



K'owino v African Commuters Services & 2 others (Employment and Labour Relations Cause E291 of 2020) [2025] KEELRC 600 (KLR) (20 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 600 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E291 OF 2020**

**K OCHARO, J
JANUARY 20, 2025**

BETWEEN

JOHNSTONE MICHAEL OBIERO K'OWINO CLAIMANT

AND

AFRICAN COMMUTERS SERVICES 1ST RESPONDENT

**AHMED RASHID JIBRIL [BEING SUED AS THE PERSONAL AND
LEGAL REPRESENTATIVE OF THE ESTATE OF MOHAMMED JIBRIL
ESMAEL] 2ND RESPONDENT**

SHURKRI ESMAEL 3RD RESPONDENT

JUDGMENT

Introduction

1. The suit herein was commenced by way of a Memorandum of Claim dated 9th July 2020. Subsequently, following an application dated 1st March 2021, and a consent order thereon, the memorandum was amended. The name of Mohamed Jibril Esmael [then the 2nd Respondent] was struck off the proceedings and substituted with Ahmed Rashid Jibril, the Administrator of his estate. The Memorandum of Claim was amended on 15th July 2022, to reflect the change. It is imperative to point out that the reliefs section of the Claimant's original pleadings remained unchanged.
2. The Claimant seeks against the Respondents jointly and severally the following reliefs: -
 - I. Basic salary for 166 months [September 2005-July 2019] USD 464,800;
 - II. Leave days [30 days in seventeen years 2002 to 2019]USD 46, 600;
 - III. Severance Pay [15 days for each year worked from 2002 to 2019] USD 23,800;
 - IV. Damages for unlawful termination [12 months' gross salary] USD 33,600;



- V. Transport and Medical allowances [equivalent to 30 days in seventeen years, 2002-2019]USD 47,600;
 - VI. Interest on [i-v] at 14% compound interest from the time it accrued until payment in full;
 - VII. General damages;
 - VIII. 10% share of the decretal sum recovered based on the oral promise and extra duties conducted by the Claimant outside employment; and
 - IX. Costs of the suit.
3. The Respondents resisted the Claimant's claim through the Memorandum of Response dated 5th October 2022. They denied the Claimant's cause of action, and entitlement to the reliefs sought, against them.
 4. Pursuant to the Rules of procedure, the Claimant filed a Reply to the Memorandum of Response, dated 9th November 2020.
 5. After hearing the parties on their respective cases, this Court directed the parties to file their submissions. They complied, thus this Judgment is with the benefit of the submissions.

The Claimant's Case

6. At the hearing, the Claimant adopted his witness statement dated 9th July 2020 as his evidence in chief. It is his case that through its letter of offer dated 1st July 2002, the 1st Respondent offered him employment for the position of Financial Controller for a period of two years as a monthly salary of USD 2,500.00, which offer he accepted and got retained as such.
7. Under the contract of employment, he was entitled to inter alia, 30 days' leave or one month's salary in lieu if he didn't utilize the same, transport and medical allowance.
8. As a result of his exemplary performance, the 1st Respondent by its letter dated 1st April 2003, awarded him a permanent contract of employment in the same position but with an improved remuneration, USD 2,800.00.
9. The 1st Respondent was operating and had been licensed by the Kenya Civil Aviation Authority with an air operating licence which enabled it to operate several aircraft. The licence was acquired with his help after he aided it put in place sound financial policies.
10. On 24th January 2003, one of the Respondent's aircraft, 5Y-EMJ was involved in an accident resulting in the death of two pilots and injuries to many other passengers who were onboard. Following this accident, the then Transport and Communication Minister, Hon. John Michuki suspended the 1st Respondent's Air Operator's Certificate [AOC]. Its appeal for reinstatement of the certificate was rejected.
11. Further, the 1st Respondent's request for a no-objection letter to enable some of its pilots to continue working was also turned down. The minister then established the "Busia Plane Inquiry" to inquire into the circumstances of the accident.
12. The Claimant states further that following the suspension of the 1st Respondent's AOC, all the 1st Respondent's aircraft were grounded and therefore its business operations were paralyzed. Operation of its aircraft which had been leased to other third parties was also terminated.



