



**Rukunga v Epix Investments Limited (Cause E495 of 2023)  
[2025] KEELRC 1616 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1616 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E495 OF 2023**

**L NDOLO, J  
MAY 29, 2025**

**BETWEEN**

**LEMMY MUNENE RUKUNGA ..... CLAIMANT**

**AND**

**EPIX INVESTMENTS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 29<sup>th</sup> June 2020, the Claimant wrote the following letter to the Respondent’s Chairman, Jonathan Jackson:

“Dear Jonathan,

Please accept this letter as formal resignation from the position of Assistant Accountant effective today (29<sup>th</sup> June 2020).

I made this decision due to the following reasons that happened beginning of this month.

Firstly as per your email dated 8<sup>th</sup> June 2020 you wrote to the Finance Department which included Duane, Anne and myself stating we are all suspended. However I have noted Anne has been reporting to work on daily basis.

Secondly, I have been locked out from the accounting software and server., Itax passwords including the itax e-mails account were changed without being informed. Hence I could not execute my duties. Thirdly, finance office door lock was changed without notice and the key given only to Anne hence I could not access the office.

Fourthly on Thursday, 25<sup>th</sup> June 2020 I came to the office and found a new team seated on my desk working.



The above reasons make me appear suspect with no valid reason given to me. I informed you of the above via email and Whatsapp but no feedback. I only received a warning via Whatsapp. Poor organization management and governance has resulted to my resignation.

Despite of (sic) the above I thank you for giving me an opportunity to work for you.

Yours sincerely,

(signed)

Lemmy M. Rukunga”

2. On the same day, Jonathan Jackson wrote back to the Claimant as follows:

“Dear Lemmy,

I refer to your termination letter dated 29<sup>th</sup> June 2020.

I accept your resignation.

With regards to the other contents of your letter I respond as follows. In my email of the 8<sup>th</sup> of June I asked the finance team to be suspended and work from home and to come to the office when asked. It is then my prerogative to ask who ever I wish to come to the office. Yes I first asked Anne to attend. Then later I asked you and for reasons I do not know you on several occasions did not turn up.

Yes we did change all the passwords and had you attended the office you would have been given the new passwords and given appropriate work. You have even refused to do the postings that I asked you to do to help Anne. There is no arrangement that you must have a key to your office. I can assure you that the office was open during all working hours. Therefore, there was no hindrance to stop you from doing your work.

There was no new team seated at your desk. There was a consultant who was using your desk as you had not turned on time to the office and we had no idea you would turn up as you were not responding. This consultant has been appointed to assist in getting the company filing up to date which is currently 7 years behind.

I ask that you make a full handover of your work to Farhat and your office equipment.

Thank you for the work you have done at Lordship Africa.

Yours sincerely

(signed)

Jonathan Jackson

Chairman

3. Arising from the foregoing communication, the Claimant lays a claim of constructive dismissal. The Claimant states his claim in a Statement of Claim dated 23<sup>rd</sup> June 2023 and the Respondent defends itself by a Memorandum of Response dated 12<sup>th</sup> September 2023.

4. At the trial, the Claimant testified on his own behalf and the Respondent called Anne Wambui Munene. Thereafter, the parties filed written submissions.



## The Claimant's Case

5. Vide an agreement dated 28<sup>th</sup> July 2017, the Claimant was employed by the Respondent in the position of Assistant Accountant, earning a monthly salary of Kshs. 200,000, which was later increased to Kshs. 220,000 effective January 2020.
6. The Claimant claims to have been employed on an initial two-year contract ending 31<sup>st</sup> July 2019 and subsequently, on permanent basis.
7. On 8<sup>th</sup> June 2020, all employees working in the Finance Department, including the Claimant, were sent on an indefinite suspension, to pave way for an audit exercise.
8. According to the Claimant, following the suspension, he was subjected to the following unfair practices:
  - a. Denial of access to the office through change of locks;
  - b. Allocating his desk to other staff members and failing to provide an alternative desk;
  - c. Denial of access to office emails;
  - d. Change of KRA itax passwords thereby preventing him from accessing the platform to carry out his duties;
  - e. Denying him access to accounting systems, including Quick Books, by way of change of passwords and failing to provide him with the new passwords;
  - f. Making him sit in the board room doing nothing;
  - g. Instructing his workmates not to engage with him or copy him in any correspondence;
  - h. Using foul language against him.
9. The Claimant claims that he was subjected to the aforementioned unfair practices because of his refusal to accede to the Respondent's demand to waive his annual leave for 2020; and his request to the Chief Operations Officer to liaise with the Head of Finance Department, prior to reallocation of duties, to avert a conflict of roles.
10. The Claimant avers that due to lack of communication on the status of his suspension and the abovementioned unfair practices, he was constrained to resign from employment, effective 29<sup>th</sup> June 2020.
11. The Claimant asserts that his resignation was involuntary, having been caused by a hostile work environment, coupled with ill treatment by the Respondent.
12. The Claimant lays a claim of constructive dismissal and therefore claims the following:
  - a. 12 months' salary in compensation;
  - b. Leave pay for 17.5 days in the sum of Kshs. 145,562;
  - c. Kshs. 3,364 being balance of salary for June 2020;
  - d. House allowance for 36 months in the sum of Kshs. 1,188,000;
  - e. Notice pay in the sum of Kshs. 253,000;
  - f. Unfair deduction of tax penalty in the sum of Kshs. 10,000;



- g. Costs plus interest.

