting and i-tax systems.

o) On or about 20.06.2020 his email credentials were changed, however, the new email credentials were not shared with him despite various requests by him to Mr. Jackson. Consequently, the claimant could not access his work emails and therefore could not perform his duties.

p) On or about 30.06.2020 the claimant's telephone line was removed from the respondent's post-paid account without any reference to him.

b. On or about 30.06.2020 the respondent cancelled the fuel card for the motor vehicle that it had assigned to the claimant.

12. The claimant states that due to the COVID -19 pandemic, from mid-March 2020 to 1st June 2020, the respondent's staff worked from home. However, there was a rota providing for staff to physically attend the respondent's office in turns in order to ensure that the respondent's office was always manned.
13. In June 2020 the respondent decided that all staff would resume working from the respondent's office with effect from 02.06.2020.
14. The claimant states that between 02.06.2020 and 05.06.2020 he was very ill and was unable to attend the respondent's office for work. During this period he kept Mr. Jackson and a couple of his colleagues aware of his condition.
15. On 08.06.2020 the claimant arrived at work, only to find that the locks to his office had been broken and changed, thereby preventing him from accessing it.

16. Mr Jackson requested the claimant to meet him at the sales office. The claimant alleges that Mr. Jackson wrote an email during the meeting stating that, the claimant together with other members of the respondent's finance department, Ms. Anne Munene and Mr. Lemmy Rukunga were suspended from work indefinitely, to pave way for an audit by a third party.

17. The claimant maintains that no such audit was carried out, and Ms. Anne was asked to return to work on 09.06.2020, Mr. Lemmy was also asked to return to work in mid-June, 2020 while the claimant was kept in suspension.

18. The claimant maintains that his suspension did not comply with the provisions of clause 7.10 of the Employee Handbook, as regards the reasons for suspension, the length of suspension and the applicable procedure prior to, during and after suspension.

19. The claimant states that the respondent, principally through Mr. Jackson, on various occasions, allegedly made false and baseless accusations against him in relation to matters arising during the course of his work, insinuating that he was not doing his work or that he was performing poorly. The claimant maintains that he on each occasion, responded to the allegations and gave the correct/actual set of facts and the status of each issue and satisfactorily answered each of the allegations, and on one occasion, specifically a WhatsApp exchange that occurred between him and Mr. Jackson on 03.03.2020, Mr. Jackson expressly acknowledged the correctness of the claimant's responses.

20. At a meeting held between Mr. Jackson, Mr. Madhav Bhalla and the claimant on 09.06.2020, Mr. Jackson informed the claimant verbally that his employment would be terminated through

redundancy and added that a sum of Kshs 4,600,000/= would be paid to him as his final dues. No reasons were given for the intended redundancy and no procedure was subsequently put in place. After this verbal communication, nothing further was communicated to him about the intended redundancy.

21. On 24.06.2020 at a meeting held between Mr. Jackson, Mr. Madhav Bhalla and the claimant, Mr. Jackson stated that his employment should be brought to an end through a mutual separation and offered the claimant a sum of Kshs 10,000,000/=:, of which Kshs 4,000,000 was to be paid in cash and Kshs 6,000,000/= was to be paid in kind through a motor vehicle whose actual value was in the region of Kshs 2,500,000.

22. The claimant states that he objected to this offer and indicated that it was his intention to continue working for the respondent and the

mutual separation offered was not acceptable. The claimant alleges that the respondent threatened to report him to the Accounting Board if he did not accept this mutual separation/settlement offer, and that he would find another way of terminating his employment.

23. On 10.06.2020 Mr. Jackson sent an email to all staff members of the respondent and the Jonathan Jackson Foundation staff requiring them to refrain from contacting or communicating with the claimant.

24. On diverse dates between 08.07.2020 and 27.05.2021 the respondent removed the claimant from most work related WhatsApp groups.

