



**Mwenda v Afri Business LLP & another (Cause E409 of 2020)
[2024] KEELRC 2346 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E409 OF 2020
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

PATRICK NJOROGE MWENDA CLAIMANT

AND

AFRI BUSINESS LLP 1ST RESPONDENT

ANNABELL KARANJA 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit on 19th August, 2020 vide a Statement of Claim which was later amended on 10th March, 2023, alleging breach of consultancy agreement.
2. It is the Claimant's case that the he was engaged by the respondents as a Consulting Director at Kshs.150,000/= every month.
3. It is the Claimant's case that the Respondent deducted the Claimant's statutory dues for onwards transmission to the Kenya Revenue Authority (KRA) as Pay as You Earn (PAYE).
4. The Claimant avers that when he applied for a Tax Compliance Certificate, he realised that the Respondent had not been remitting tax and upon notifying the respondents, they failed to rectify the situation.
5. The Claimant further states that the Respondent wilfully acted in contravention of the agreement between them.
6. It is the Claimant's case that the 2nd Respondent wilfully failed to pay the Claimant's monies due to him from December 2017 to April 2018;
 - a. That the Claimant was underpaid in December 2017 when he was given Kshs.55,000/= as opposed to Kshs.150,000/= which was the amount due and owing to him.



- b. The Respondent subsequently did not pay the Claimant any amount whether in part or full from January 2018 to April 2018.
 - c. That the Respondent wilfully failed, refused and or neglected to remit the Claimant's PAYE despite deducting the same from the Claimant's salary.
7. It is the Claimant's case that he consistently showed up to work and performed his duties and responsibilities diligently as per the performance agreement executed on the 16th May, 2017.
 8. The Claimant avers that he served the Respondent diligently until April 2018 when he resigned following frustrations by the Respondent which included continually refusing to pay his salary.
 9. It is the Claimant's case that the 2nd Respondent is hiding under the corporate veil to shield fraud and improper conduct of the 1st Respondent in failing to remit statutory deductions.
 10. The Claimant avers that the 2nd Respondent misappropriated monies already deducted from its faithful and diligent employees and failed to remit the same to the KRA.
 11. The Claimant prays for;
 - a. Kshs.695,000/=.
 - b. This Honourable court be pleased to pierce the 1st Respondents corporate veil in order to find the 2nd Respondent culpable for the claimants failure to get an update tax compliance certificate for their non- remittance of his PAYE which they had faithfully deducted.
 - c. This Honourable court do issue a mandatory injunction compelling the 2nd Respondent to account to the last cent in both expected remittances and penalties thereof that are due and owing to the Kenya Revenue Authority on account of their failure to remit the claimant's PAYE.
 - d. Punitive damages of Kshs.1,000,000/= with interest at court rates from the date of filling suit for the agony occasioned upon the Claimant and his family.
 - e. General damages for the pain and suffering resulting from the financial hardship caused by the Respondent non payment of the Claimants dues.
 - f. This Honourable court do issue a mandatory injunction compelling the Respondents to issue the Claimant a certificate of service.
 - g. Costs of the suit and interests thereon until payment in full.
 - h. Any other relief that this honourable court may deem fit and just to grant.

Respondent's case

12. In response, the respondents filed a Memorandum of Reply dated 18th December, 2020 which was later amended on 12th March, 2024.
13. It is the Respondents' case that the 1st Respondent was the employer of the Claimant and the 2nd Respondent is a partner to the 1st Respondent and is wrongly sued in the cause.
14. The Respondent avers that the Claimant's salary was pegged on performance of duties.
15. The respondent denies breaching the contract and states that the termination was mutually agreed upon by the parties effective 31st January, 2018.



16. The respondent denies having received any resignation letter from the Claimant.
17. The respondent avers that the Claimant is not entitled to the orders prayed for and urges the court to dismiss the claim with costs.

Claimant's evidence

18. The Claimant adopted the written statement as his evidence-in-chief.
19. On cross-examination, the Claimant confirmed that he had not received the certificate of service dated 31st December, 2017 as alleged by the Respondent.
20. He confirmed that he received the sum of Kshs.55,000/= as part payment of salary for the month of December 2017.
21. The claimant testified that he had communicated on email with the Respondent regarding his payment and he received a computation of Kshs.223,740.00.
22. On re-examination, the Claimant testified that he was only paid Kshs.50,000/= in December 2017 and resigned in April 2019 and the PAYE was not paid.

Respondent's evidence

23. RWI, Anabel Karanja confirmed, on cross examination that the Claimant was a consulting Director being paid a salary of Kshs.150,000/= per month.
24. The witness confirmed that in November 2017, the Respondent had a discussion with the Claimant on his performance and they agreed that from December 2017 he would be paid on commission basis and as the arrangement did not work, they agreed to terminate the contract.
25. The witness testified that she could not recall any resignation by the Claimant.

