

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E851 OF 2024

LEMMY MATHENGE.....

CLAIMANT

VERSUS

TOKEA SOLUTIONS LIMITED1ST

RESPONDENT

WANDERJOY PARTYWORLD LIMITED.....2ND RESPONDENT

JUDGMENT

1. The Claimant avers that on 15th March 2023, he received a consultancy agreement appointing him as a consultant in the position of General Manager for the Respondent, effective 11th April 2023. He states that the consultancy contract was renewable and provided for a negotiated monthly remuneration of Kshs 450,000.00 prorated for the period 11th April 2023 to 31st April 2023, subject to a 5% withholding tax. He was also entitled to a medical insurance cover under APA Insurance valued at Kshs 260,000.00 per annum, as well as a fuel allowance of 40 litres per month for his motor vehicle.

2. The Claimant asserts that he diligently discharged his duties as a consultant General Manager and additionally served in the same capacity for four other companies, including the 2nd Respondent, Maggie's Tavern Limited, Dash Logistics Limited, and Precise Biotech Limited.
3. He further avers that, on the instructions of the Director of the 1st Respondent, Mr. Wandere Maina, he undertook roles and responsibilities outside the scope of his consultancy, including signing appointment, dismissal, and redundancy letters, as well as local purchase orders and other documents ordinarily outside a consultant's mandate.
4. The Claimant states that by virtue of these expanded responsibilities, he effectively transitioned into an employee in the position of General Manager, thereby converting his consultancy agreement into a de facto contract of employment.
5. It is the Claimant's case that on 21st May 2024, due to a difficult working environment and irregular salary payments from June 2023 to April 2024, he tendered his resignation, which the Respondent accepted in May 2024.

6. The Claimant contends that upon receiving his terminal dues, he identified several discrepancies, including underpayments, unjustified deductions, and unpaid leave. On this account, the Claimant has cited the Respondent for constructive dismissal and seeks the following reliefs:

- a) A declaration that the Claimant's employment was unfairly terminated.***
- b) A declaration that the Respondent was in breach of the consultancy agreement.***
- c) Special damages totaling Kshs 8,670,922.6.***
- d) General damages on the footing of aggravated and exemplary damages.***
- e) Costs of the suit.***
- f) Interest on (c) and (d) at court rates from the date of judgment until payment in full.***
- g) Any other relief that this Honourable Court deems fit.***

7. The Respondents opposed the Claim through a joint Statement of Response dated 26th November 2024, asserting that the Claimant was engaged under a contract for service as a management consultant pursuant to a consultancy agreement executed on 15th March 2023.

8. The Respondents further state that the consultancy agreement was for a 12-month term, renewable on new terms and conditions. They add that the

agreement provided for a consultancy fee of Kshs 427,500.00 per month as net pay, prorated for the period between 11th April 2023 and 30th April 2023, and subject to a 5% withholding tax.

9. Putting the Claimant to strict proof, the Respondents deny that he served with loyalty and diligence or performed duties beyond the scope of the consultancy. They maintain that the Claimant's responsibilities were expressly defined in the consultancy agreement.
10. The Respondents also deny that the Claimant was constructively dismissed or that there was any breach of contract, contending instead that he voluntarily resigned by issuing one month's notice, thereby bringing the engagement with the 1st Respondent to an end.
11. The Respondents further aver that this Court lacks the requisite jurisdiction to determine the present dispute. On this basis, they urge the Court to dismiss the Claim with costs.