13. The accident and consequent suspension of the 1st Respondent's AOC accessioned so much financial loss and operational challenges on its part leading to the termination of contracts of employment of several employees. However, the 1st Respondent retained his services because his role was pivotal.
14. Although he remained loyal and continued to work for the 1st Respondent, the 1st Respondent stopped paying his salary and other benefits in September 2005. Notwithstanding the action, he continued serving the 1st Respondent, diligently and dedicatedly carrying out assignments whenever they were assigned to him. These he did, hoping that he would be paid all his entitlements once the 1st Respondent got back to its feet financially.
15. He asserts that he was very instrumental in the filing and prosecution of a suit that challenged the decision of the Minister for Transport and Communication in suspending the 1st Respondent's AOC, Nairobi High Court Civil Case No. 1208 of 2003- African Commuter Services Limited v The Attorney General & Kenya Civil Aviation Authority.
16. He singlehandedly calculated the estimated losses occasioned by the suspension of the 1st Respondent's AOC. He gave the Advocates involved in the matter vital insights into the estimated figures.
17. The High Court exclusively relied on his report to award damages in favour of the 1st Respondent. In the matter, he testified both as an employee of the 1st Respondent and an expert in financial matters. Despite this, he wasn't compensated thereafter.
18. In the matter, the trial Judge awarded the 1st Respondent a sum of KShs. 928, 412, 065.50 as damages, costs and interest. The Attorney General appealed against the decision vide Nairobi Civil Appeal No. 311 of 2009, -The Attorney General & Civil Aviation Authority v African Commuter Services Limited. Through its Judgment dated 7th February 2014, the Learned Judges of the Court of Appeal reduced the amount of damages to KShs. 362, 615.00. It awarded interest on the sum.
19. After the Court of Appeal decision, he again singlehandedly computed the interest payable. Due to his efforts the 1st Respondent was awarded and indeed recovered over KShs. 2.6 billion, being the damages awarded plus compound interest accrued thereon.
20. The 1st Respondent was 1st paid KShs. 46 million in 2015, over one billion Kenya Shillings in February 2019, over KShs.1.4 billion in July 2019 and over KShs. 115 million later on.
21. Despite his efforts, dedication, selflessness, patience and loyalty to the 1st Respondent, he was ignored, and his salary and other benefits weren't paid even after the 1st Respondent recovered the sum of the decree in the matter forestated. Its directors refused to pick up his calls upon receiving the payment and pay him a share of 10% in any recovered sum that was orally promised.
22. The Claimant further stated that he was last assigned duty by the 1st Respondent on 15th July 2019, when the 1st Respondent's managing director tasked him to calculate further interest due for it on the decretal sum. Computation which he did and arrived at the sum of KShs. 115,000 which was later paid.
23. He contended that he expected that after recovering the decretal amount and accrued interest thereon, the 1st Respondent could revive its business operations. However, the directors ventured into other businesses and chose not to engage him.
24. Additionally, he is apprehensive that the 1st Respondent may be rendered a shell company or even be wound up and, therefore, recovering any amounts from it may be impossible in which case the directors [2nd and 3rd Respondents] should be held liable.



