Levati v Dodla Dairy Kenya Limited & another (Cause E021 of 2024)
[2025] KEELRC 2127 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2127 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE E021 OF 2024

AN MWAURE, J

JULY 18, 2025

BETWEEN

ESWAR LEVATI ..... CLAIMANT

AND

DODLA DAIRY KENYA LIMITED ..... 1ST RESPONDENT

COUNTRY DELIGHT DAIRY LIMITED ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 24th April, 2024 and later amended it by filing an amended Memorandum of Claim dated 6th November, 2024.

2. The Memorandum of Claim was initially filed by the firm of Ouma & Ouma Associates Advocates, but the Claimant changed his advocates vide a Change of Advocates dated 4th November 2024 by appointing the firm of Kipchoech Terrer & Associates Advocates to represent him.

Claimant's case

3. The Claimant avers that he served as a Finance Manager for both Respondents, subsidiaries of one parent company, for over six years, initially working in Nairobi and later transferred to Nyahururu, without being issued a written contract contrary to section 9(1)(a) of the *Employment Act*. He worked continuously without off days or leave, violating sections 27(2) and 28(1)(a) of the *Employment Act*, and was denied double pay for work on public holidays.

4. After experiencing drastic changes to his terms of service and a toxic work environment, including threats and reduction of benefits, the Claimant avers that he was verbally informed his work permit would not be renewed and was pressured into resigning.

5. Despite issuing a formal demand and notice of intention to sue, the Respondents failed to respond, leading the Claimant to seek redress for unfair termination and statutory breaches.

6. The Claimant prays for:

    a. Normal overtime or 258 days 2 hours daily, amounting to USD. 8098

    b. Public holidays amounting to USD 2,346

    c. Leave amounting to USD 1,600

    d. Off-duty amounting to USD 6,941

    e. Service pay amounting to USD 8,050

    f. Saturday, 3 hours' overtime amounting to USD 1,735

    g. Air ticket back to India

    h. Certificate of service under section 51 of the *Employment Act*

    i. Declaration of unfair termination of the Claimant

    j. Compensation for dismissal (equivalent to a number of months' wages not exceeding twelve months based on the gross monthly wages, as provided under the *Employment Act*

    k. Costs of the suit to be borne by the Respondents

    l. Interest of the suit.

Respondents' reply to the amended Memorandum of Claim

7. In opposition to the amended Memorandum of Claim, the Respondents initially filed a reply to the Memorandum of Claim dated 30th May 2024 through the firm of Soita & Associates Advocates. The Respondents later amended their reply by filing their amended reply to the amended Memorandum of Claim dated 25th November 2024.

8. The Respondents later changed their advocates by appointing the firm of APL Kenya Advocates vide Change of Advocates notice dated 16th January 2025.

9. The Respondents refute the Claimant's allegations, maintaining that he was granted leave as per the law, except for USD 1600 representing one month's unpaid leave after his resignation.

10. The Respondents deny issuing threats or creating a toxic work environment, instead attributing warnings to poor performance, including sleeping during work. The Respondents further assert that the Claimant voluntarily resigned, disputing claims of unfair termination.

11. Nevertheless, the Respondents agree to settle the Claimant's dues, including:

    a. Payment of USD 1600, amounting to one month's paid annual leave;

    b. Payment of working days' salary for the month of March 2024;

    c. Return ticket to India; and

    d. A certificate of service.

12. The Respondent urged this Honourable Court to dismiss the claim with costs.

Claimant's evidence in court

13. The Claimant, CW1, adopted his witness statement dated 6th November 2024, together with the list of documents dated 24th November, 2024, marked as exhibits 1 to 4 and a further list of documents dated 24th April, 2024, marked as exhibits 5 and 6, as his evidence in chief.

14. CW1 testified that the claims of him sleeping on duty were false and that his resignation was not voluntary but rather coerced due to a toxic work environment. He stated that he worked continuously without leave or rest days and used his internet at home instead of using the office internet. His allowances were reduced, and he denied signing the alleged employment contract dated 24th January 2018, claiming that the signature was not his. He also challenged the accuracy of the Respondents' attendance records, noting several omissions.