25. The claimant states that as part of his benefits, he had medical cover under the respondent's medical scheme, which scheme was extended to his mother, Martha Esperanca Fernandes, by consent of Mr Jackson.

26. When the medical cover expired on 13.12.2020 the respondent refused to renew them. By refusing to renew them, the claimant alleges that the respondent denied him an express contractual employment benefit without any justification.

27. On account of the respondent's failure to provide the said medical cover, the claimant was compelled to incur medical expenses amounting to Kshs 190,931/=.

28. The claimant states that clause 2.4 of the employment contract, entitled him to an annual bonus equivalent to a minimum of a year's salary, however, the respondent failed and/or refused to pay the bonuses due to him.

29. In December 2017, the claimant was paid a bonus of only one month's salary and his subsequent requests for regularization of this position were ignored.

30. In December 2018 and December 2019 all the respondent's members of staff and some consultants received bonuses with an exception of the claimant.
31. The claimant was not paid any bonus for the years 2018, 2019 and 2020 and his appeals for the resolution of this issue were all ignored.
32. The claimant states that from 17.07.2017 when the claimant began working for the respondent, he did not receive a salary increment.
33. In the course of the years 2018 and 2019 various members of the respondent's staff who reported to the claimant directly and were in his department were awarded salary increments.
34. In February 2019 Mr Jackson promised the claimant that his net salary would be reviewed upwards by Kshs 100,000/=, this review according to the claimant, was never effected.

35. In August, 2019, Mr Jackson indicated to the claimant via WhatsApp that his salary would be reviewed upwards by a further 15%, however, this review was never effected.

36. In December 2019, all the members of the respondent's staff and some consultants were awarded further salary increments, however no explanation was given to justify the claimant's exclusion from the salary increment.

37. The claimant states that clause 2.11 of the employment contract required the respondent to conduct an annual performance appraisal and to review his salary accordingly. It is the claimant's case that the respondent breached the foregoing provision by failing and/or refusing to conduct a review of his performance.

38. The Claimant expressed that on account of the treatment meted to him by the respondent, by itself and through its employees and agents, he

was forced to leave employment by resigning. Accordingly, he informed the respondent of his resignation by way of resignation letter dated 22.06.2021.

39. The claimant maintains that the decision to leave employment was not voluntary, rather it was forced by;

a) The aggregate discriminatory, harassing, unfair, unlawful and hostile treatment that he had received from the respondent.

b) The unbearably difficult situation he had been put in by the respondent, where:

i. he was unable to carry out any part of his work;

i. he was unable to communicate with his colleagues, other stakeholders and third parties; and ,

- ii. he was not receiving any of the income or benefits that were due to him under the employment contract and under the law.
- c) The respondent's failure and/or refusal to address his grievances.
- d) The fact that it was inconceivable that the respondent would change its ways by:
 - i. beginning to treat him fairly and lawfully;
 - ii. allowing him to carry out his work; and,
 - iii. ensuring the provision of the benefits and remuneration attaching to his position.
- e) His critical financial instability arising from the non-payment of his salary arrears and consequently, him using his savings to near depletion.

40. The claimant maintains that it is beyond doubt that the respondent terminated his employment unfairly and unlawfully through constructive dismissal.

41. Following the termination of employment, the claimant states that the respondent failed to issue him with a certificate of service.
42. On the part of the respondents, it is stated that the claimant's main role and purpose was to serve as a Group Finance and Operations Director and was to report directly to Jonathan Adrian Jackson, the Chairman.
43. The respondent's case as pleaded is that the claimant did not deliver on critical tasks and roles, which cost the company financially and otherwise, in terms of manpower, delays, penalties, lawsuits, loss of reputation and losses.
44. The respondent states that the claimant's prime task was the preparation of all accounts and audits for all group companies for the past 10- 12 years, which he failed to produce during his tenure,

except for one that he did on account of Karen Hills, which was inaccurate.