25. He asserts that he was thus rendered redundant in July 2019 without the 1st Respondent issuing him any redundancy notice hence a termination of his employment which was unlawful.
26. He goes on to contend that he was constructively dismissed on 15th July 2019.
27. Cross-examined by Counsel for the Respondents the Claimant testified that as of July 2019, the 1st Respondent Company was a going concern. Further, once the AOC licence was cancelled, the Company couldn't operate.
28. He further testified that following the accident, the 1st Respondent became financially crippled, causing it to terminate its employee's contracts of employment. However, his contract and that of a few others weren't. He continued working as a Financial Controller and later a Finance Manager. At the hearing of the civil case, the 1st Respondent's CEO confirmed that his position at the material time was Finance Manager.
29. The promise that was made to him regarding the 10% share was outside the employment contract. His employment contract pre-dated the promise. The promise was orally made by the CEO [now deceased] of the 1st Respondent. The promise was made on the premise that it was through his effort that the 1st Respondent was awarded the damages in the civil suit.
30. In the report that he prepared for the stated civil suit, he indicated that the employees of the 1st Respondent Company were owed KShs. 9, 387, 274, as unpaid salaries, office rent and VAT, and that its office wasn't operational due to non-payment of rent.
31. He further testified that his last salary was paid in August 2005. However, he continued to render services to the 1st Respondent till 2019. As the 1st Respondent didn't have an office, he was forced to render services from his house. Additionally, his contract of employment allowed him to work from anywhere.
32. As the civil case was going on, he took the pivotal role of dealing with creditors of the 1st Respondent, negotiating with them, and preparing documents for the Advocates. However, he didn't present to the court any document to demonstrate it, as he didn't foresee the situation of suing his employer. As such, he didn't carry any documents home from the Respondent's offices.
33. As late as 2007, he was processing various documents for the 1st Respondent notably, applications for licence documents.
34. He testified that he was rendered redundant technically in 2019.
35. He further stated that his claim for constructive dismissal is based on the fact, that his employer [the 1st Respondent] failed to continue assigning him work.
36. His last assignment for the 1st Respondent was on 15th July 2019.
37. In his email dated 31st October 2016, he claimed a reward from the 1st Respondent and the same was subsequently paid by Mr Esmael. The reward was not related to matters of his employment but in respect of a land sale transaction.
38. He testified that the last search he did at the Companies registry revealed that Mr Esmael was the majority shareholder of the 1st Respondent, and his wife was a director. The other director was MAE International. However, he didn't have any document to prove the directorship of the 1st Respondent.



39. His Claim is twofold. On the one part, that anchored on his employment contract, and on the other, that premised on the promise made to him. The email correspondence between Mr Esmael and him, more specifically those on pages 584-586 confirm the promise.
40. In his evidence under re-examination, the Claimant asserted that the Kenya Shillings twenty million he received from Mr Esmael was for the Land he had sold to them.
41. He reiterated that in the civil matter, he testified in two capacities, as an expert and an employee of the 1st Respondent. In the civil suit, the Court asked him to prepare a report following the Respondent's request. It was after he prepared the report, that the promise of the 10% share was made.
42. He was still an employee of the 1st Respondent when the decree in the High Court suit was being settled. Upon recovery of the decretal sum, the same was not channelled into the 1st Respondent's account[s]. The company didn't get back to operations and offices.
43. After the Judgment in the above-mentioned matter, at the instructions of Mr. Esmael, Counsel for the 1st Respondent forwarded the decree to him to compute compound interest payable on the sum of the decree. He received the document and carried out the assignment as an employee of the 1st Respondent.
44. Lastly, his craving for compound interest on the figures sought is premised on the fact that the value of the Kenyan Shilling then isn't the same today. Further, the decretal sum in the civil matter was settled plus compound interest.

The Respondents' case.

45. The 2nd Respondent testified on behalf of the estate of his late brother, Mohammed Jibril Esmael and that of the other Respondents. He adopted his witness statements filed herein, as his evidence in chief, and produced their documents herein filed, as exhibits 1-10.
46. It is the Respondents' case that the dispute, the subject matter of this case, emanates from an employment contract between the 1st Respondent and the Claimant. The doctrine of privity of contract only allows persons and entities, who were parties to the contract to sue and be sued in respect of the rights and obligations thereon. As such, the Claimant has wrongly sued the Estate of the deceased and the 3rd Respondent.
47. The 1st Respondent as a Private Limited Company incorporated under the now repealed *Companies Act*, is a separate legal entity that can sue or be sued in its name.
48. The Respondents assert that the Claimant was not retained by the 1st Respondent after the cancellation of the AOC. His allegation that he continued working for the 1st Respondent is untrue. His employment was terminated together with that of all the other employees. The deceased's affidavit sworn on 6th November 2020, speaks to this.
49. In the High Court case, the Claimant's role was very limited to rendering evidence on the financial aspect of the claim as he was the Finance Officer during the time leading up to the cancellation of the certificate.
50. The High Court suit was prepared by the 1st Respondent's Advocates. The Claimant isn't a lawyer. He played no role in the legal arguments in the case.
51. In calculating costs and interest on the awards, the Claimant did so as a witness on behalf of the 1st Respondent and no right would accrue to him. He has no legal or equitable right to any portion of the decretal sum in the High Court case.



52. In appreciation of his efforts, the Claimant was paid a sum of 20,000,000. In September 2019.
53. Cross-examined by Counsel for the Claimant he stated that per the letter of appointment, the Claimant's starting salary was USD 2000. The salary was later increased to USD 2500. The contract was for two years subject to a mutual extension.
54. The Claimant's employment contract provided for a termination notice of three months. He couldn't testify with certainty as to whether or otherwise the notice was issued to the Claimant by the 1st Respondent.
55. On 1st April 2003, the Claimant was offered a permanent employment. The salary was reviewed upwards to USD 2800, however, the other terms expressed in the 1st contract were maintained.
56. His assertion in the 1st witness statement that the Claimant's employment was terminated in July 2003, flowed from his thinking that the first contract lapses by effluxion of time.
57. He testified that the letters of administration in respect of Mohammed Jibril Esmael named him as the Administrator of the estate. One of the beneficiaries named therein is the 3rd Respondent. Further, the Respondent company herein is named as one of those properties that belonged to the deceased.
58. The contents of the Judgment in the High Court civil matter confirmed that his brother [the deceased] was a director and shareholder of the 1st Respondent.
59. In the aviation industry, one entity cannot have two operating licenses. It could be illegal if an entity was to have two operating licences.
60. In 2003, the 1st Respondent's AOB was cancelled. His brother hoped all through that the cancellation could be lifted and the certificate reinstated, but this never happened at any time thereafter.
61. He was seeing for the 1st time in court, the certificate that was allegedly issued in 2005, which was expressed to lapse in June 2006.
62. Shown a joint operating agreement entered into in February 2006, the witness confirmed that it appeared to have been entered between the 1st Respondent and JAN Carrier. However, he couldn't understand why the agreement was entered into, yet the 1st Respondent didn't have an operating licence at that time. The agreement was executed by the deceased and the 3rd Respondent.
63. The witness asserted that the 1st Respondent didn't fly any of its aircraft after the Minister cancelled its certificate.
64. The letter dated 13th April 2007 was authored by the Claimant on behalf of the 1st Respondent. Additionally, the letter dated 18th May 2007 authored by him was on the 1st Respondent's letterhead. However, he was uncertain whether or not at this time the Claimant was still in the employment of the 1st Respondent.
65. The witness testified that in his view, the twenty million that the deceased paid the Claimant was a token of appreciation. It couldn't be in respect of the land sale agreement as the property the subject matter of the agreement was never transferred to his late brother.
66. In his evidence in re-examination, the witness testified that the Claimant in his report that he prepared and produced in the High Court matter, indicated that the 1st Respondent was unable to pay salaries. However, the skeleton staff that continued to work was owed KShs. 9, 387,274 as of 30th March 2007. The Claimant was part of the skeleton staff.



67. The Claimant didn't work for the 1st Respondent for 166 months.
68. The title deed in respect parcel of land, the subject matter of the agreement between the deceased and the Claimant is still in the name of the latter per the certificate of search dated 21st June 2023.