15. During cross-examination, CW1 denied signing the employment contract dated 24th January 2018, asserting that the signature was not his and that he lacked an expert report to support the claim. As an expatriate, he stated that he came to Kenya under a work permit to serve as Business Finance Manager for the 1st Respondent, though he was uncertain about the permit requirements. CW1 stated that he was informed verbally that his work permit would not be renewed, although email correspondence suggested renewal was possible. Despite acknowledging, he did not complain of coercion, he later claimed his resignation was forced due to issues arising in Nyahururu, although he lacked documentary proof. He confirmed in a February 2024 email that he was leaving and requested settlement of dues.

16. CW1 stated that he was receiving various allowances for accommodation, internet, and airtime depending on location, but noted discontinuation of internet support in Nyahururu. He stated that he reported to Mr. Kanchabu until departure and earned USD 1600 per month, with unchanged salary despite altered allowances, and no NHIF contributions.

17. In re-examination, CW1 stated that he was demoted and there was no formal communication to that effect, and he resigned due to unfavourable conditions.

Respondent's evidence in court

18. RW1, Ramesh Kanumuru, the Respondent's Plant Manager, adopted his witness statement dated 24th November 2024, along with his supplementary statement dated 4th February, 2025, as his evidence in chief. He also adopted a list of documents dated 25th November 2024 and a supplementary list of documents of even date as his supplementary witness statement, which were marked as exhibits 1 and 2, respectively, as adopting them as his evidence in chief as well. He requested that this Honourable Court dismiss the Claimant's case.

19. RW1, in cross-examination, stated that the Claimant held the position of Senior Executive Finance, not Finance Manager, and he received a contract in January 2018, which was not signed by the Respondent. He stated that he confirmed that the Claimant was granted 30 days of annual leave each year, and any warnings issued were verbal rather than written. RW1 noted that the Claimant's name was absent from the attendance sheet on 25th April 2023 and clarified that expatriates had access to recreation facilities, though none included a swimming pool. He stated that by adding that the Claimant accessed the office Wi-Fi. He also stated that the Claimant was informed about his transfer to Nyahururu, did not experience allowance reductions, and occasionally worked on public holidays.

20. In re-examination, RW1 clarified that the Claimant received his March 2024 salary, one month's salary in lieu of notice, and a return ticket to India. He confirmed the existence of an employment contract between the Claimant and the 1st Respondent, though the Claimant was working for the 2nd

Respondent, a sister company, at the time of resignation due to lack of work in the 1st Respondent's organisation. He stated that the attendance sheets were prepared by the secretary for recordkeeping and were signed by employees, supplemented by biometric data to track presence rather than work performance. He emphasized that this biometric information did not determine payment and that no documentation existed confirming the Claimant worked overtime.

21. The court directed the parties to put in their respective written submissions.

Claimant's submissions

22. The Claimant submitted that while his employment as Finance and Accounts Manager from 1st February 2018 is undisputed, inconsistencies in the Respondents' pleadings and testimony suggest a deliberate attempt to justify what amounts to unfair dismissal. The Claimant alleges that he was coerced into resigning on 9th March 2023 after issuing a notice in accordance with the law due to intolerable working conditions, amounting to constructive dismissal. As highlighted in the case of Kenya Union of Sugarcane Plantation and Allied Workers V Othira [2024] KEELRC 843, resignation must result from the intolerability of the employer's conduct to qualify as constructive dismissal. The abrupt transfer of the Claimant from Nairobi to Nyahururu without consultation or reasonable notice, as admitted by the Respondents, violated principles of fair labour practices outlined in the *Employment Act* and was deemed arbitrary. This echoes the court's view in Henry Ochido V NGO Coordination Board [2015] eKLR, where sudden transfers without prior consultation were held to undermine healthy labour relations. Additionally, the principle from Githunguri V Republic [1986] eKLR, cited in Henry Ochido V NGO Coordination Board(supra), reinforces that official undertakings must be honoured, and employees deserve stability. Collectively, the abovementioned cases support the assertion that the Claimant was subjected to constructive dismissal.

