

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. E810 OF 2023

(Before Hon. Lady Justice Agnes Kitiku Nzei)

PAMELA ABONYO.....CLAIMANT

VERSUS

FINACESS LIMITEDRESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a Statement of Claim dated 15th September, 2023 and pleaded:-

(a) that the Claimant was employed by the Respondent from 16th June, 2022 vide an employment contract dated 24th June, 2022, at a monthly salary of USD 6,000.00, subject to deductions.

(b) that the Claimant worked diligently until 23rd November, 2022 when she tendered a 3 months'

resignation notice **due to non-payment of her wages for the 6 months' period worked.**

(c) that at the time of leaving the Respondent Company **on 23rd February, 2023, the Claimant was owed 9 months' salary arrears by the Respondent.**

(d) that in the course of her employment, the Claimant executed various projects in her position as the Respondent's Country Manager and spent monies in the form of disbursements which were supposed to be refunded by the Respondent.

(e) that failure by the Respondent to remit the Claimant's dues was in breach of both the employment contract and Section 37 of the Employment Act; which created a difficult work environment that left the Claimant with no choice but to leave employment.

2. The Claimant sought the following reliefs against the Respondent:-

- (a) *A declaration that the Claimant was constructively dismissed by the Respondent, amounting to unfair termination.*
- (b) *Salary arrears of USD 54,000.*
- (c) *Salary in lieu of unfair termination of USD 72,000*
- (d) *Administrative costs of USD 456.*
- (e) *Costs of the claim.*
- (f) *Interest at Court rates.*
- (g) *Any other orders that the Court deems just in the circumstances.*

3. Documents filed alongside the Claimant's Statement of Claim included an affidavit in verification of the claim, the Claimant's written witness statement dated 15th September, 2023 and an evenly dated list of documents listing 8 documents. The listed documents included an employment contract dated 24th June, 2022, the Claimant's resignation notice dated 23rd November, 2022, the Claimant's correspondence with the Respondent via email, receipts dated 28/6/2022, 26/3/2022 and 6/7/2022.

4. The Respondent filed a response to claim dated 13th March, 2024, denying the Claimant's claim. The Respondent further pleaded that:-

“The Respondent had been in cash - crunch for the past 2 years and that if any monies are owed to the Claimant, the same shall be paid promptly as soon as the Respondent resolves its cash flow issues.”

5. When the suit came up for hearing on 13th February, 2025, a date fixed in Court in the presence of Counsel for both parties, there was no appearance on the part of the Respondent. Hearing proceeded ex-parte. The Claimant testified and adopted her written witness statement, which replicates the averments made in the statement of claim, as her testimony. The Claimant also produced in evidence the documents referred to in paragraph 3 of this Judgment.
6. The Claimant further testified that she worked for 6 months without being paid any salary, prompting her to give a 3 months' resignation notice in accordance with her employment contract. That she was, in view of non-payment

of her salary, constructively dismissed; and that at the time of termination, she was owed salary arrears for 6 months, that she was also owed money by the Respondent regarding money expended by her in execution of projects as the Respondent's Country Manager, which money was supposed to be refunded.

7. As already stated herein, one of the documents produced in evidence by the Claimant was her contract of employment signed on 24th June, 2022. **Clause 3.3** of the said employment contract states that the Claimant's **monthly salary was USD 6,000**. The contract further stated that either party could terminate the contract by giving the other three (3) months' written notice or paying three (3) months' salary in lieu (**Clause 9 of the contract**).
8. The Claimant further produced in evidence copies of email correspondence between herself and the Respondent, clearly demonstrating that the Claimant had not been paid the contractual salary **as at 23rd November 2022 when she issued a three months' resignation notice, and that she was owed 6 months' salary arrears as at the**

date of the said notice. The Claimant further demonstrated that she served the notice period of three (3) months, during which no salary was paid to her.