The Claimant's Submissions

69. In his submissions, the Claimant's Counsel heavily reiterated the factual issues as they had come out in the parties' pleadings and evidence. I will not expend this Court's time summarising the facts but will certainly consider those that are relevant to the determination of the issues as shall be shortly identified hereafter.
70. Counsel submitted that the last time the Claimant was ever engaged and or assigned duties by the 1st Respondent was 15th July 2019, when the 1st Respondent's Managing Director instructed him to compute the interest on the decretal sum in the High Court matter. The decretal amount was subsequently settled.
71. The 1st Respondent unlawfully constructively dismissed the Claimant from his employment on 15th July 2019, when it committed a repudiatory breach of fundamental terms of the contract of employment by:
 - I. Failing to pay the Claimant's salary from 2005 to date;
 - II. Stopping to assign the Claimant any duties from 15th July 2019;
 - III. Redirecting funds meant to revive its operations to other business ventures;
 - IV. Failing and or refusing to revive its aviation business and operations upon execution of the decree and obtaining in excess of 2.6 billion from the Government of Kenya.
 - V. Failing to re-engage him into the new business that the 1st Respondent ventured into after realizing the decretal sum;
 - VI. Failing to issue him with a termination notice and reasons for the termination of his employment or not reengaging him.
 - VII. Failing to re-engage him permanently till retirement age.
72. The Claimant's Counsel urged this Court to consider the Court of Appeal in *Coca-Cola East & Central Africa v Maria Kagia Ligaga* [2015] eKLR, apply the test set out therein and find that the Claimant was constructively dismissed.
73. To support the submission that a failure by the 1st Respondent to pay the Claimant's salary amounted to constructive dismissal, reliance was placed on the decision of this Court in *Peter Kaburu Karanja v Kirinyaga Construction [K] Limited* [2020] eKLR.
74. In this matter, the 1st Respondent didn't controvert the Claimant's case that it didn't pay him salary from 2005. Further, in the High Court case, it was admitted so admitted. The Claimant's outstanding salary as of June 2007 stood at USD 72,800. This outstanding salary and salaries for the subsequent months were never paid.
75. The 1st Respondent's directors' act of redirecting funds that were meant to revive the 1st Respondent meant that the Claimant was to be rendered redundant or reassigned duties different from what he was contracted to do in fundamental breach of his contract of employment. To support this point, reliance



was placed on the case of Board of Governors Cardinal Otunga High School Mosochi & 2 others v Elizabeth Kwamboka Khaemba [2016] eKLR.

76. The 1st Respondent didn't issue a three months' termination notice to the Claimant as per the stipulations of his employment contract. This amounted to a breach of a fundamental term of the contract, thus, an act of constructive dismissal.
77. Submitting on the Claimant's decision to enjoin the 2nd and 3rd Respondents in these proceedings, Counsel submitted that they were rightfully so joined on strength of the provisions of Order 1 rule 3 of the Civil Procedure Rules which stipulates;

“All persons may be joined as defendants against who any right to relief in respect of or arising out of the same act or transaction or a series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise” and the circumstances of the matter including;

- I. the 1st Respondent was owned 98% by the late Managing Director, Jibril Esmal Mohammed and 2% owned by MIA International Limited, which was the 1st Respondent's sister company specialised in acquiring and leasing aircrafts. MIA International Limited was owned by the deceased and the 3rd Respondent. The 3rd Respondent was a co-director in the 1st Respondent Company. This was confirmed in the proceedings in the High Court case.
 - II. The 2nd Respondent is the administrator of the estate of the late Managing Director, Jibril Esmal Mohammed and the largest shareholder of the 1st Respondent while the 3rd Respondent is a minority shareholder and co-director of the 1st Respondent. She is now a beneficial owner within the 1st Respondent and MIA International Limited.
 - III. The Claimant is apprehensive that the 1st Respondent might have been rendered a shell company and therefore recovering any amounts from it might be impossible in which case the directors [2nd and 3rd Respondents] should be personally held liable, as by diverting the sum that was recovered through the civil case to other business ventures, instead of reviving the 1st Respondent, was a deliberate move to escape liability.
78. On the reliefs sought, Counsel submitted that prayers [a], [b], and [e] are contractual and factual remedies. There was no denial that the Claimant was never paid from September 2005 to July 2019 when he was constructively dismissed from employment, a span of 166 months.
 79. The Respondents' contention that the Claimant left employment in March 2003 with other employees after the accident was not backed by any evidence. There was a clear admission by the Respondents that the Claimant's outstanding salary as of June 2007, when he was still in employment was USD 72, 800.
 80. There is sufficient evidence that the 1st Respondent continued to engage the Claimant up to 15th July 2019. The Respondents did not place forth evidence that his employment was ever terminated.
 81. The Claimant's case that he never proceeded with his entitled leave and earned his transport and medical allowance for the 17 years was not rebutted.



82. Prayers[c] and [d] are statutory. The employer is obligated under law to pay an employee declared redundant severance pay at the rate of not less than fifteen days' salary for each completed year of service. The Respondents' actions are tantamount to having rendered the Claimant redundant from employment from 15th July 2019 when they stopped assigning him duties and responsibilities.
83. Constructive dismissal is a form of unfair dismissal. Since the Claimant proved that he was constructively dismissed, he is entitled to the compensatory relief contemplated under Section 49[1] [c] of the *Employment Act*, twelve months' gross salary.
84. Counsel further submitted that through the emails referred to hereinabove, the Claimant demonstrated that there was an oral agreement between him and the deceased that owing to the pivotal role that he played in the High Court case, he was to receive 10% of the sum of the decree. The Respondents didn't dislodge his assertion that he was entitled to the amount, outside of his salary and allowances.
85. The oral agreement is not strictly an employment issue but is intertwined with the Claimant's employment. The oral agreement is enforceable and was made during his employment. It could amount to a duplicity of cases and a waste of the Court's precious time if the Claimant were to be allowed to file another suit other than the instant for enforcement of the oral agreement.

The Respondent's Submissions

86. The Respondents' Counsel identified four issues for determination thus; whether the claim is time barred; whether the Claimant complied with Section 106 of the *Evidence Act*; whether the Respondent summarily dismissed the Claimant; and whether the Claimant is entitled to the reliefs sought.
87. He submitted that Section 4[1][a] of the *Limitation of Actions Act*, barred actions founded on contract from being initiated after the end of six years from the date on which the cause of action accrued. From the Claimant's pleadings particularly, paragraphs 7 and 16 of the Memorandum of Claim, it is clear that the cause of action arose in September 2005, when the 1st Respondent committed a fundamental breach of the employment contract by ceasing to pay the Claimant's salary. As such, the claim herein was time barred in September 2011 and the Claimant filed it nine years after the limitation period had expired.
88. Provisions regarding the limitation of actions are not merely procedural but substantive, as such the claim herein should be struck out. To buttress this submission, reliance is placed on *Mary Kasiwa v Scorpio Enterprises Limited* [2013] eKLR and *Wilson Nyabuto Areri v Postal Corporation of Kenya* [2018] eKLR.
89. On the 2nd issue Counsel submitted that the Claimant didn't comply with the provisions of Section 106B of the *Evidence Act* in producing the email correspondences between him and the 1st Respondent's Director. Electronic evidence is only admissible if accompanied by a certificate. The correspondences were not accompanied by the certificate contemplated in the stated provision of the law. Therefore, reliance should not be placed on the emails.
90. On whether the Claimant was constructively dismissed from employment, Counsel submitted that an employee alleging constructive dismissal can only be successful upon satisfying the conditions that were aptly set out in the case of *Coca-Cola East and Central Africa* [2015] eKLR, and several other judicial precedents like *Milton M Isanya v Aga Khan Hospital Kisumu* [2017] eKLR, and *Nathan Ogada Atriagaga v David Engineering Limited* [2015] eKLR.



91. The Claimant having been last paid in September 2005, had the liberty of resigning within reasonable time. His alleged continuation if at all was a waiver of the right to claim constructive dismissal. To further support this point he placed reliance on the English case of *Western Excavating ECC Ltd v Sharp* [1978] 2 WLR 344.
92. The Claimant failed to demonstrate that the 1st Respondent created an unbearable condition for him to continue working. Therefore, he failed to satisfy the unreasonable test.
93. In the circumstances of the matter, including the financial report that the Claimant himself prepared regarding the financial status of the 1st Respondent after the cancellation of the AOC, the reliefs sought in his pleadings are unreasonably so sought, and an award of the same in his favour will defeat the whole essence of compensatory awards in proceedings like the instant, and amount to unjust enrichment. To support this point, reliance was placed on the cases of *GMV V Bank of Africa Kenya Limited*, and *D.K Njagi Marete v Teachers Service Commission* [2013] eKLR.
94. It was submitted further that the KShs. 20,000, 000 that was admittedly paid to the Claimant was for the settlement of his dues. His assertion that the same was a consideration for a property purchased from him was a lie. He never tendered in evidence any executed transfer documents. Additionally, the official certificate of search dated 21st June 2023, issued to the Respondents shows that the title in respect of the property that was allegedly sold to the deceased is still in the name of the Claimant.