23. The Claimant submitted that he was subjected to inhumane and degrading labour conditions, including an arbitrary transfer, demotion from his Finance Manager role, unjustified reduction in benefits such as accommodation and airtime, and forced extended working hours without compensation or leave, leading to an intolerable work environment. The Claimant also submitted that the attendance records were selectively presented, omitting evidence of his weekend and public holiday work. The Claimant submitted that the Respondents failed to produce leave records or justify benefit changes. The Claimant relied on the case of Kenya Union of Sugarcane Plantation and Allied Workers V Othira(supra) where the court cited the case of Pretoria Society V Loots [1997] 6 BLLR 721 and the court stated that constructive dismissal refers to a situation in the workplace that has been created by the employer, making it intolerable for the employee to continue the employment relationship. As a result, the employee feels they have no choice but to resign.

24. Still in Kenya Union of Sugarcane Plantation and Allied Workers V Othira(supra), the court cited the case of Western Excavating (ECC) Ltd V Sharp (1978) ICR 222, where Lord Denning stated as follows:

> "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 essentials of the contract, then the employer 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 instantly without giving any notice and say that he is leaving at the end of the notice..."

25. The Claimant contends that he was constructively dismissed due to intolerable working conditions, including an arbitrary transfer, demotion, reduction of benefits, long hours, and persistent pressure

to resign. These conditions rendered continued employment untenable, and left him no reasonable choice but to step down. In Enid Nkirote Mukire V Kenya Yearbook Editorial Board [2022] eKLR and Emmanuel Mutisya Solomon V Logistics [Cause No. 1148 of 2011], the court stated that resignation under such circumstances amounts to constructive dismissal. Section 47(5) of the *Employment Act* places the burden on the employer to justify termination, which the Respondents failed to do. Their actions, lacking evidence of misconduct, amounted to bad faith and unlawful termination, warranting relief for the Claimant.

26. The Claimant submitted that he was entitled to compensation for annual leave not taken and service pay, arguing that despite NSSF and NHIF contributions, it was the Respondents' norm to offer service pay upon termination. The calculations involved are straightforward and based on accepted mathematical principles. Applying the civil standard of proof, balance of probabilities, the Claimant relies on Palace Investments Ltd V Geoffrey Kariuki Mwenda & Another [2007] eKLR, where the Court of Appeal adopted Denning J's approach in Miller V Minister of Pensions [1947] 2 ALL ER 372, the burden is met if it's more probable than not.

27. On costs, the Claimant referred to Justice Kuloba's Judicial Hints on Civil Procedure, 2nd Edition (Nairobi: Law Africa, 2011), page 94, In Chamilabs V Lalji Bhimiji and Shamji Jinabhai Patel, HCCC No. 1062 of 1973, where the High Court of Kenya affirmed that the awarding of costs is within the court's discretionary powers, guided by applicable laws and conditions in force. However, the general principle is that costs should follow the outcome of the case—meaning the losing party typically pays—unless the court finds compelling reasons to depart from this norm. The Claimant also argues that costs should fairly reimburse a successful litigant. The Claimant, therefore, urged this Honourable Court to allow the Memorandum of Claim, having met the burden of proof and demonstrated entitlement to the reliefs sought.

Respondent's submissions

28. The Respondents submitted that the Claimant's denial of a written employment contract is unsubstantiated and fails the evidentiary threshold required to prove forgery. The Respondents relied on sections 107(1), 109, and 112 of the *Evidence Act* (Cap. 80), which emphasize that the burden of proof lies with the party asserting fraud—here, the Claimant failed to prove the said allegation of fraud. As reiterated in the case of Christopher Ndaru Kagina V Esther Mbandi Kagina & Another [2016] eKLR, where the court cited the case of Central Bank of Kenya Ltd V Trust Bank Ltd & 4 others, allegations of fraud demand strict and credible evidence, typically supported by expert testimony, which the Claimant failed to provide. In his own admission during cross-examination, that a work permit cannot be issued without a valid employment contract, supports the Respondents' position. As an experienced expatriate finance professional, it is implausible that he would have worked in Kenya without a documented agreement. Thus, the court should presume the contract's authenticity and find that the Claimant was employed under valid terms.