45. The respondent states it relied on the finance director for full information on the financial position and documentation and that without full and proper information, Mr. Jackson could not sign off on any financial documents. The information provided to him by the claimant, he states, was just prints of entries from the accounting software, and it was not possible for him to give a full response from just entry printouts.

46. The respondent maintains that contrary to the claimant's assertions, that as at June 2020, the claimant was not done with preparing the accounts for the Lordship Group of companies, and that it has taken its current team of three full time accountants, enormous time and resources over three years, to clean up the backlog and rectify numerous accounting errors.

47. The respondent states that the claimant's failure to finalize the accounts for all companies cost it a lot of money in company overheads, consultant fees and penalties to KRA.

48. The respondent maintains that the claimant's bonus or salary increase was on his employment contract as a discretionary benefit and it was pegged on him completing and finalizing all group company accounts up to date.

49. When the claimant joined the respondents, RSM were handling the accounts reconciliations and new accounts for all companies. The respondent states that the claimant failed to meet with RSM and failed to respond to their queries and didn't provide them with information, forcing their services to come to a stop, resulting in a large cost to the respondent.

50. Due to lack of response and clarity as to the progress on the financial positions of all the

companies from the claimant, the respondent states that it opted to hire a consultant to undertake an internal audit in June 2019 as a mitigating measure. This was conducted by Ms Wang, who the respondent states it never intended to hire as Finance Director as implied by the claimant.

51. The respondent states that due to lack of audited financial statements for the Karen Hills Management Company, which docket fell under the responsibility of the claimant, the homeowners sued the respondent, culminating in ELC Case No. E047 of 2021.

52. According to the respondent, the claimant failed to respond expeditious and efficiently to business decisions and actions and payments to suppliers and made a bad reputation for the group of companies.

53. As the claimant was failing on his key role to undertake the accounts and financial audits of the companies, and that his management of the operations of the company were not being performed well, the respondent states that it had to appoint a new COO to relieve the claimant of the operational responsibilities with the intent that he would focus solely on accounts and finance matters.

54. The respondent states that as finance director, the claimant was aware that housing allowance was part of his salary, and accordingly refutes his claim and states that the claimant was responsible.

55. The respondent indicates that the employment contract only allowed for a spouse and 3 dependents under the age of 18 years, and that there is no written approval of an exception extended to the claimant allowing him to include

his mother on the medical scheme. The respondent maintains that the only other employee that had his mother on the company medical was an employee known and hired by the claimant. That the addition of his mother onto the scheme without authorization was blatant breach of his duties and responsibilities as Finance and Operations Director.

56. The claimant regularly lacked to report to work in a timely manner and also failed to work full days during working hours.

57. The respondent maintains that the claimant failed it in the following manner, namely:

a) he failed in early 2020 to send water invoices to the Karen Hills residents;

b) he never set up any accounting policy for the finance department;

c) he never did any monthly finance reports;

- d) he failed to put Karen Hills staff on the payroll;
- e) for about half a year the claimant failed to do posting and bank reconciliations for the company accounts;
- f) the claimant failed to book staff car benefits leading to major penalties for the company;
- g) the claimant failed to get the correct bank guarantee for a government tender which resulted in the respondent being disqualified for the tender;
- h) failed to check that the correct performance bond was given by the main contractor for 88 Nairobi construction works.

58. The respondent states that it proposed a mutual separation in June 2020 and suggested Madhav Bhalla as a neutral party to mediate a mutual separation. However the claimant requested, in the respondent's view, an extremely unreasonable and unwarranted sum for mutual separation. Subsequently, the claimant failed to

negotiate and respond to the mediator's calls and emails on the same.

59. The respondent states that in hindsight it ought to have summarily dismissed the claimant for gross misconduct contrary to clause (b) of the employment contract, inability to carry out his or her duties contrary to clause (c) failure to report to work for a period of three consecutive working days without prior consent from his supervisor contrary to clause (j) and/or causing the company substantial financial loss contrary to clause k of the employment contract.