12. Subsequent to filing the Statement of Response, the Respondents filed a Notice of Preliminary Objection dated 4th March 2025, premised on the following grounds:

- 1) ***THAT in light of Article 162(2) (a) of the Constitution of Kenya 2010 and Section 2 of the Employment Act, No. 11 of 2007, this Honourable Court lacks jurisdiction to entertain the Claim herein. The jurisdiction of this Honourable Court is pegged on the existence of an employment relationship between the Claimant and the Respondents.***
- 2) ***THAT the claim dated 7th October, 2024, is ill-advised and misconceived since it does not disclose a cause of action or dispute against the 1st and 2nd Respondents within the meaning of Section 12(1) of the Employment and Labour Relations Court Act and the Employment Act, No. 11 of 2007.***
- 3) ***THAT the entire claim as filed fails to meet the threshold set out under the Employment and Labour Relations Court Act, Employment and Labour Relations Court (Procedure) Rules 2016 and the Employment Act, No. 11 of 2007 and is therefore frivolous, vexatious and an abuse of the Court process and ought to be struck out in limine.***

4) THAT the Claim ought to be struck out with costs to the 1st and 2nd Respondents.

13. On 26th February 2025, the Court directed that the Preliminary Objection be canvassed together with the main suit, noting that it raised factual issues that could only be resolved through a factual analysis and evaluation of the evidence on record.

14. The matter proceeded for hearing on 25th September 2025 and 28th October 2025, during which both sides called oral evidence in support of their respective cases.

Claimant's Case

15. The Claimant testified in support of his case as CW1 and, at the outset, adopted his witness statement to constitute his evidence in chief. He further produced the initial and supplementary lists and bundles of documents filed on his behalf, as exhibits before the Court.

16. It was the Claimant's evidence that during his engagement with the Respondents, he purchased a Subaru Forester from the Respondent at a value of Kshs 750,000.00. He explained that the vehicle had been used during the 2022

campaign period and required extensive repairs amounting to Kshs 174,200.00, of which the Respondent only contributed Kshs 130,000.00.

17. The Claimant further stated that upon receiving his terminal dues, he identified the following discrepancies:

- a) Underpayment from November 2023 to April 2024, amounting to Kshs 150,000.00 per month, and prorated pay for May 2024 amounting to Kshs 290,322.6;*
- b) An unfair deduction of Kshs 900,000.00 for the purchase of the motor vehicle, which was overvalued owing to the repairs made. The Claimant contends the vehicle's fair value was Kshs 600,000.00 due to extensive repairs costing Kshs 170,000.00;*
- c) An unjust deduction of Kshs 130,000.00 for repairs, which the Respondent should have borne since the vehicle was sold with many issues;*
- d) An unwarranted deduction of Kshs 40,000.00 for Mpesa advances made on April 4, 2024, March 26, 2024, March 20, 2024, and March 12, 2024, for vehicle fueling and other official duties;*
- e) Failure to provide medical cover as agreed in the consultancy contract;*
- f) Failure to pay for the notice period after the termination notice; and*

g) Failure to account for unpaid leave days from April 2023 to May 2024, as well as thirty (30) public holidays and off days.

18. The Claimant stated that, in the foregoing circumstances, he was left with no reasonable option but to resign, which forms the basis of his claim for constructive dismissal.

19. He further contended that the Respondents breached the consultancy agreement by failing to provide the agreed medical cover and by underpaying his salary between November 2023 and April 2024.

Respondents' Case

20. The Respondents called oral evidence through **James Chumbe Siundu**, who testified as RW1. Mr. Chumbe identified himself as the 1st Respondent's Human Resources Manager and similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the Respondents' list and bundle of documents, which were admitted as exhibits before the Court.

21. RW1 testified that the Claimant's consultancy duties were specific and expressly set out in the consultancy agreement. He stated that at no point were

the Claimant's responsibilities changed or added. He maintained that the Claimant continued to receive the agreed consultancy fee throughout.

22. He further averred that the Respondents neither breached the consultancy agreement nor created a difficult working environment or irregular payment pattern that could have prompted the Claimant's resignation. He maintained that the Respondents complied with all principles of fair labour practices.

23. RW1 also asserted that this Court lacks jurisdiction to hear the present suit, as the dispute arises from a consultancy agreement and therefore does not give rise to an employer-employee relationship.

