



**Muchiru v Lordship Africa Fund Management Limited (Cause
2532 of 2017) [2024] KEELRC 331 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2532 OF 2017
MA ONYANGO, J
FEBRUARY 14, 2024**

BETWEEN

WENDY NYAMBURA MUCHIRU CLAIMANT

AND

LORDSHIP AFRICA FUND MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 28th December 2017 and filed in court on 29th December 2017, the Claimant seeks the following orders against the Respondent-
 - i. A Declaration/declaratory order to issue that the Respondent herein acted in breach of its express and implied terms under the contract of employment by continually failing to pay up and remit the Claimant's commissions and other contractual entitlements complained of herein.
 - ii. A Declaration/declaratory order to issue that the circumstances and the conduct of the Respondent in these proceedings amount to unlawful/wrongful constructive dismissal of the Claimant herein.
 - iii. A Declaration/declaratory order to issue that the constructive dismissal of the Claimant herein was in the first instance unlawful, wrongful and unfair and generally in breach of the provision of section 41 as read with section 45 of the *Employment Act*.
 - iv. The Respondent be ordered to pay the Claimant's terminal dues and benefits as well as compensation and damages as particularized under paragraph 74 to the Memorandum of Claim with interests from the date of filing these proceedings to the date of payment in full at court's rates and/or upon such other terms this Honourable Court may impose.



- v. An order of injunction to issue restraining the Respondent herein from purporting to demand payment of rent and/or purported accrued rental arrears from the Claimant herein on account of housing provided for to the Claimant on account and by didn't of the provisions of section 31 of the *Employment Act*, 2007.
 - vi. An order for payment of the costs of the suit.
2. The Respondent filed a Statement of Response on 4th February 2019 denying the averments in the Claim. In a rejoinder dated 23rd June 2021 the Claimant reiterated the contents of her Memorandum of Claim.
 3. The suit was set down for full trial during which the Claimant testified on her own behalf while the Respondent called its Deputy Director of Operations and Human Resource who testified in furtherance of its case. At the end of the trial, the court directed parties to file written submissions.

The Claimant's Case

4. The Claimant testified on 7th July 2022 as CW1. She adopted her witness statement recorded on 9th February 2022 as her evidence in chief. She also relied on her documents filed in court in support of her case.
5. It was the Claimant's case that she started working for the Respondent in the year 2011 initially as a Consultant and was subsequently confirmed and integrated as an employee of the Respondent.
6. According to the Claimant her first task with the Respondent was in January 2012 when she was required to establish and formulate a Project Sales Management Plan for execution in respect of the Respondent's sales, strategies and procedures. She testified that she presented the said plan to the Managing Director which then informed further conversations about her role. The Claimant testified that she was not provided with a contract of employment until 10th February 2016 when she was issued with a letter of appointment despite her persistent push for the same.
7. The Claimant stated that she was confirmed to the position of Sales Manager for the Respondent's group of companies. That according to her contract of employment she was entitled to a monthly basic salary of Kshs. 500,000 and a telephone allowance of Kshs. 8,000. That she was also entitled to Commission of Kshs. 400,000 for every plot sold and Kshs. 800,000 for every house sold in Karen Hills with effect from August 2014. It is the Claimant's case that according to her employment contract 70% of the commission earned was payable upon receipt of the purchase price deposit and 30% upon full completion of the sale. The Claimant stated that she was also entitled to a pension scheme, provision of a car to facilitate movement to be treated as car allowance, bonuses at the sole discretion of the employer, provision of a notebook, 21 days annual leave days, 3 sick days in a year and 12 weeks maternity with full pay.
8. It is the Claimant's case that upon being issued with the said contract, she was surprised that she was to be placed on probation for a period of 3 months and was issued with a fixed term contract despite having worked for the Respondent continuously as a regular employee from 2012.
9. The Claimant testified that contrary to the Respondent's allegation that she was an independent contractor, she was an employee as evidenced by the P9 forms issued to her by the Respondent for purposes of filing her tax returns. That she was issued with payslips and took annual leave as an entitlement provided in respect of an employee. It was the Claimant's further contention that she travelled to the UK and US for vacations and the Respondent would write letters to the respective