Claimant's submissions

26. The Claimant's Counsel highlighted the following issues for determination
 - i. Whether the Respondent carried out actions that amount to repudiation of the contract of employment that led to the Claimant's constructive dismissal
 - ii. Whether the Claimant is entitled to the reliefs sought.
27. The Claimant submits that he was underpaid in December 2017 when he was given Kshs.55,000/= instead of Kshs.150,000/=. That the respondent failed to pay the Claimant's salary from the month of January 2018 to April 2018 despite his showing up to work and performing his duties diligently.
28. It is the Claimant's submission that he was constructively dismissed.
29. Reliance was made on the holding in Nathan Ogada Atiagaga versus David Engineering Limited (2015) eKLR, where the court stated as follows;

“Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not voluntary, it is a termination in effect. 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 affect a constructive discharge.”

30. Counsel submits that non-payment of salary is a fundamental breach of contract of employment as it subjects the employee to unfair labour practices under Article 41 of *the Constitution* of Kenya.
31. On the second issue, counsel submits that having proved that the Claimant was constructively dismissed, he was entitled to the reliefs sought.
32. The claimant urges the court to allow the claim as prayed.

Respondent’s submissions

33. The Respondents’ counsel highlighted the following issues for determination;
 - i. Whether the 1st Respondent issued a Certificate of Service dated 31st December, 2017.
 - ii. Whether the parties entered into a mutual separation agreement effective 30th April, 2018.
 - iii. How much is due to the Claimant.
 - iv. Misjoinder of the 2nd Respondent.
 - v. Costs and the absence of a demand letter.
34. On the first issue, counsel submits that the Claimant was issued with a certificate of service dated 31st December, 2017 which had not been disputed.
35. Counsel relied on the holding in *Wokabi v British American Tobacco Kenya Limited* ([2022] KEELRC 12694) where the court held that the mutual separation agreement signed by the employee and the issuance of a certificate of service were binding and precluded further claims by the employee. This case establishes that once a Certificate of Service is issued and acknowledged, it is conclusive evidence of the termination and settlement of employment relations.
36. On the second issue, counsel submits that a mutual separation agreement was entered into between the Claimant and the 1st Respondent on the 30th April, 2018 which agreement terminated the employment relationship.
37. Reliance was made on the decision in *Kamau V Tusker Mattresses Limited* ([2022] KEELRC 12788) where the court emphasized that mutual separation agreements are binding and conclusive unless there is evidence of coercion or duress. The court found that the employee’s acceptance of the terms constituted a full and final settlement of all claims related to employment
38. On the third issue, counsel submits that the only outstanding payment due to the Claimant was Kshs.223,740/= agreed upon during the mutual separation agreement out of which the Claimant acknowledged receipt of Kshs.55,000/= and therefore, the amount outstanding is Kshs.168,740/=.
39. Reliance was made on the Court of Appeal decisions in *Coastal Bottlers Ltd V Kimathi Mithika* ([2018] eKLR) and *Thomas De La Rue (K) Ltd V David Opondo Omutelema* ([2013] eKLR) on the binding nature of mutual separation agreements, to urge that once an employee signs a settlement agreement, he/she waives the right to pursue further claims against the employer unless the settlement agreement is vitiated by duress, misrepresentation, mistake or undue influence.
40. On the fourth issue, counsel submits that the 2nd Respondent was improperly joined to the suit as there was no contractual relationship between the Claimant and the 2nd Respondent.



41. On the fifth issue, the respondent denies having been issued with a demand and intention to sue. The respondent further submits that the litigation was unnecessary as there is an underlying mutual separation agreement. The Respondent submits that costs should not be awarded to the claimant.
42. Reliance was made on Civil Appeal No. 84 of 2011 (Stanley Kaunga Nkarichia V Meru Teachers College & another) where the court held that the absence of a demand letter can be a factor in denying costs and the principle that costs should follow the event can be departed from when there is impropriety by the successful party.
43. It is the Respondents' submission that the only amount the Claimant is entitled to is Kshs.168,740/= being the balance agreed upon in the separation agreement.