Submissions

24. The Claimant submitted that he undertook to provide his own labour and skill in offering services to the Respondents in exchange for wages or other remuneration. In the same vein, he further argued that it was an express term of their engagement that, in performing his duties, he would be subject to the Respondents' control. According to the Claimant, such control encompassed the authority to determine the tasks to be performed, the manner and means of performing them, and the time and place of their execution. In support of this

position, the Claimant relied on the decision in ***Benjamin Joseph Omusamia v Upperhill Springs Restaurant [2021] eKLR.***

25. The Claimant further cited the case of ***Everest Limited v Alice Mumo Mutisya (2020) eKLR***, asserting that the contract of service satisfied the essential elements of an employment relationship, including compliance with statutory obligations under the Employment Act, such as minimum wage, leave entitlements, and payment of income tax.

26. It was the Claimant's position that, as defined under Section 2 of the Employment Act, he met all the characteristics of an employee working under a contract of service.

27. The Claimant additionally argued that the Respondents' deviation from key terms of the Agreement created an intolerable working environment, effectively compelling him to leave. On this basis, he maintained that the termination of his employment, precipitated by the Respondents' conduct, amounted to constructive dismissal and was therefore unlawful, unfair and procedurally improper. To support this argument, the Claimant relied on the cases of ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR***,

Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR and ***Alinur Mohamed Abdi v County Government of Garissa [2021] eKLR***.

28. The Respondents, on the other hand, submitted that the Claimant was an independent contractor who determined the manner in which he rendered services to the 1st Respondent. It was further submitted that the Claimant operated as an independent service provider, invoicing the 1st Respondent monthly for services rendered and receiving compensation accordingly. The Respondent maintained that the relationship between the parties was governed by a job engagement agreement and payment based on invoicing for completed work. In support of this position, the Respondents cited the decision in ***Maurice Odour Oketch v Chequered Flag Limited (2013) KEELRC 891 (KLR)***.

29. Relying on the case of ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1***, the Respondents further argued that, to the extent a cause of action exists, it does not fall within the jurisdiction of this Honourable Court but rather arises from a commercial contract, given the nature of the parties’ relationship.

30. The Respondents also submitted that there is no evidence supporting the allegation of constructive dismissal or any form of ‘forced or frustrated

treatment' leading to the Claimant's resignation. They contended that they merely accepted the resignation, computed the Claimant's terminal dues, and allowed him to clear with the company. In advancing this position, reliance was placed on the case of *Milton M. Isanya v Aga Khan Hospital, Kisumu [2017] eKLR*.

Analysis and Determination

31. Having considered the pleadings by both parties, the evidence on record, and the rival submissions, the issues singled out for determination by the Court can be as follows:

- i. Whether the Claimant was engaged under a contract of service or a contract for service;**
- ii. If engaged under a contract of service, whether the Claimant was constructively dismissed;**
- iii. Whether the Claimant is entitled to the reliefs claimed.**

Contract of service or contract for service?

32. The central dispute between the parties concerns the nature of their relationship.

The Claimant asserts that his engagement evolved into an employer–employee relationship, constituting a contract of service, whereas the Respondents maintain that he was engaged as an independent contractor under a contract for

service, with responsibilities unchanged as outlined in the consultancy agreement.

33. It is common ground that the parties' relationship was founded on an 'Engagement Agreement' dated 15th March 2023 which was also referred to as a 'Consulting Agreement.' As per the Agreement, the Claimant was retained to provide consulting services in management to the 1st Respondent.

34. The Claimant contends that he undertook duties beyond the scope of his consultancy, including signing appointment, dismissal, and redundancy letters, as well as local purchase orders and other documents typically outside a consultant's remit.

35. In view of the foregoing, the question that this Court must answer is whether the parties' engagement constituted a consultancy agreement (contract for service) or an employment relationship (contract of service).