29. The Respondents submitted that the Claimant's resignation via email on 16th February 2024 was voluntary and not a result of constructive dismissal. While the Claimant cited demotion, reduction of allowances, and threats to resign, these issues were not raised during his employment or immediately thereafter. The Respondents relied on the case of Coca-Cola East & Central Africa Ltd V Maria Kagai Ligaga (2015) eKLR, where the Court emphasized that constructive dismissal requires a fundamental breach of contract by the employer. Further guidance from the case of Kenneth Kimani Mburu V Kibe Muigai Holdings Ltd [2014] KEELRC 723 outlines that such a breach must prompt immediate resignation, failing which the claim may be deemed waived. The case of Catherine Kinyany V MCL Saatchi & Saatchi [2013] KEELRC 583 supports the position that mere resignation does not amount

to constructive dismissal without evidence of intolerable working conditions. Thus, the Respondents assert the resignation was voluntary and not actionable.

30. The Respondents submitted that the Claimant's resignation was voluntary, not the result of constructive dismissal. The Respondent stated that the dispute is his alleged demotion and points to consistent salary and benefits, with no written communication of a change in terms as required under section 10(5) of the *Employment Act*. The transfer to Nyahururu was necessitated by business circumstances, not punitive action, and the Claimant never objected until after resignation. The Claimant failed to produce credible evidence of reduced allowances or unfair treatment. Furthermore, email records confirmed the renewal process of his still-valid work permit, contradicting claims of forced exit. As established in the case of Coca-Cola East & Central Africa Ltd v Maria Kagai Ligaga (Supra), constructive dismissal must arise from a fundamental breach by the employer. Here, the burden of proof was not met, and the resignation, communicated in advance, appears deliberate, not compelled.

31. The Claimant's overtime claim lacks credible evidence and does not meet the legal burden of proof. In Rogoli Ole Manaideigi v General Cargo Services Ltd [2016] KEELRC 1607 (KLR), the court emphasized that the employee must specifically demonstrate the excess hours worked, rather than rely on the employer's absence of records. The security register presented by the Claimant only recorded entry and exit, not assigned work, and was not linked to actual duties performed. Furthermore, the period in question involved factory renovations, with no substantive work for accounting staff. The Respondents' analysis revealed inconsistencies in sign-in patterns and shorter-than-expected shifts, suggesting the Claimant's overtime claim is both exaggerated and unsupported. As per section 10(7) of the *Employment Act*, the employer's written records prevail unless challenged with reliable evidence, which the Claimant failed to present.

32. The Respondents argue that the Claimant's case lacks merit, relying on Rogoli Ole Manaideigi v General Cargo Services Ltd(supra), which confirms that overtime and public holiday claims must be proven with specific evidence. The Claimant failed to substantiate claims for working on 13 public holidays, off-duty compensation, or Saturday overtime, rendering these speculative and duplicative. The Respondent cited the case of Andera V Aimsoft Ltd [2025] KEELRC 60 and section 35(6) of the *Employment Act*, the Respondents assert that remitted NSSF contributions disqualify service pay entitlement. Furthermore, the constructive dismissal claims collapse as the Claimant voluntarily resigned and failed to show demotion, salary reduction, or work permit denial. Under section 49 of the *Employment Act*, compensation is only available following unfair dismissal, which was not established.

33. On costs, the Respondent relied on section 27 of the *Civil Procedure Act*, where costs follow events, and the Respondents urged this Honourable court to dismiss the claim with costs, having offered USD 2,000 in admitted dues, which the Claimant declined to accept.

Analysis and determination

34. The court has considered the pleadings by both parties together with the rival submissions; the issues for determination are as follows:

    i. Whether the Claimant was constructively dismissed

    ii. If (i) above is in the affirmative, whether the Claimant is entitled to the reliefs sought

    iii. Who should bear the costs of the suit?

35. Constructive dismissal has been reiterated in the earlier part of this judgment in the cases of Kenya Union of Sugarcane Plantation and Allied Workers V Othira(supra) and Coca-Cola East & Central

Africa Ltd v Maria Kagai Ligaga(supra). It is not in dispute that the Claimant was employed by the 1st Respondent in the Finance Department and he was later transferred to the 2nd Respondent organisation. The two Respondents are sister companies to one mother company altogether. The Claimant alleged that he was constructively dismissed, whereby the Respondent created a hostile environment that forced the Claimant to resign.