60. The respondent states that the claimant failed to provide information to the company's lawyers to enable them defend the company in a suit filed by KRA. The claimant also failed to calculate the correct amount of Withholding tax paid, and due to these shortcomings, the respondent lost the case,

costing the respondent a significant amount of money and time.

61. The executive chairman of RSM by his email of 23.03.2018 indicated that he had called the claimant 4 times regarding the case with KRA, without the claimant calling him back.

62. The respondent maintains that the termination of the claimant was justified and he is not entitled to the prayers he is seeking.

63. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.

64. To answer the **1st issue** the Court returns that there was no dispute that parties were in a contract of service. The claimant was employed by the 1st respondent and he could be and was actually assigned to work for all respondents who the parties considered to be a group of companies.

The terms of service were per the contract of employment on record.

65. To answer the **2nd issue**, the Court returns that upon evidence and material on record, the separation and end of the employment contract herein did not amount to unfair constructive termination. The evidence was plain and elaborate. The parties had grievances, validly so against each other. For instance, the respondents had indeed failed to appraise the claimant, grant salary increase which was to be based upon the appraised performance, hired a chief operating officer unilaterally and in view of the respondent's failures in performance the claimant's scope of roles and reporting channels had been downgraded unilaterally as pleaded and shown for the claimant. On the other hand, the claimant had failed on his performance on timely reports as was assigned, the claimant's wanting performance had forced the

respondent to incur more expenses in hiring the chief operating officer and also a consultant to mitigate the situation, and, as per evidence, the claimant had let down the respondents in his work performance like by failing on delivery deadlines. In such circumstances it appears parties were reluctant to go to their entitled strict rights and obligations arising from the contract of service. They therefore convened and the evidence was that the claimant and the chairperson of all the respondents, Mr. Jackson convened. The undisputed position per the evidence on record is that they mutually agreed to separate and further agreed to negotiate the terms of the separation. The further evidence was that the negotiations between the parties, the claimant by himself and Mr. Jackson for the respondents deadlocked. As pleaded for the respondents and testified by the claimant, parties then agreed to have a mediator

assist them to arrive at agreeable terms of the separation agreement. Unfortunately that did not yield agreed terms of the separation agreement. The claimant testified that on 09.06.2020 Mr. Jackson invited the claimant to a meeting and Mr. Jackson conveyed to the claimant that he proposed to terminate the employment based on redundancy. Further the claimant testified thus, "He offered Kshs.4.6 Million. We discussed separation. I said I did not wish to separate. I told him I loved my job...." The claimant further testified that from 09.06.2020 and thereafter, he was not at work. He stated thus, "On 09.06.2020 I was at meeting. 10.06.2020 I was not at work. On 08.06.2020 I was put on suspension. On 22.06.2021, I delivered resignation letter. It is my last day at work. From June 2020 to June 2021 I tried to work.08.06.2020 to22.06.2021 I was on suspension. On 09.06.2020 money was offered to

me. In 2020 no employee was made redundant. At meeting of 09.06.2020 there was list of those to go on redundancy. I was on the list....He wanted us to separate,” the claimant also testified that at the meeting of 09.06.2020 Mr. Jackson offered Kshs.4.6 Million so they separate but the claimant declined; on 15.06.2020 he was requested to reconsider the offer but he said he loved his job, on 24.06.2024 the claimant and Mr. Jackson held a meeting and Mr. Jackson offered Kshs.10, 000, 000.00 but the claimant declined as he wished to continue working. The last meeting was on that 24.06.2024. The claimant testified and confirmed that effective 09.06.2020 he was not required at work.

