



**Kaara v Associated Construction Company (Cause 1907 of 2017)
[2024] KEELRC 472 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 472 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1907 OF 2017
JK GAKERI, J
MARCH 4, 2024**

BETWEEN

LAWRENCE MAINA KAARA CLAIMANT

AND

ASSOCIATED CONSTRUCTION COMPANY RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim on 26th September, 2017 and prays for;
 - i. Unpaid accumulated salary arrears Kshs.3,595,827.00.
 - ii. One month's salary in lieu of notice Kshs.180,000.00.
 - iii. Accrued annual leave 3 years Kshs.378,000.00.
 - iv. Compensation for loss of employment Kshs.2,520,000.00
Total Kshs.6,673,827/=
 - v. Costs of the suit and interest.
 - vi. Any other or better relief the honourable court may deem fit to grant.
2. The Claimant's case is that he started working with the Respondent on 3rd February, 2014 until 8th July, 2017 at Kshs.230,000/= per month.
3. The Claimant avers that as at the date of termination, the Respondent owed him Kshs.3,595,827.00 as evidenced by correspondence with the Respondent since 2014.



Respondent's case

4. In its response to the claim filed on 18th December, 2019, the Respondent admits that the Claimant was its employee from 30th February, 2014 but he terminated his employment without sufficient cause.
5. It also admits that his gross salary was Kshs.210,000.00 per month but denies owing him any terminal benefits or compensation.
6. It is the Respondent's case that the Claimant, as an Engineer in the general construction industry ought to have known that construction companies received Exchequer funds intermittently depending on the budgetary allocation and ought to have understood the situation as opposed to terminating his employment and had not adduced evidence to show how the Respondent refused or neglected to pay his dues.
7. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

8. The Claimant adopted the witness statement on 20th November, 2023.
9. On 23rd March, 2023, both counsels were present but none was ready to proceed.
10. On 18th July, 2023, hearing could not proceed as the Respondent's counsel was absent and the court did not sit on account of the Annual Conference and Symposium of the court.
11. The Respondent neither filed a witness statement nor documents.

Determination

12. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether the Claimant was constructively dismissed.
 - iii. Whether the Claimant is entitled to the reliefs sought.
13. As to whether the Claimant was an employee of the Respondent, in an undefended suit or where the Respondent is absent, it is incumbent upon the Claimant to establish that he/she was an employee of the Respondent as a preliminary issue, before establishing other requirements. In this case, the Claimant has provided copies of documents which show that he had a relationship with the Respondent that involved payment of salary or wage.
14. He has also attached printout of emails between himself and one Richard Juma Alex and Sanjeev Parmar on salary matters and allowances. The emails are dated 2014, 2015 and 2016.
15. In one dated 14th January, 2016, the Claimant tabulates the salary owed as Kshs.1,470,000.00.
16. Similarly, the Claimant filed copies of his bank statements which show that he received regular payments from the Respondent from March 2014 to July 2017.
17. More significantly, in its Reply to the Memorandum of Claim dated 18th December, 2019, the Respondent admitted that the Claimant was its employee as alleged.
18. Evidently, there is overwhelming evidence to show that the Claimant was an employee of the Respondent and the court so finds.



Whether the Claimant was constructively dismissed

19. In his witness statement dated 12th September, 2017, the Claimant admits that he terminated services to the Respondent but does not expressly state that the same was actuated by the non-payment of salary.
20. Similarly, the Claimant is silent on how he terminated his services though he prays for one month's salary in lieu of notice. However, in his claim, the Claimant is unambiguous that he terminated his services on 6th July, 2017 for none payment of salary arrears.
21. The concept of constructive dismissal was aptly captured by Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (1978) Q.B 761 where he 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 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 that 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”.
22. The concept was adopted and applied by the Court of Appeal in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR where the court approved the contractual test which requires proof of a repudiatory breach of contract by the employer for constructive dismissal to be sustainable.
23. The Court of Appeal went further and articulated the guiding principles for determining whether a constructive dismissal has taken place.
24. In this case, it is evident that the Respondent paid the Claimant a salary from March 2014 to 17th July, 2017.
25. Although the net payable appears as Kshs.170,000/= per month, it was not paid every month, for instance no salary was deposited in the Claimant's account in April 2014, August 2014, March 2015, November 2015, March – May 2016, July and August 2016.
26. Equally, from July 2015, the Respondent deposited less than Kshs.170,000/= and the trend continued until the last salary was paid in July 2017.
27. From the bank statement on record, it is decipherable that the Respondent was not consistent in the payment of the Claimant's salary from mid 2015 and the trend of paying less continued and deteriorated in 2016.
28. The Respondent owed the Claimant salary arrears from 2014 to 2017 and filed this suit on 26th September, 2017.
29. One of the elements of constructive dismissal is that the breach must be fundamental to occasion a repudiatory breach and the employee must leave at the instant failing which he/she is estopped from alleging constructive dismissal.



30. Non-payment of salary or payment of less than the contracted amount is in the court's view a repudiatory breach of a contract of employment as payment of salary is a fundamental term of the contract as exemplified by the definition of the term employee under Section 2 of the [Employment Act, 2007](#) as well as the provisions of Section 10(1), 17, 18 and 19 of the Act.
31. Although a fundamental breach of the contract of employment had taken place, the Claimant did not in the court's view leave within a reasonable time and cannot be heard to say that he was constructively dismissed by the Respondent.
32. To the issue as to whether the Claimant was constructively dismissed, the court returns that the Claimant has failed to demonstrate that he was constructively dismissed.

Whether the Claimant is entitled to the reliefs sought

i. Unpaid accumulated salary arrears

33. Having found that the Respondent owes the Claimant salary arrears, the Claimant is awarded the outstanding salary arrears up to 8th July, 2017 as;
2014 Kshs.379,677.00
2015 Kshs.490,000.00
2016 Kshs.1,390,000.00
2017 Kshs.220,000.00
Total Kshs.2,479,677.00
34. As the Claimant was receiving a net of Kshs.170,000/= from a gross of Kshs.230,000/=, the Respondent was not deducting the correct PAYE and other statutory deductions which are deductible and ought to be deducted as by required.

ii. One month's salary in lieu of notice

35. Having found that the Claimant's employment was not constructively terminated and the Claimant has not demonstrated that the Respondent was at fault in the termination, the Claimant has not demonstrated entitlement to pay in lieu of notice.
The prayer is declined.

iii. Compensation for loss of employment

36. Neither the Memorandum of Claim nor the Claimant's written statement dated 21st September, 2017 attribute any wrong doing on the part of the Respondent in the termination of employment.
37. Paragraph 3 of the Memorandum of Claim is clear that the Claimant terminated his services for non-payment of salary, a fact the Respondent admitted in its response.
38. Relatedly, the Claimant adduced no evidence to prove that the termination of employment was unfair or unlawful.
39. The prayer for compensation is unmerited and is declined.
40. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
 - a. Salary arrears Kshs.2,479,677.00.



- b. Costs of this suit.
- c. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF MARCH 2024

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