36. In the case of Principal Secretary, National Treasury & another v Kimutai [2024] KECA 488 (KLR), where the Court of Appeal cited the case of Public Service Commission & 4 Others v Cheruiyot & 20 Others [2022] KECA 15 (KLR), the Court held that:

> "A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act."

37. In this instant case, the Claimant voluntarily resigned from work. The Claimant is an expatriate who entered into an employment contract with the Respondent dated 24th January 2018, which the Respondent executed in accordance with section 10 of the *Employment Act* but for whatever reason the Claimant does not seem to have signed the same.

38. The Claimant evidence is that he was working for the Respondents in Nairobi until 9th March 2023 when he was transferred to Nyahururu. He says he was employed as a Finance Manager. The contract of appointment signed by the Respondent though not signed by the Claimant indicate he was a Senior Executive in the Finace Department and the work permit indicates he was Business Development Manager. The court is not clear from the evidence on record what position the Claimant held under the circumstances. It is evident however that Claimant had a work permit and worked for Respondent for about 6 years. It is doubtful he would have got a work permit without an executed contract.

39. Claimant's contention is that his position was downgraded but it is not clear since there are no documents that make it clear, what his initial positon was seeing he had not even signed the contract of appointment which is in the court file. What the court finds from evidence is that Claimant was working in the Finance Department of the Respondent and his salary was US $ 1600.

40. The Claimant was transferred to Nyahururu on 9th March 2023. He claims he was not consulted about his transfer. There are again no documents to assist the court to be able to tell how he was transferred. The Claimant served in Nyahururu for one year before his resignation and there is no proof whatsoever that he raised any issues or grievances about his transfer.

41. He also says his allowances were reduced. In his evidence in court he could not articulate how his allowances were reduced. During cross examination he said he still received Kshs.4,100/= for WIFI and in Nairobi he used to receive Kshs.2,000/=. That confused the court and especially when he further claimed he used to pay his WIFI in Nyahururu but produced no evidence.

42. He said he was living in the Respondent's house together with his colleague in Nyahururu. The court finds no proof of the allowances which the Claimant alleges were deducted and his position was not also downgraded. He admitted in court his salary was not deducted and with all diligent consideration the court did not find proof of deduction of Claimant's allowances. Rather the Respondents met the Claimant's needs as indicated in the letter of appointment.

43. The court finds the principles set out in various case laws that justify situations where resignation can be regarded as constructive dismissal have not been established by the Claimant against the Respondents. The one notable case of Coca Cola East & Central Africa Ltd Vs Maria Ligaga (Supra) sets out the principles that must be established to justify resignation as constructive dismissal. In particular the court in the above case held that constructive dismissal must arise from a fundmaental breach by the

employer. Constructive dismissal is justified where the employer creates such a hostile environment that the employee has no option but to resign.

44. In this case constructive dimissal has not been proved. The Respondent even cancelled the Claimant's work permit way after his resignation. Therefore even when he resigned he still had a work permit. The Claimant resigned volutarily and there is no evidence of coercion by hositle behaviour of the Respondents. The court therefore finds the Claimant resigned volutarily and he did not quote any untold behaviour by the Respondents in the email he wrote on 16th February 2024 to resign from his employment. His claim therefore fails and is dismissed accordingly.

45. Having said so the Respondent admitted he owed the Claimant the following which court orders them to pay the Claimant -

    1. Payment equivalent to one month annual leave being US $ 1600
    2. The payment of March 2024 as would be worked out by the Respondent.
    3. The prayers for
        i. Overtime
        ii. Public holidays
        iii. Leave days
        iv. Off duties are not proved and are not allowed. The case of Rogoli Ole Manadiegi -Vs- General Cargo Services Ltd emphasises that employee must prove excess hours worked. These prayers should have been raised during the six years the Claimant worked for the Respondent and not raise them even when they are locked out by time limitation contrary to Section 89 of the *Employment Act*.
    4. The Respondent will pay for Return ticket to India or cash in lieu thereof.
    5. The certificate of service to be availed to the Claimant in accordance to Section 51 of *Employment Act* 30 days from date of this judgment.
    6. The court will exercise its discretion and order each party to meet their costs of the suit.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 18TH DAY OF JULY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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.

A signed copy will be availed to each party upon payment of Court fees.