Analysis and determination

44. The issues for determination are;
 - i. Whether the Claimant was constructively dismissed or parties entered into a mutual separation agreement.
 - ii. Whether the Claimant is entitled to the relief's sought.
45. It is common ground that the Respondent engaged the Claimant through the agreement dated 16th May, 2017 as a consulting director earning Kshs.150,000/= per month.
46. What is in dispute is how the relationship between the Claimant and the Respondent came to an end.
47. The Claimant submits that he was constructively dismissed by the Respondent as he was subjected to harsh working conditions where he was not paid his salary from December 2017 to April 2018.
48. The Respondent, on the other hand submits that the employment relationship ended by a mutual agreement. That the parties entered into a disengagement agreement, computation of monies owed done and the Claimant was issued with a certificate of service dated 31st December, 2017.
49. The locus classicus rendition of the principle of constructive dismissal are the celebrated words of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp (1978) QB 761* 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 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”.
50. The principle of constructive dismissal was domesticated in Kenya by the Court of Appeal in *Coca cola East and Central Africa Ltd v Maria Kagai Ligaga (2015) eKLR* where the Court adopted the contractual approach test of constructive dismissal and formulated the guiding principles applicable in determining constructive dismissal which include; the fundamental or essential terms of the contract of employment, whether there is repudiatory breach, whether the conduct of the employer



is fundamental and goes to the root of the contract, causal link between the employers conduct and termination of contract, employers conduct was effective cause whether or not the notice is given, employee must not have accepted or waived or acquiesced or conducted himself as to be estopped from asserting the repudiatory breach and burden of proof is borne by the employee.

51. The court is guided by the above principles in determining whether the Claimant was constructively dismissed.
52. Regrettably, the Claimant tendered no verifiable evidence as to when he resigned and why and as the parties cannot agree as to when he left and did not file or serve a demand letter, the argument that he was constructively dismissed by the Respondent is unsubstantiated.
53. In the instant case the Claimant testified that non-payment of salary from December 2017 to April 2018 was the proximate cause of his frustration that led to resignation.
54. The Respondent on the other hand maintains that there was a mutual agreement to terminate the employment relationship and a certificate of service was issued.
55. Regrettably, the disengagement agreement has not been adduced as evidence by the Respondent. However, the Respondent adduced as evidence a set of emails between the Claimant and one Anabell, the 2nd Respondent where the Claimant was following up on payment.
56. The email dated 8th September, 2020 contains a computation of full and final settlement that contains the salaries for the month of December 2017 and January 2018.
57. The Claimant also adduced evidence of a similar set of emails. The email dated 8th October, 2019 reads in part “I know the assignments I handled and they have the laptop. I completed the clearance form and signed the form that detailed the amount that is owed to me . . .”
58. In *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR, the Court of Appeal cited its holding in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR as follows:-

“ . . . it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the [Employment Act](#) and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”
59. From the communication on record, it is evident that the Claimant was following up on the payment of final dues which would appear to suggest that the employment relationship had ended.
60. In *Damondar Jihabhai & Co Ltd & Another v Eustace Sisal Estates Ltd* 1967 EA 153 at p 156

“ The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - *Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others* – Lord Justice Beatson stated as follows:

“Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”
61. As regards resignation, neither party adduced evidence of the alleged resignation in April 2018. However, the Respondents’ computation of final dues form mentions NSSF and dues from December to January 2018 and identifies January 31st 2018 as the last date of the Claimant’s employment.



62. It is unclear to the Court why the form mentions January – April 2018, although no amount was due as NHIF.
63. The Claimant adduced no evidence of having demanded or claimed the alleged salary of February, March and April 2018 or date of the alleged resignation.
64. By email dated 9th July, 2018 at 13.53 pm, the Claimant is following up on the December 2017 salary and the salary for January 2018 was due at the end of October 2018.
65. Finally, the draft payment computation forwarded to the Claimant vide email dated 19th July, 2018 is for 2 months only and the Claimant did not contest the same.
66. From the email communication, the only amount due to the Claimant was Kshs.223,740/= for December 2017 and January 2018, less Kshs.55,000/=, the Claimant acknowledged. The total sum due is Kshs.168,740/=
67. From the evidence on record, the Court is not persuaded that the separation was accrimonious and may have been mutual as contended by the Respondent, which would explain the Claimant's acceptance of part payment of Kshs.55,000.00 and the only sum outstanding is Kshs.168,740.00 which the Respondent has taken too long to pay and it is merited.
68. The totality of the evidence adduced by the parties is that the Claimant has failed to demonstrate that he was constructively dismissed by the Respondent.

Reliefs

- a. Kshs.695,000/=
69. The Claimant tendered no evidence to prove that the sum of Kshs.695,000.00 was owed by the Respondent and the prayer is declined.
70. The Claimant is however awarded Kshs.168,740/=.
- b. The prayer for piercing of the 1st Respondent's corporate veil or shell was unsubstantiated as no evidence was adduced to prove that the Claimant's case fell within the exception of the Rule in *Salomon V Salomon & Co. Ltd (1892) A.C 22*.
- c. Entitlement to the remedies of mandatory injunction, punitive damages of Kshs.1,000,000.00 and general damages was not demonstrated and the prayers are dismissed.
- d. Certificate of service
71. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#).
72. In the upshot, the Claimant's case against the Respondent is dismissed for want of proof save for;
 - a. Kshs.168,740/= with interest from date of filing till payment in full.
 - b. Certificate of service.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 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