Analysis and Determination.

95. I have carefully considered the pleadings by the parties, their, evidence, and Counsel's submissions, and the following issues emerge for determination;
 - a. Whether the 2nd and 3rd Respondents were properly enjoined to the proceedings herein;
 - b. Whether the Claimant's claim herein is time barred;
 - c. Was the Claimant's employment was terminated on account of redundancy;
 - d. Whether the Claimant was constructively dismissed; and
 - e. Whether the reliefs sought can be awarded to the claimant.

Whether the 2ND and 3rd Respondents were properly enjoined to the proceedings herein.

96. Inarguably, a party can only be sued by the other if the party suing has a cause of action against him or her. A cause of action is the factual basis or set of material facts that 'begets' the plaintiff's right of action against the defendant. I have keenly considered the Claimant's pleadings, evidence and submissions, and find it very challenging to fathom any sufficient fact or set of facts that could attract any claim against the 2nd and 3rd Respondents, considering that the suit herein flows from an employment contract between the Claimant and the 1st Respondent.
97. In my view, enjoining the 2nd and 3rd Respondents in the instant suit was an act of ignorance of the doctrine of corporate personality [separate legal personality], as set out in the landmark case of *Salomon v Salomon* [1897] AC, by the House of Lords, which has remained unimpeached for over a century. The Claimant does not assert that the 2nd and 3rd Respondent there obtains in this matter those exceptional circumstances that have been delineated through judicial precedents after the *Salomon* case when a Court can legitimately disregard the company's separate legal personality, such as where a crime or fraud has been committed.



98. Paragraphs 30 and 31 of the Memorandum of Claim attempts to demonstrate why the 2nd and 3rd Respondents are enjoined in this Claim, thus;

“ 30. The Claimant’s understanding was that upon payment of the decretal sum and the interests thereon, the 1st Respondent was going to revive its business and operations. However, the directors have now ventured into other businesses in which they have chosen not to engage or re-engage the Claimant.

31. The Claimant is apprehensive that the 1st Respondent may be rendered a shall company or even be wound up and therefore recovering any amounts from it may be impossible in which case the directors [2nd and 3rd Respondents] should be held liable.”

99. The facts which to me sound speculative, cannot be held to fall under the space of the exceptional circumstances.

100. In sum, the 2nd and 3rd Respondents were improperly and unjustifiably enjoined in this suit.

Whether the Claim herein is time barred

101. For the purposes of the Claimant’s claim for constructive dismissal and applying the contractual test, one shall safely argue and conclude that the cause of action arose when the 1st Respondent committed a repudiatory breach of the contract of employment, ceasing to pay the Claimant his salary. According to the Claimant, this happened in September 2005. I see it in no other way than that the cause of action arose in September 2005. Therefore, applying the provisions of Section 4 of the *Limitation of Actions Act*, Cap 22, this matter ought to have been filed by September 2011.

102. The Claimant stated that after the cancellation of the AOC, the 1st Respondent folded its business and operations and let go of its employees. However, it decided to retain him because of the vital role he was to continue playing in the Company, working hand in hand with the 1st Respondent’s Advocates in the High Court civil case, pursuing and negotiating with its creditors. The Respondents vehemently denied this fact and asserted that when the 1st Respondent folded its operations; the Claimant was discharged just like the other employees. This Court hasn’t lost sight of the Claimant’s testimony that after the 1st Respondent closed its offices, he continued serving it as its employee from his house. Nothing could have been easier for him than to tender documentary evidence to show that indeed throughout the whole 166 months, he was in the business of negotiating with the 1st Respondent’s creditors and lending a hand to Advocates in respect of the single case. The version by the Claimant is one this Court is unable to buy.

Was the Claimant’s employment terminated on account of redundancy?