36. It is notable that in the address part of the agreement, the Claimant is referred to as an 'employee,' but elsewhere in the Agreement, he is described as a 'consultant.'

37.It is also notable that, as per the Agreement, the Claimant was entitled to medical insurance for himself and his family valued at Kshs 260,000.00.

38.Additionally, the Agreement described the Claimant as a ‘*permanent consultant*’ who would work under the supervision of the 1st Respondent’s Director.

39.In addition to the foregoing, the signature section of the Agreement, where the Claimant appended his signature, is couched as follows:

“I Lemmy G. Mathenge have received and read this Agreement, understand the effect of the terms it contains and agree to the terms set out herein and consider them to be reasonable in relation to the position of employment.”

40.From the foregoing, it is evident that, although the Agreement is classified as a *Consultancy Agreement*, there are compelling indicators that the true nature of the engagement between the parties was that of an employment relationship. Why do I say so?

41.Typically, consultants do not receive statutory employment benefits such as medical cover. In this regard, it is worth pointing out that under Section 34(1) of the Employment Act, an employer is required to ensure adequate provision

of proper medical care for employees during illness. In the instant case, by providing the Claimant with a medical cover under the consultancy agreement, the 1st Respondent was in effect acknowledging obligations akin to those of an employer under the Employment Act.

42. Further to the foregoing, it is uncommon for a consultant to perform assignments under the direct supervision and control of another, whereas an employee ordinarily works under the supervision and control of the employer while being expected to achieve the set targets. In a consultancy arrangement, the focus is on the end result, achieved independently, without direct supervision.

43. It is also atypical to describe a consultant as ‘*permanent*,’ since consultants are generally engaged for specific, time-limited projects or to provide specialized expertise.

44. In distinguishing between a contract for service and a contract of service, the Court stated in *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR*:

“A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another’s

control, except to the extent admitted under the contract. The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties' intention... A Consultant is not eligible for Company benefits such as health insurance, which was extended by the Respondent to Mburu and three other members of his family." Underlined for emphasis

45. The Court concurs with the reasoning in the aforementioned decision and is persuaded that, notwithstanding the descriptive terms and labels used in the Agreement, the engagement herein was, in substance, an employer–employee relationship disguised as a consultancy.

46. This finding aligns with ILO Recommendation No. 198, which provides that the existence of such a relationship should be determined primarily by the factual circumstances of the work performed and the remuneration paid, regardless of how the parties may have labeled or characterized the relationship in any agreement, contractual or otherwise.

47. For these reasons, the Court finds that the Claimant herein was engaged under a contract of service rather than a contract for service, and therefore, the

engagement falls within the ambit of the Employment Act, 2007. Consequently, this Court has jurisdiction to hear and determine the dispute.

48. In view of the foregoing, the Respondents' Preliminary Objection dated 4th March 2025 is overruled.

49. Having made this finding, the Court will now consider whether the Claimant was constructively dismissed.

Constructive dismissal?

50. Constructive dismissal arises where an employee resigns because the employer's conduct has made the working environment so intolerable or difficult that the employee is left with no real choice but to resign. Although the resignation is formally tendered by the employee, it effectively amounts to a termination by the employer.

51. In the landmark case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR*, the Court of Appeal stated as follows with regard to constructive dismissal: -

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been

entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test."

52. In the present case, the Claimant contends that the Respondents created a hostile working environment and paid his salary irregularly from June 2023 to April 2024, which compelled him to tender his resignation.

53. The Respondents, however, deny the Claimant's allegations and maintain that they observed all the principles of fair labour practices.

54. Notably, despite denying irregular payments, the Respondents did not adduce any evidence to substantiate their claim. This is particularly significant given that, as the employer, they were under a duty pursuant to Section 74 (1) of the Employment Act to maintain employment records.