### **The Respondent's Case**

13. In its Memorandum of Response dated 12<sup>th</sup> September 2023, the Respondent denies that the Claimant's resignation was involuntary.
14. The Respondent further denies that the Claimant was forced into resignation, and challenges him to strict proof of every allegation and/or assertion made in the Statement of Claim.
15. The Respondent maintains that the Claimant is not entitled to any of the remedies sought.

### **Findings and Determination**

16. There are two (2) issues for determination in this case:
- a. Whether the Claimant has proved a case of constructive dismissal;
- b. Whether the Claimant is entitled to the remedies sought.

### **Constructive Dismissal?**

17. The Claimant's case is that he was forced to resign, by the Respondent's conduct, that made it impossible for him to continue working. He therefore lays a claim of constructive dismissal.
18. Conversely, the Respondent maintains that the Claimant voluntarily resigned without giving the requisite notice.
19. Black's Law Dictionary (Tenth Edition) defines constructive dismissal or discharge as:
- “An employer's creation of working conditions that leave a particular employee or 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 almost no option but to quit.”
20. In the persuasive decision in *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) it was held that:
- “Where an employee resigns or terminates the contract as a result of constructive dismissal, such employee is, in fact, indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work.”
21. Closer home, in *Nathan Ogada Atiagaga v David Engineering Limited (Cause No 419 of 2014)* constructive dismissal was defined thus:
- “Constructive dismissal occurs when an employee resigns because their employer's behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”



22. In *Milton M. Isanya v Aga Khan Hospital* [2017] eKLR the Court stated that:
- “In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.”
23. In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following guiding principles to be applied in adjudicating claims of constructive dismissal:
- 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 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 causal link between the employer’s conduct and the reason for the employee terminating the contract i.e. causation must be proved.
  - f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
  - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
  - h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
  - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.
24. In his resignation letter dated 29<sup>th</sup> June 2020, the Claimant stated the following reasons that caused him to resign:
- a. An indefinite suspension with no clear terms;
  - b. A lockout from the accounting software, server and passwords, thus preventing him from executing his duties;
  - c. Change of locks in the finance office and denial of office keys, thus barring him from accessing the office;
  - d. Assignment of his work station to a new team;
  - e. Unresponsiveness to his inquiries regarding the status of his employment.
25. In accepting the Claimant’s resignation, the Respondent’s Chairman, Jonathan Jackson, admitted that the passwords and office locks had been changed. He however blamed the Claimant for failing to report to the office for allocation of new passwords. Regarding access to the office, Jackson stated that the Claimant did not need to have a key, because the office was open throughout working hours.



26. Jackson further admitted that the Claimant's work station was occupied by a consultant, because the Claimant had failed to report to work.
27. Additionally, as confirmed by the Respondent's witness, Anne Wambui Munene, when the Claimant went to the office on 18<sup>th</sup> June 2020 and 25<sup>th</sup> June 2020, he was not allocated any work.
28. With no clear access to the physical office and without passwords to the virtual workspace, there was no way the Claimant could perform his duties. In any event, there was no communication regarding the status of his suspension and when he showed up, he found his work station occupied and was not assigned any work.
29. The Respondent's overall conduct clearly made it impossible for the Claimant to discharge his duties. I therefore have no difficulty in reaching the conclusion that he was constructively dismissed.

### Remedies

30. Pursuant to the foregoing, I award the Claimant six (6) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's conduct which forced him out of employment. I have further taken into account the withholding of the Claimant's terminal dues for a period of five (5) months.
31. I further award the Claimant one (1) month's salary in lieu of notice.
32. In the absence of any leave records to counter the claim for leave pay, this claim succeeds and is allowed.
33. The deduction of tax penalty in the sum of Kshs. 10,000 was in the nature of a surcharge; and as held by this Court in Kenya National Library Services Board v Beatrice N. Ayoti [2014] KEELRC 1415 (KLR) a surcharge, being a disciplinary action, must be preceded by a fair disciplinary process as contemplated in Section 41 of the Employment Act. The unilateral surcharge effected against the Claimant was therefore unlawful and a refund of the surcharge amount is due to him.
34. The Claimant claims house allowance on the basis that his letter of appointment did not provide for a housing component as part of his monthly salary. However, the Court notes that the Claimant was paid a fair salary commensurate with his qualifications and job content. This may explain why he never wrote to his employer to complain about lack of house allowance. To award a well-remunerated employee house allowance at the end of the employment relationship, just because the employer failed to properly document the pay statement, would in my view, amount to an unjust enrichment. For this reason, I reject the claim for house allowance.
35. The claim for Kshs. 3,364 being balance of salary for June 2020 was not proved and is dismissed.
36. Finally, I enter judgment in favour of the Claimant as follows
  - a. 6 months' salary in compensation.....Kshs. 1,320,000
  - b. 1 month's salary in lieu of notice.....220,000
  - c. Leave pay for 17.5 days (220,000/30\*17.5).....128,333
  - d. Unlawful deduction on tax penalty.....10,000
  - Total.....1,678,333
37. This amount will attract interest at court rates from the date of judgment until payment in full.
38. The Claimant will have the costs of the case.



39. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2025**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Njuguna for the Claimant

Ms. Guserwa for the Respondent