9. The evidence presented by the Claimant was not controverted, as the Respondent did not testify in defence. In the case of **Janet Kaphiphe Ouma & Another - vs - Marie Stopes International Kenya, (Kisumu HCCC No. 68 of 2007)**, the High Court, citing the decision in **Edward Muriga (Through Stanely Muriga - vs - Nathaniel D. Schulter (Civil Appeal No. 23 of 1997)**, stated as follows:-

“In this matter, a part from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted, and the statements in the defence therefore remain mere allegations . . . Sections 107 and 108 of the Evidence Act are clear that he who asserts or

pleads must support the same by way of evidence.”

10. Similarly, in the case of **Interchemie E.A. Limited - vs - Nakuru Veterinary Centre Limited (Milimani) HCCC No. 165B of 2000**), the Court stated as follows:-

“Where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.”

11. The afore-cited two Court decisions, with which I agree, were cited in **Chrispine Otieno Caleb - vs - Attorney General [2014] KEHC 8485 (KLR)**.

12. Having considered the pleadings filed by the Claimant and evidence presented thereon, issues that present for determination, in my view, are as follows:-

(a) Whether the Claimant was constructively dismissed.

(b) Whether the reliefs sought are merited.

13. On the first issue, the Black's Law Dictionary (10th Edition) defines **constructive dismissal** as follows:-

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

14. The Court of Appeal stated as follows in the case of **Coca Cola East & Central Africa Ltd - vs - Maria Kagai Ligaga (2015) eKLR:-**

“Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without notice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer’s conduct. The employer’s behaviour in either case must be shown to be heinous, so intolerable that it made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The

employee needs to show that the employer, without reasonable or proper cause, conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer, and the employee may claim compensation for unfair termination."

15. Failure, and indeed a continuous failure by an employer to pay salary, either as agreed in the contract of employment or at all, is a clear demonstration by the employer that he is not willing to be bound by the terms of the contract. It amounts to a significant breach of the contract, one which goes to the foundation of the contract of employment **as salary is paid in consideration of contractual services rendered by an employee.**

16. The Claimant in the present case worked and performed her contractual duties for six (6) months without payment of her salary, until 23rd November, 2022 when she issued a three (3) months' resignation notice as per her contract of employment. She is shown to have worked/served during the three months' notice period; and her evidence on record demonstrates that **she worked for a total of nine (9) months without a salary.**

17. Under the foregoing circumstances, the Claimant was entitled to terminate the contract of employment by way of resignation, with or without notice, with the resignation being deemed as an unfair dismissal by the Respondent. I return a finding that the Claimant was constructively dismissed by the Respondent, and that the dismissal amounted to an unfair termination of employment. I so declare.

18. On the second issue, and having made a finding that the Claimant's employment was unfairly terminated by the Respondent, I award the Claimant the equivalent of four (4) months' salary as compensation for unfair termination of

employment. **That is USD 6,000 x 4 = USD 24,000, which I award to the Claimant.**

19. On the claim for salary arrears, the Claimant demonstrated that she worked for a total of nine (9) months without receiving any salary. **I award her USD 54,000 being salary arrears for the nine (9) months worked.**
20. On the claim for [refund of] administrative costs amounting to USD 456.00, some of the receipts exhibited by the Claimant in support of the claim are dated 2/3/2022, 21/3/2022, 26/3/2022 and 28/5/2022; which dates fall **before** 24/6/2022, the date of the Claimant's contract of employment. Under this claim (sub-heading), **I award the Claimant a total of Kshs.105,000/= based on some two receipts produced by her in evidence, dated 6/7/2022 - (Kshs.80,000/=) and 10/7/2022 - (Kshs.25,000/=), respectively.**
21. In sum, Judgment is hereby entered for the Claimant against the Respondent as follows:-

(a) Compensation for unfair termination of employment USD 24,000.

(b) Salary arrearsUSD 54,000

(c) Administrative costs Kshs.105,000

22. The awarded sums shall be subject to **Pay as You Earn (PAYE)** pursuant to Section 49(2) of the Employment Act.

23. The Claimant is awarded interest on the awarded sums, to be calculated at Court rates from the date of this Judgment.

24. Costs of the suit are awarded to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS

16TH DAY OF JANUARY 2026

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

No appearance for the Claimant

No appearance for the Respondent

ORIGINAL