- Embassies and Consulates indicating that the Claimant was its employee with effect from January 2012.
10. It was the Claimant's case that she worked hard to secure sales for the company in the Karen Hills Project and other projects and was not paid any commission yet the sale agreements had been executed and the initial deposit paid. She contended that every single time she had to write emails requesting for payment of the commissions despite the clear terms of her contract of employment as to when such commissions became due for payment. The Claimant stated that she held several meetings with the Respondent's Director but her concerns were not addressed.
 11. The Claimant stated that in a meeting between herself and the Respondent's Director on 2nd August 2017, she brought up the issue of her unpaid commissions and the director informed her that all her outstanding commissions would be recovered in the form of a car benefit tax which she objected to.
 12. It was the Claimant's evidence that on 3rd August 2017, a further meeting was held in the Respondent's Director's office where she was presented with a pre-drafted resignation letter and instructed to execute the same in order to relinquish her position as Sales Manager with the Respondent. According to the Claimant, during the said meeting the Respondent's director scribbled what he considered as the Claimant's terminal dues payable and outlined some commissions which he considered payable and purported to deduct an amount as alleged to be Car Benefit Tax, Mobile phone benefit tax and rent for the apartment the Claimant lived in from September 2015 to July 2017.
 13. The Claimant stated that she did not execute any resignation letter as there was no intention on her part to resign from employment. According to the Claimant, the Respondent's Director sought to escape paying her commissions by coercing her resignation and undertaking unjustified deductions from part of the commissions owed to her.
 14. The Claimant avers that the Respondent's Director became overly disgruntled and aggressive towards her and blocked the office servers so that the Claimant could not access work emails. That the Director further instructed a mobile service provider to block the Claimant's official telephone number. The Claimant maintained that the subsequent actions on the part of the Respondent's Director rendered it impossible for the Claimant to continue discharging her duties with the Respondent and that by so doing she stood constructively dismissed from employment.
 15. The Claimant therefore sought to be paid Notice pay, unpaid salaries, unpaid overtime, unpaid commissions, compensations for unlawful constructive termination from employment as well as the costs of the suit.
 16. On being cross examined, the Claimant admitted that she had received an email from the Respondent's Director on 4th June 2016 expressing concern that she was not reporting to work.

The Respondent's case

17. The Respondent's witness, Jilna Sunil Patel testified as RW1 and adopted his witness statement dated 9th February 2022. She stated that she joined the Respondent in September 2021. That she had custody of employment records of the Respondent's employees including those of the Claimant.
18. According to RW1, the Claimant's performance was good initially but later she stopped observing the company's work timings as stipulated in her contract. This prompted the Respondent's Director to write to her an email dated 4th June 2016 expressing his frustration at the Claimant's disregard for company timings and policies.



19. RW1 further stated that the Director of the Respondent held discussions with the Claimant with regard to her performance and her blatant disregard for company policies. RW1 stated that on 3rd August 2017 during one of such meetings, the Claimant had an outburst and resigned from her position as Sales Manager in the presence of the Director and the Finance director making 3rd September 2017 the last day of serving her notice. It is the Respondent's case that the Claimant confirmed her resignation vide the email dated 24th August 2017. According to the Respondent the Claimant abruptly resigned with effect from 31st August 2017 before the talks reached the disciplinary hearing.
20. With regard to the terminal dues sought by the Claimant in her Claim, RW1 stated that the Claimant is not entitled to Notice pay as she resigned on 3rd August 2017 and served a month's notice as evidenced by her email dated 24th August 2017 addressed to Oliver Wala. On the issue of overtime pay, the Respondent's witness stated that overtime pay is not applicable as the Claimant's employment contract clearly stated that the Claimant was expected to work longer hours whenever the need arose. On the issue of unpaid salaries claimed by the Claimant, RW1 denied the Claimant's allegation that she was not paid salary. She told the Court that the Claimant was not entitled to salary for September as her last day of work was 31st August 2017 as confirmed by her email.
21. On the issue of Commission payable to the Claimant, the Respondent's witness stated that it was agreed that the Claimant would be paid Kenya Shilling two (2) Million as a lump sum commission for all sales deals up-to 20th August 2015 and that the said commission was paid out in instalments. In January 2017 she was paid one (1) Million Kenya Shillings. She was paid another Kshs. 500,000 in April and Kshs. 500,000 in May 2016. RW1 testified that according to the records, the Claimant was paid all her commissions and as such there was no outstanding commission due to the Claimant.
22. As to the prayer for 12 months' salary compensation, RW1 stated that the claim is not applicable as the Claimant verbally resigned in the beginning of August 2017.
23. In the end, the court was urged to dismiss the Claim on the basis that the Claimant had resigned voluntarily.

DETERMINATION

24. From the pleadings on record, the evidence adduced, and the submissions, the issues that arise for this court's determination are;
 - i. What was the nature of engagement between the Claimant and the Respondent?
 - ii. Whether the Claimant voluntarily resigned or whether she was constructively dismissed
 - iii. Whether the Claimant is entitled to the reliefs she is seeking.
25. The Claimant's employment contract dated 10th February 2016 provides the terms of engagement between the Claimant and the Respondent and from the terms therein, there is no doubt that the Claimant was an employee of the Respondent.
26. I therefore find and hold that the Claimant was indeed an employee of the Respondent until August 2017 when she left employment.
27. On the second issue, the Claimant has maintained that she was constructively dismissed from employment after the Respondent's Director frustrated her by blocking the office servers so that she could not access work emails and further, that the director instructed its mobile phone service provider



to block the Claimant's mobile number. The Respondent on its part maintains that the Claimant voluntarily resigned from employment on 3rd August 2017.