55. In any event, the tabulation of the Claimant's terminal dues shows that he was being paid Kshs 300,000.00 per month, which is significantly lower than the Agreement, where his gross pay is clearly stated as Kshs 450,000.00. This confirms the Claimant's assertion regarding the 1st Respondent's irregular payment of his salary.

56. With that being said, the next question for determination is whether the Claimant was constructively dismissed. To address this, it is necessary to examine the Claimant's resignation email dated 21st May 2024, which states as follows:

"Dear Sir,

Let me take this opportunity to thank you for the confidence bestowed upon me to hold the abovementioned position in Wanderjoy Party World for the past one year. It has indeed given me a wealth of experience that I will hold dear.

However, it is time for me to move on to other personal matters and do hereby give one month notice as per my letter of appointment. I wish to serve the notice while on my annual leave as I have not gone on leave for the past one year.

I thank you once again and wish nothing but the very best to you personally and to the entire organization.

Warm regards

Lemmy Mathenge”

57. It is noteworthy that the Claimant did not state that his resignation was a response to the 1st Respondent's irregular payment of his salary. Accordingly, no causal link exists between the 1st Respondent's irregular payment and the Claimant's resignation.

58. One of the principles formulated in the case of ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [supra]***, is that *there must be a causal link between the employer's conduct and the reason for the employee terminating the contract i.e causation must be proved.*

59. Therefore, the Claimant was required to establish a causal link between the 1st Respondent's conduct and the reason for his resignation. In this case, the Claimant's resignation indicates that he was moving on to pursue other personal matters. He did not assert that his resignation was due to irregular pay or the allegedly hostile work environment now alleged in the Claim.

60. In light of the foregoing, the Court finds that the Claimant has not demonstrated, to the required standard, that his resignation resulted from the 1st Respondent's conduct hence amounted to constructive dismissal.

Reliefs?

61. The claim for salary underpayment succeeds, as the Court has found that the 1st Respondent has not presented evidence to refute the Claimant's assertion that his salary was underpaid. If anything, the Court has found the tabulation of terminal dues indicates that the Claimant's gross pay was calculated at Kshs 300,000.00 per month, rather than the contractually agreed Kshs 450,000.00, confirming that the 1st Respondent effectively underpaid the Claimant's monthly salary.

62. As the Court has determined that the Claimant was not constructively dismissed, the claims for notice pay and compensatory damages cannot be sustained.

63. The claim for annual leave also fails, as the Claimant stated in his resignation email that he would use the one-month notice period as his annual leave, having not taken leave during the year.

64.The claim for public holidays and off-days not taken similarly fails, as the Claimant did not specify which public holidays or off-days he worked or was entitled to.

65.The claim for alleged unjust deductions for motor vehicle repairs is dismissed, as there is no evidence of an agreement that the 1st Respondent would cover these costs.

66.The claim for unwarranted deductions of Kshs 40,000.00 for M-Pesa advances is dismissed, as there is no evidence that such deductions were actually made from the Claimant's salary. In any event, the deductions were reflected in the tabulation of the Claimant's terminal dues, hence there is no evidence that the same were actually effected from his salary during employment.

67.Similarly, the claim for an alleged overcharge of Kshs 300,000.00 for the motor vehicle purchase is dismissed, as it is unrelated to the Claimant's engagement with the 1st Respondent.

Orders

68.In the final analysis, judgment is entered in favour of the Claimant against the Respondents as follows: -

- (a) The Claimant is awarded Kshs 900,000.00 as underpaid salary for the period from November 2023 to April 2024.**
- (b) The Claimant is awarded prorated salary for May 2024 in the sum of Kshs 290,322.60.**
- (c) The total award amounts to Kshs 1,190,322.60.**
- (d) Interest on the total sum in (c) shall accrue at court rates from the date of filing the suit until full payment.**
- (e) The Respondents shall also bear the costs of this suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of February 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant	Mr. Ngatia Wambugu
For the Respondents	Ms. Tuwei
Court assistant	Mohammed

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE