



**Wambugu v Foresight Ventures Limited (Cause 742 of 2019)  
[2024] KEELRC 2515 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2515 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 742 OF 2019  
L NDOLO, J  
OCTOBER 17, 2024**

**BETWEEN**

**MUCHIRI KARARI WAMBUGU ..... CLAIMANT**

**AND**

**FORESIGHT VENTURES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This dispute arises from an employment contract between the Claimant and the Respondent, dated 11<sup>th</sup> May 2018. The Claimant states his claim in a Memorandum of Claim dated 5<sup>th</sup> November 2019 and the Respondent's defence is contained in a Memorandum of Response dated 15<sup>th</sup> March 2020.
2. The matter went to full trial where the Claimant testified on his own behalf, with the Respondent calling Samuel Gathungu Wanjohi. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was engaged by the Respondent as a Consultant, in the role of Acting Managing Director, at a monthly salary of Kshs. 400,000. He claims that he was required to perform the consultancy until 31<sup>st</sup> August 2018, after which he would transition to permanent employment as Managing Director in a company known as Popote Payments Limited, at a monthly salary of Kshs. 1,250,000.
4. According to the Claimant, he performed his duties as Acting Managing Director during the consultancy period running from 14<sup>th</sup> May to August 2018, upon which his employment transitioned into permanent employment as Managing Director of Popote Payments Limited, effective 1<sup>st</sup> September 2018. The Claimant accuses the Respondent of failure to execute the contract of employment, containing the terms and conditions of his employment.



5. The Claimant claims that from 1<sup>st</sup> September 2018, his monthly salary ought to have been Kshs. 1,250,000 in addition to Kshs. 20,000 per week for fuel, data and airtime. The Claimant however states that he was paid only Kshs. 400,000 until 31<sup>st</sup> January 2019, Kshs. 300,000 in February 2019 and Kshs. 250,000 in March 2019.
6. The Claimant avers that he had raised the issue of underpayment with the Respondent's Director and CEO, who gave him verbal assurances that the issue would be resolved. The Claimant states that these assurances were not honoured leaving him with no option but to tender his resignation vide letter dated 26<sup>th</sup> June 2019.
7. The Claimant lays a claim of constructive dismissal and therefore claims the following:
  - a. 12 months' salary in compensation;
  - b. Kshs. 9,950,000 being underpayment from 1<sup>st</sup> September 2018 to 30<sup>th</sup> June 2019;
  - c. Kshs. 500,000 being unpaid allowances;
  - d. Costs plus interest.

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

8. In its Memorandum of Response dated 15<sup>th</sup> March 2020, the Respondent denies the existence of any employment relationship between itself and the Claimant. The Respondent claims that the Claimant was engaged as a consultant and asserts that this Court lacks jurisdiction to hear and determine the claim.
9. The Respondent further denies the allegation that the Claimant was required to perform the consultancy until 31<sup>st</sup> August 2018, after which he would transition to permanent employment. The Respondent states that permanent employment was merely a possibility contingent upon success of the consultancy, which the Claimant failed to achieve.
10. The Respondent accuses the Claimant of poor performance during the consultancy, particulars being:
  - a. Failure to generate revenue in line with set targets;
  - b. Failure to grow customer base in line with set targets;
  - c. Failure to provide periodic reports in the prescribed times and format;
  - d. Failure to improve operations and efficiency and/or develop and implement procedures aimed at achieving efficiency.
11. The Respondent reiterates that the Claimant's employment was not automatic upon the expiry of the consultancy but was predicated on success of the consultancy, by meeting set targets. The Respondent avers that the Claimant was duly informed through emails and in meetings held with management that he had failed to execute his roles and functions under the consultancy.
12. The Respondent adds that in April 2019, the Claimant was notified of the intention to vary the terms of his consultancy, by changing the role to brand ambassador. The Claimant is said to have declined the varied terms and therefore tendered his resignation.

### **Findings and Determination**

13. There are three (3) issues for determination in this case:



- a. Whether there was an employment relationship between the Claimant and the Respondent;
- b. Whether the Claimant has made out a case of constructive dismissal;
- c. Whether the Claimant is entitled to the remedies sought.

### **Employment Relationship?**

14. The Respondent's line of defence is that there was no employment relationship between the parties in the dispute. In pursuing this line, the Respondent claims that the Claimant's engagement was on the basis of a consultancy agreement, which did not fall within an employment contract as defined in law. On his part, the Claimant argues that although he was referred to as a consultant, he was in fact an employee.
15. Section 2 of the [Employment Act](#) defines an employee as 'a person employed for wages or salary and includes an apprentice and indentured learner.' The same provision defines an employer as 'any person, public body, firm or corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.'
16. Black's Law Dictionary (Eight Edition) defines an employee as:

'A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.'
17. It is common cause that the Claimant was employed in the position of Acting Managing Director and that he was required to report to the Chief Executive Officer. In his final submissions dated 29<sup>th</sup> May 2024, the Claimant cited the decision in *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] EKLRC where Rika J in holding that the existence of an employment contract is to be discerned from the conduct of the parties, not merely the terms used in the contract, stated thus:

"It was not necessary that the words 'employer' and 'employee' be expressed on the face of the agreements, for them to be valid employment contracts...Consultancies/independent contracts are based on the periphery of the employer's business. They are not integral to the business."
18. In the present case, the Claimant was employed in the central position of Managing Director, albeit in an acting capacity. In this capacity, the Claimant was at the centre of the Respondent's core business and it cannot be said that his role was peripheral.
19. It seems to me therefore that the relationship between the Claimant and the Respondent was one of employer/employee and the fact that the contract was termed as a consultancy agreement did not alter this reality. The answer to the question whether there was an employment relationship between the parties is therefore in the affirmative.



## Constructive Dismissal?

20. The next question is whether the Claimant has made out a case of constructive dismissal. Constructive dismissal was defined in *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR in the following terms:
- “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 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.”
21. In its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following principles in determining 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.
22. From the evidence on record, it is clear that the Claimant’s initial engagement was intended to transition into the position of Managing Director of Popote Payments Ltd, a company associated with the Respondent. It is however evident that the Respondent raised concerns regarding the Claimant’s performance in his initial role and on 3<sup>rd</sup> March 2019, the Claimant was offered the role of brand ambassador, which he declined.
23. The Claimant therefore left the Respondent’s employment pursuant to variation of the terms of his engagement. Section 10(5) of the *Employment Act* recognises that employment terms may be varied subject to notification to the affected employee. This position was well articulated by Rika J



in Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Ashari Education Board t/a Jaffrey Academy [2020] eKLR as follows:

“Section 10[5] does not require that there is agreement in revision of contract, between an Employer and an Employee...It states, “Where any matter stipulated in subsection [1] changes, the Employer shall, in consultation with the Employee, revise the contract to reflect the change and notify the Employee in writing.” The provision does not require, that consultation ends up in agreement. All that the Employer is required to do, in changing terms of the contract, is to consult the Employee; revise the contract to reflect the change; and notify the Employee about the change. The word ‘agreement’ does not feature in Section 10(1) of the *Employment Act*. There would be no requirement for notification, if agreement has already been reached. The Employee is free to take the revised contract, or reject it. It is not correct that if the Employee declines the revised terms, termination would invariably amount to constructive dismissal.”

24. I do not need to say more; the Claimant having declined to take up the new position offered by the Respondent, cannot lay a claim of constructive dismissal.
25. The result is that the Claimant’s entire claim fails and is dismissed with an order that each party will bear their own costs.
26. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mogire for the Claimant

Mr. Gitahi h/b for Mr. Juma for the Respondent