28. The 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.”

29. In the case cited by the Respondent Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR, the Court of Appeal while addressing the issue of constructive dismissal observed:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's 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.”

30. This court in the case of Milton M Isanya versus Aga Khan Hospital Kisumu (2017) eKLR, observed as follows:

“In constructive dismissal, the desire to resign is from the employee as a result of a 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 tender's resignation.”

31. In the instant case, the Claimant wrote an email to Oliver Wala on 24th August 2017 whose contents read as follows:

Hi Wala,

Please see email below. Also to let you know I will not be with Lordship anymore as of the end of this month.

It's been a pleasure working there for the last 6 years and I will be moving on to other things.

You can still reach me on my number or personal email; wendynyambura@gmail.com

All the best!

Best regards,

Wendy.

32. There is also an email dated 28th August 2017 written by the Respondent's Director and addressed to the Claimant that reads:

Dear Wendy

Below is the sms message I sent this morning

Wendy, I wish to discuss further the termination of your employment process with you. As we last discussed you agreed to work till end this month. But I see you have not been



in the office (except for a few short visits I understand you made) Please note this is an abscondment of work. I there request you report to work today and have a meeting with me.

Kind regards, Jonathan

33. The above correspondence confirm that the parties herein discussed the termination of the Claimant's employment at some point and it was agreed that the Claimant would work until end of August 2017. From the tone of the email the Claimant wrote to Oliver Wala, there is no indication that the Claimant was coerced into resigning.
34. The court in the case of *Godfrey Allan Tolo v Tobias O. Otieno & another* [2022] eKLR observed as follows:
- “For constructive dismissal to be inferred, the employee must have resigned within reasonable time from his employment, with or without notice as a result of the employer's hostile treatment or hostile working conditions at his workplace. The employer must also not have expressed the desire to terminate the employee. My analysis of the evidence on record, reveals that the claimant was not constructively dismissed from employment.”
35. The facts of the instant case do not support a finding of constructive dismissal. If anything, what the facts reflect is a consensual termination of employment.

What reliefs should issue?

36. The Claimant prayed for the following:
- a. Notice pay
- Having not proved that she was constructively dismissed the Claimant is not entitled to this prayer.
- b. Overtime pay
- The claimant did not prove that her contract provided for payment of overtime. The contract states that she may be required to work extra hours but does not state that any such extra hours worked would be paid for as overtime.
- Further, the Claimant did not adduce any evidence to prove that she worked overtime by producing a schedule of the days the overtime work was done or the number of hours as claimed or at all. This prayer has thus not been proved.
- c. Unpaid salaries for August and September
- No evidence was adduced to prove that the Claimant worked in September, 2017. The evidence on record is that the Claimant stopped working for the Respondent sometime in August 2017. I therefore award the Claimant salary for August 2017 in the sum of Kshs. 500,000
- d. Unpaid commission on concluded transactions
- The Claimant's contract provided for payment of commission as follows:
- The employer shall pay you Ksh.400,000/= for every plot sold in Karen Hills and Ksh.800,000/= for every house unit sold in Karen Hills being a sales commission effective from 1st August 2015. The said commission rates shall be revised from time to time and shall be paid as follows: 70% upon receipt of the deposit by the employer



and 30 % upon completion of the sale. The Employer will withhold and remit all relevant taxes and other withholding, from the employee's commission as set out on Kenyan laws and regulations.”

The contract provides that the effective date of the Clause was 1st August 2015. The Claimant has included in her bundle of documents sale agreements dating as far back as 2012 without proof of what her terms of commission as of that date was. She has further not adduced proof of the payments received for all the sale agreements she claims to have concluded. Further, she has not stated if she received any payments during the period in question.

In one of the correspondence in the Claimant's bundle at page 72, there is correspondence from the Claimant where she was demanding payment for only three (3) sales that she had “closed and started last year”. The communication is dated 17th June 2017.

This being a claim in the nature of special damages it was incumbent upon the Claimant to give a full tabulation with proof of every item claimed.

I find no proof of the Claim from the evidence on record.

e. 12 months compensation

The Claimant having not proved constructive dismissal as alleged in the Claim, she is not entitled to compensation.

f. Damages

No evidence was adduced to prove that the Claimant is entitled to any damages.

g. Costs

As the claim has only partially succeeded, I award the Claimant 50% of costs and disbursements.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