66. For respondents Mr. Jackson testified that the claimant’s last day at work was on 08.06.2020 and on 22.06.2021 he wrote a resignation letter. He further testified that he wrote the letter of 01.06.2020 to the claimant about his poor

performance. Further, Mr. Jackson testified that on 29.05.2020 he got fed up with the claimant because he had assigned to prepare certain accounts schedules at end of 2019 as assigned in September 2019 but by December he had not completed the work and by 29.05.2020 there had been no sign of the assignment being done by the claimant. The correspondence exhibited confirm that Mr. Jackson's testimony. Further when Mr. Jackson wrote to the claimant a long letter of 01.06.2020 conveying his frustration of the poor performance, the claimant replied by the harsh letter of 03.06.2020 and Mr. Jackson decided not to write to him again. Subsequently, the meetings were held after parties agreed to separate but they failed to agree on exit package. Mr. Jackson testified that the claimant refused to co-operate with the proposed mediator.

67. The Court has considered the flow of events. it cannot be that the claimant went on suspension or was emplaced on suspension where as he confirms that thereafter he continued to attend meetings for separation offers. The Court returns that the parties agreed to separate at the meeting of 08.06.2020. After the meeting of 08.09.2020 the parties engaged to perfect the agreement to separate. However the separation package was not agreed upon. The evidence is that thereafter, the claimant wrote his purported resignation letter of 22.06.2021 alleging constructive termination upon the matters and alleged frustration prior to 08.06.2020.

68. In the circumstances the Court finds that there was no constructive unfair termination. The claimant walked away after agreement to separate on 08.06.2020 and subsequently when parties failed to agree on the separation package or

terms . The purported resignation letter of 22.06.2021 is found to have been misconceived because after parties agreed to separate on 08.06.2020 the contract thereby lapsed. That the claimant was resisting the separation and not agreeable on 08.06.2020 is found inconsistent with the subsequent meetings to agree on the separation terms and the long lapse of time of over a year when on 22.06.2021 he wrote purporting to resign. It has not been established for the claimant that he separated because the employer created a hostile environment or imposed intolerable conditions. The position was that the parties looked at their grievances against each other and agreed to separate on 08.06.2020 thereby waiving going back to merits of their respective grievances in that regard. The respondents did not use the failed negotiations to push the claimant away. He simply walked away.

The Court has found there was no constructive termination at all. No compensation will issue as prayed for under section 49 of the Employment Act.

69. In that regards, the Court will not uphold the conclusive submission for the claimant thus “239. In light of the overwhelming factual record and binding Court of Appeal authority, the Claimant has demonstrated that he was constructively dismissed through the Respondents’ deliberate, malicious, and unlawful conduct, including exclusion from work, deprivation of salary, humiliation, and procedural abandonment. The evidence further establishes that all Respondents, acting under the unified control of Mr. Jackson jointly employed the Claimant and are jointly and severally liable for the violations committed. The Respondents’ counterclaims collapse under their own contradictions, lack of evidentiary support, and the

legal standards governing employer obligations and burden of proof.” The Court has found that on 08.06.2020 parties convened and agreed to separate and they cannot go back on their effective waiver arising from that agreement made to override their strict rights and obligations under the contract and relationship generally.

70. The **3rd issue** is whether the claimant is entitled to the reliefs prayed for. The Court returns as follows:

a)The order for the respondents to deliver to the respondent the Kshs.33, 000.00 and listed personal items will not issue for want of evidence that they belonged to the claimant and that respondents had a duty to deliver as alleged. In absence of due evidence and justification the prayer will fail.

b)The court has found that parties separated by agreement and the allegations of unfair

constructive dismissal will fail. No compensation is justified as already found.

c) The claimant testified that the bonuses were discretionary and based on appraised performance but which never took place. In any event the claimant's record of service was not clean.

d) Parties agreed to separate and no basis for pay in lieu of three months 'notice is justified. The parties agreed to separate on 08.06.2020 and only deferred negotiations on the terms.

e) The claimant testified that he claimed 75.6 leave days. However, as submitted for the respondents he has not shown that he applied and was denied to go on leave. Section 28 of the Employment Act provides for employer and employee agreeing on when to go on leave. The claimant has not offered evidence to show that the respondents frustrated the application of that provision. The respondents have submitted that the claimant had taken leave

and only had 31 days of leave were pending and the Court awards $31/30 \times \text{Kshs.1,000,000.00}$ making **Kshs.1,033,333.30**.