103. In paragraph 32 of the Memorandum of Claim, the Claimant averred;

“ The Claimant was thus rendered redundant in July 2019 without the 1st Respondent issuing any redundancy notice hence unlawful redundancy and or termination.”

104. Lack of fault on the part of the employee is the defining characteristic of dismissal on account of redundancy. As such, where an employee asserts that his employment was terminated on account of redundancy, the assertion must not be based on speculation by the employee. He must demonstrate, some action on the part of, or declaration, by the employer, denoting that the employer initiated the termination due to operational requirements rightly or otherwise. The Claimant didn’t show this.



Whether the Claimant was constructively dismissed

105. Constructive dismissal occurs when the employee terminates the contract, either with or without notice, in circumstances in which he is entitled to terminate it with notice by reason of the employer's conduct. The test of employer misconduct in the context of constructive dismissal implicitly incorporates the common law principle of contract law relating to the employee's right to resign in the face of a repudiatory breach by the employer.

106. In the case of the case of *Western Excavating ECC Ltd v Sharp* [1978] QB 761, known for imposing contract test in constructive dismissal, Lord Denning aptly stated;

“If conduct the employer is guilty of 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 employer is entitled to treat himself 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, 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: 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.”

107. The Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR stated;

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have a 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 behaviour 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 constitutes a repudiatory breach of the contract of employment-this is the contractual test.”

108. As correctly pointed out by Counsel for the Respondent, the Court at paragraph 30 of its decision laid down the principles of constructive dismissal, thus;

“The legal principles relevant to determining constructive dismissal include the following:

- a. What are the fundamental or essential terms of the contract of employment?
- b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
- c. The conduct of the employer must be a fundamental or 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.
- d. An objective test is to be applied in evaluating the employer's conduct.



- e. There must be a casual link between the employer’s conduct and the reason for the employee terminating the contract i.e. causation must be proved.
- f. An employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- g. The burden to prove repudiatory breach or constructive dismissal is on the employee.
- h. Facts giving rise to repudiatory breach or constructive dismissal are varied.”

109. From the decisions cited above, and a host of others one golden thread reveals itself and rightly so, owing to the character of constructive dismissal, the affected employee must leave within reasonable time of the intolerable conduct of the employer or the repudiatory breach. Where he doesn’t, he shall be deemed to have waived the right to assert constructive dismissal. In my view, the Claimant’s case herein is that the Respondent committed a repudiatory breach by ceasing to pay him his salary. For purposes of this point, it then becomes important to decipher when the breach occurred. According to the Claimant, the 1st Respondent ceased to pay him his monthly salary in September 2005 and continued to so do until this suit was filed.

110. Undoubtedly, the Claimant didn’t leave and or assert constructive dismissal within a reasonable time. To attempt to assert constructive dismissal almost fifteen years after the alleged repudiatory breach occurred is with great respect to the Claimant unreasonable in itself. By reason of this, the Claimant is estopped from asserting repudiatory breach of the employment contract. He waived his right to claim constructive dismissal.

111. By reason of the foregoing premises, his claim for constructive dismissal fails.

Whether the Claimant is entitled to the reliefs sought.

112. Having declined the Claimant’s case for unfair termination, this Court will not have any basis to grant any of those reliefs sought in paragraphs [a], [b], [c], [d], [e], and [f] of the reliefs section of the Claimant’s Memorandum of Claim.

113. The Claimant claimed a 10% share in the decretal sum based on an oral promise and extra duties conducted by the Claimant outside employment. This claim must fail for the following reasons;

- a. To buttress his assertion that there existed the promise and that he was entitled to the stated share, the Claimant pointed out and urged this court to consider the emails dated 31st October 2016, and 31st March 2020. I have carefully considered the emails and garnered the impression that there was no conclusive agreement regarding compensation as claimed by the Claimant.
- b. The Claimant asserted that the promise was made after the 1st Respondent secured the Judgment in the High Court. The judgment was delivered on 18th December 2008. The matter herein was filed inter alia to enforce the promise, twelve years later. No doubt the claim is time barred.

114. In the upshot, the Claimant’s case is without merit. It is hereby dismissed with costs.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 20TH DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

In the presence of

.....for Claimant

..... For Respondents

