



**Mwaniki v Tihan Limited (Cause E403 of 2020)  
[2025] KEELRC 1208 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1208 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E403 OF 2020  
CN BAARI, J  
APRIL 30, 2025**

**BETWEEN**

**TONY MWANGI MWANIKI ..... CLAIMANT**

**AND**

**TIHAN LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before Court is the Claimant’s Statement of Claim dated 3<sup>rd</sup> August, 2020, and filed on 19<sup>th</sup> August, 2020. The Claimant’s prayer is for payment of unpaid salary, terminal dues and compensation for constructive dismissal.
2. The Respondent did not defend the suit despite service, and the Court ordered that the matter proceeds for formal proof.
3. The Claimant’s case was heard on 17<sup>th</sup> December, 2024, when he testified in support of his case, adopted his witness statement, and produced a list and bundle of documents as exhibits in the matter. The Claimant closed his case on the same day and the Court declared the Respondent’s case closed, paving way to filing of submissions.
4. Submissions were filed for the Claimant.

**The Claimant’s Case**

5. The Claimant’s case is that he was first employed by the Respondent as a Managing Director on 1<sup>st</sup> August 2018. It is his case that it was agreed between the parties herein, that the Claimant would be paid a monthly net salary of Kshs 500,000.00/= payable once every month for his services.



6. The Claimant states that he was a diligent employee who worked for the Respondent for a period of eight and half (8 ½) months without receiving the agreed monthly salaries.
7. It is the Claimant's case that during the period that he served, he was entitled to be paid a sum of Kshs. 4,250, 000.00. He avers that in blatant breach of the aforesaid contract, the Respondent failed, neglected and/or refused to pay him the outstanding salary arrears, and when the Claimant persisted on being paid what was rightfully owed to him for services offered as per the agreed terms, the Respondent started frustrating him in the performance of his duties.
8. The Claimant states that due to the Respondent's intolerable and unreasonable conduct, he on 15<sup>th</sup> April 2019, tendered his resignation in line with the provisions of his employment contract. He states that his resignation letter was duly received and that the Respondent waived his notice period, before the lapse of the thirty (30) days.
9. It is the Claimant's position that the Respondent then ensured that he cleared and handed back all the equipment in his possession that belonged to the Respondent. He avers further, that the Respondent promised to pay the salary arrears and all final dues owed to him which they have failed, neglected and/or refused to honour to date.
10. It is his case that the Respondent also refused to issue him with a Certificate of Service.
11. The Claimant prays that this Court helps him recover his dues from the Respondent.

#### **The Claimant's Submissions**

12. It is submitted for the Claimant that the Respondent herein, was in significant breach going to the root of the Claimant's contract of employment for failing to pay him his monthly salary for about eight (8) months, leaving him with no option but to resign from this employment. He submits further, that the Respondent was in blatant breach of Clause 3 of the Contract of Employment dated 1<sup>st</sup> August 2018. He placed reliance in the cases of Osman Eggae Egaal versus John Philip Tilley & Others, Petition No.90 of 2012 and David Potter versus New Brunswick Legal Aid Services Commission, Supreme Court of Canada, 2015 SCC 10, where Wagner J held that: -
 

“The test for constructive dismissal has two branches. The court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. ... first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it constitutes such a breach, it must be found to substantively alter an essential term of the contract....”
13. It is the Claimant's submission that the Respondent created an intolerable work environment for him and continued to make the employment intolerable by repudiating the Contract of Employment that was signed duly to be adhered to, and the same amounting to constructive dismissal, ought to be found wrongful and unfair. The Claimant sought to rely in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR to support this position.
14. The Claimant submits that he has clearly demonstrated that the Respondent dismissed him constructively by failing to pay him his salary, hence creating an intolerable work environment for about 8 months, and for such reason the Claimant resigned from the employment. He submits further that the conduct of the Respondent was in breach of the fundamental terms of the Contract of employment hence such dismissal was wrongful and unfair.



15. The Claimant finally submits that he has been able to prove that his termination by the Respondent was wrongful and unfair in terms of reasons stated herein, and humbly urges this Court to grant the payers sought together with costs and interest.

### **Analysis and Determination**

16. I have considered the pleadings herein, the Claimant's testimony together with his written submissions. The issues for determination are:-
- i. Whether the Claimant was constructively terminated
  - ii. Whether the Claimant is entitled to the remedies sought.

### **Whether the Claimant was constructively terminated**

17. The Claimant's position is that he was constructively dismissed by the Respondent, on the premise that the Respondent was in significant breach going to the root of his contract of employment for having failed to pay him his monthly salary for about eight (8) months, leaving him with no option but to resign from the service of the Respondent.
18. It is his assertion that the Respondent was in blatant breach of Clause 3 of his Contract of Employment dated 1<sup>st</sup> August 2018, and that this Court should find that he was constructively terminated.
19. The principle of constructive dismissal is a presumptive concept developed by common law and the courts to address instances when an employer, in all circumstances of the case, conducts himself in a manner to infer termination. (George Ogembo, Employment Law Guide for Employers, Second Edition (2022)-Law Africa).
20. The Claimant herein was employed by the Respondent vide a contract of employment dated 1<sup>st</sup> August, 2018 on a monthly salary of Kshs. 500,000/-, which the Claimant contends was not paid. The Respondent did not defend this suit and which then leaves the court with only the Claimant's evidence, which is that the Claimant was never paid a salary in the eight and half months (8 1/2) that he served the Respondent.
21. In Kenya today, there is no law defining with clarity when a constructive dismissal should be deemed to have occurred. Constructive dismissal has however been largely applied by courts tied to the law of contract under the doctrine of discharge by breach.
22. The first element that must be present for constructive dismissal to be construed, is that the employee has to have resigned from the service of the employer, and the resignation must be by reason of the employer creating working conditions that leave the employee with no option but to resign.
23. Lord Denning in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, opined thus on constructive dismissal: -

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must



make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

24. Failure by the Respondent to pay the Claimant a salary, is no doubt an express breach of his employment contract. Salary being an essential term of the contract between the parties, goes to confirm that the breach was sufficiently serious to constitute constructive dismissal.
25. In the premise, I find and hold that the Respondent’s action constitutes a breach of the Claimant’s contract and which substantively altered an essential term of his contract rendering his subsequent resignation a constructive dismissal.

#### **Whether the Claimant is entitled to the remedies sought.**

26. The Claimant’s claim against the Respondent, is for payment of unpaid salary, salary for notice period waved and compensation for constructive dismissal.

#### **Unpaid Salary**

27. For reason that the Respondent did not defend this suit, the Claimant’s assertion that he was not paid salary for the eight and half months that he was in the service of the Respondent, remains uncontroverted.
28. This claim thus succeeds on this ground, and is awarded as prayed.

#### **Compensation for unfair termination**

29. The Court has found that the Claimant was unfairly terminated, and which finding entitles the Claimant to compensation per Sections 49 and 50 of the [Employment Act](#), 2007.
30. In the case of *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR the Supreme Court of Kenya noted as follows in regard to an award of compensation:-

“When giving an award under Section 49 of the [Employment Act](#), a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”

31. The Claimant was terminated for no wrong committed, after being in the service of the Respondent for over eight months. In the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR the Court cited the case of *D.K. Marete v Teachers Service Commission Cause No. 379 of 2009* for the holding that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, but are meant to redress economic injuries in a proportionate way.
32. Premised on the Claimant’s long service and the holding in the case aforementioned, I find an award of six months’ salary sufficient compensation for the constructive dismissal, and which is hereby awarded.

#### **Salary for notice period waved**

33. The Claimant’s evidence is that he issued a one month’s notice upon tendering his resignation, but which notice, he avers the Respondent waived, and allowed him to hand over and leave their service. The Claimant now claims payment for the period of the notice.



34. Section 38 of the *Employment Act*, 2007 states thus on waiver of notice by an employer: -

“Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise.”

35. There is nothing indicating that the parties herein had any agreement in respect of the notice period. By Section 38 of the *Employment Act*, the Claimant is entitled to payment of salary for the period of the notice as service during the notice period was waived by the Respondent/employer.

36. The claim thus similarly succeeds, and the Claimant awarded one month salary for the term of the notice.

37. In whole, Judgment is entered for the Claimant as against the Respondent as follows: -

- a. Payment of 8 & 1/2 months' unpaid salary at Kshs. 4,250,000/-
- b. Payment of 6 months' salary as compensation for unfair termination at Kshs.3,000,000/-
- c. One-month salary for the notice period at Kshs. 500,000/-
- d. Costs of the suit and interest from the date of the judgment until payment in full.

44. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Mwangi h/b for Mr. Banda for the Claimant

N/A for the Respondent

Ms. Esther S- C/A