f) The Court has found parties separated by agreement on 08.06.2020 and resignation on 22.06.2021 was misconceived and no basic salaries for that period can be justified. The claimant did not work for respondents during that period and cannot be entitled to payment as claimed.

g) Alleged salary arrears upon unimplemented salary increments are not due because the claimant admitted that there was no appraisal to determine his performance as a basis of the claim. Further, the salaries are claimed for period 01.02.2019 to 08.06.2020 and as the time the suit was filed on 14.12.2021, the 12 months of limitation for a continuing injury from date of cessation thereof in section 89 (formerly section 90) of Employment Act

had lapsed on or about 08.06.2021. The claim was statutorily time barred just as the claim on purportedly claimed house allowance in circumstances the respondent has submitted parties agreed on consolidated salary and which the Court finds was the case. Similarly, outstanding claim for PAYE for July 2017 to June 2021 is time barred. The Court returns that in any event related claims on payment of tax penalties would be handled per applicable tax law.

- h) The claimant testified and confirmed the mother was not an approved beneficiary of the medical cover and the medical expenses Kshs. 190, 931.00 claimed in that respect is declined and unjustified.
- i) Motor vehicle fuel incurred and claimed up to May 2021 is with respect to period the claimant had already quit employment and is unjustified.
- j) Outstanding NHIF claims are in the nature of special damages to be particularised in pleadings

and strictly proved. That was not done. Further the same can be pursued per applicable law. The prayer is declined.

k) The claimant is entitled to a certificate of service per section 51 of Employment Act.

71. The **4th issue** is whether the respondent is entitled to the counterclaim. The claimant testified that he had not surrendered the respondent's items as claimed. The Court finds that he should surrender the motor vehicle, computers and phone forthwith and failing to pay their value as claimed. While making the finding the court has observed that the claimant did not dispute the value thereof in his testimony and as was urged for the respondent. As separation was by agreement on 08.06.2020, the respondent is not entitled to pay in lieu of three months' notice, even if, the Court has found that the claimant then abandoned by absconding and simply left employment when

parties failed to agree on the separation pay packages. The claim for respondent's mother's premium Kshs. 126, 373.00 is declined as time barred under section 89 of the Employment Act as a continuing injury whose cessation date was well beyond 12 months as at time the counterclaim was made.

72. Each party to bear own costs of the suit including the counterclaim in view of margins of success,

In conclusion the amended memorandum of claim and the counterclaim are determined and judgment hereby entered for parties as follows:

- 1) The declaration that there was no unfair constructive termination but parties agreed to separate on 08.06.2020 and subsequently the claimant went away by way of absconding and the purported resignation letter of 22.06.2021 was

misconceived as it came long after termination of contract on 08.06.2020.

- 2) The respondents jointly or severally and on priority the 1st respondent to pay the claimant **Kshs.1,033,333.30** by 01.02.2025 failing interest at court rates to run there on from today until full payment.
- 3) The claimant to deliver to the respondent the claimed respondent's motor vehicle, two laptops and phone or in alternative to pay their respective value (to be included in the final decree accordingly) by 01.02.2026 and failing, interest to run on the value (**Kshs.5,000,000.00; 75,000; 75,000**, and **Kshs. 35,000.00** respectively) from the date of this judgment till full payment; and if items not delivered or any of them by 01.02.2026, the option to deliver shall lapse and the value amount be paid accordingly.
- 4) The parties may agree on a set off in view of the orders as may be appropriate towards settling the decree herein.

- 5) The respondent to deliver to the claimant the certificate of service by 01.02.2026 and as per Section 51 of the Employment Act.
- 6) Each party to bear own costs of the claimant's suit and the counterclaim.

**Signed, dated and delivered by video-link and in court at Nairobi
this Wednesday 17th December, 2025.**

**BYRAM ONGAYA
PRINCIPAL JUDGE**