



**Achieng' v Africa Diatomite Industries Limited & another (Employment and Labour Relations Cause 13 of 2020) [2023] KEELRC 293 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 293 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 13 OF 2020  
DN NDERITU, J  
FEBRUARY 2, 2023**

**BETWEEN**

**EDWARD MUSEBE ACHIENG' ..... CLAIMANT**

**AND**

**SOVEREIGN GROUP LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AFRICA DIATOMITE INDUSTRIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**I Introduction**

1. In a Statement of Claim dated March 6, 2020 and filed in court on March 12, 2020 through Saring'i Momanyi & Co Advocates the claimant prays for orders that -
  - a. The Respondents' dismissal of the Claimant was unfair and unlawful thus amounted to wrongful dismissal and unfair termination
  - b. Payment of the Claimant's terminal benefits amounting to Kshs 10,876,923.05.
  - c. The Respondents to pay costs of this suit.
  - d. Interest (b) above.
2. The claimed sum of Kshs 10,876,923.05 is made up as follows –

Claims Arrangement

  - a. Unpaid Salary - Kshs 800,000/=
  - b. Unpaid Wages - Kshs 123,076.90/=
  - c. Unpaid Leave - Kshs 2,153,846.15/=



- d. Gratuity Pay - Kshs 600,000/=
  - e. Unpaid Housing Allowance - Kshs 7,200,000/=
- Total amount due Kshs 10,876.923.05/=
3. Together with the statement of claim was filed a statement by the Claimant and a bundle of documents in support of the claim.
  4. On June 30, 2020 the Respondents through Ogembo & Associates entered appearance and filed a joint defence to the claim. In their defence the Respondents pray that the Claimant's cause be dismissed with costs for want of merits.
  5. The Respondents also filed a bundle of documents and witness statements.
  6. Vide a notice of motion dated August 20, 2020 filed in court on August 31, 2020 the Claimant sought leave to amend the memorandum of claim as per draft amended memorandum of claim that was attached to the said application.
  7. On April 22, 2021 when the said application came up in court for hearing Counsel for the Respondents informed the court that they were not opposed to the application and the same was allowed. However, the Claimant did not file an amended memorandum of claim after obtaining leave through the said application. The court shall address this issue in a later part of this judgment.
  8. This cause came up in court for hearing on May 24, 2022 when the Claimant (CW1) testified and closed his case. The defence was also heard on the same day when Dominic K Tallam (RW1) testified and the Respondents' case was closed as well.
  9. Counsel for the parties addressed the court and summed up their respective client's case by way of written submissions. Counsel for the Claimant filed written submissions on June 14, 2022 while Counsel for the Respondent filed on July 13, 2022.
  10. It is important to note that other than that the 2<sup>nd</sup> Respondent owns the 1<sup>st</sup> Respondent there is no single claim against the 2<sup>nd</sup> Respondent and the orders sought are not pleaded jointly and severally against both Respondents. The Claimant prays for judgment against the Respondent, ostensibly the 1<sup>st</sup> Respondent, not against the two Respondents.

## **II. Claimant's Case**

11. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, and the same is summed up as hereunder.
12. As noted in the preceding part of this judgment the Claimant sought for and was granted leave to amend the memorandum of claim. However, the Claimant never filed an amended memorandum of claim on record and what is on record is the original memorandum of claim as spelt out above. The draft amended memorandum of claim that was attached to the affidavit in support of the application for leave to amend cannot stand in for an amended memorandum of claim. The same is undated and unsigned and is hence not a proper pleading.
13. While Counsel for the Respondents ably submitted on the foregoing issue of the Claimant's failure to file an amended memorandum of claim after obtaining leave, the Counsel for the Claimant did not comment on the same. This court is in concurrence with Counsel for the Respondents that in the foregoing circumstances this court can only consider this cause on the basis of the original



memorandum of claim dated March 6, 2020 and filed in court on March 12, 2020 and the court shall proceed as such.

14. The Claimant's case is that he was employed and worked for the 1<sup>st</sup> Respondent which is owned and or is a subsidiary of the 2<sup>nd</sup> Respondent. Both Respondents are limited liability companies duly incorporated under the *Companies Act* (Cap 486).
15. The Claimant was engaged as the General Manager of the 1<sup>st</sup> Respondent based at Gilgil within Nakuru County and reported to the CEO of the 2<sup>nd</sup> Respondent, who was the accounting officer for both Respondents. A contract dated February 1, 2018 was availed and produced by both sides as an exhibit.
16. Vide a letter dated May 4, 2019 the Claimant resigned and left the employment of the 1<sup>st</sup> Respondent. In his memorandum of claim the Claimant alleges that the working environment had become intolerable and unbearable and as such he had no option other than resignation. His resignation letter was received and acknowledged by the Respondent and his resignation was accepted.
17. Subsequently, the Claimant prepared and handed in a report as he finally bowed out. However, the Claimant pleads that he was not paid his terminal dues and that the Respondents have failed, refused, and or neglected to settle the same hence his filing of this cause.
18. The Claimant states that as at the time of his resignation he was on a monthly salary of Kshs 800,000/- and that his resignation was as result of the Respondents making the working environment unbearable for him and hence he argues that he was constructively terminated.
19. In his testimony in court the Claimant stated that he was first engaged by the 1<sup>st</sup> Respondent in 2015 under a contract that expired in 2018. He entered into a new contract dated January 31, 2018. The said contract was to run for three years commencing on February 1, 2018.
20. However, in December, 2018 the Claimant received a letter from the Chairman of the Respondents to show cause why disciplinary action should not be taken against him for engaging in other gainful employment as a part-time lecturer and as chair of the Board of Kenya Broadcasting Corporation (KBC).
21. The Claimant testified that the above engagements were not in conflict with his employment with the Respondents in that he engaged in the said functions during his free time and more so over the weekends. In any event, the Claimant testified that his said engagements were not in conflict with his employment with the Respondents and that he had disclosed the same to the Respondents right from the beginning of their employment relationship. The Claimant responded to the show cause letter along the premises of the foregoing.
22. It is clear that at that point the issue about the other engagements by the Claimant had become a disciplinary issue and a number of correspondences were exchanged between the employer and the employee. The Claimant states that he at that point decided to consult some human resources (HR) experts who advised him to resign as he did through his letter dated February 4, 2019.
23. The Claimant testified that he agreed to serve the notice period of three months and that he officially left the employment on May 3, 2019 after handing over to the incoming general manager of the 1<sup>st</sup> Respondent.
24. The Claimant testified that he was not paid salary for the month of April and for the days worked in May, gratuity for the first and second contracts, and other dues as claimed for in the memorandum of claim.



25. In cross-examination the Claimant categorically stated that he had resigned and that is why he was not seeking compensation for unlawful or unfair termination or dismissal. He stated that he sued the Respondents jointly as the 2<sup>nd</sup> Respondent was the owner of the 1<sup>st</sup> Respondent. But he admitted that he worked for the 1<sup>st</sup> Respondent.
26. He admitted that house allowance was only payable if the contract expressly so stated and in accordance with the applicable human resources and policies manual. He also admitted that he did not include house allowance as one of the terminal dues that he was demanding in his initial demand notices, including one by his lawyers dated July 23, 2019.
27. The Claimant admitted that he had at no time claimed house allowance or leave days, either after expiry of his first contract in 2018 or upon resignation during his second contract. He admitted that in his letter of June 10, 2019 he had demanded for four leave days subject to confirmation by the HR department.
28. He testified that he was not given a clearance form upon exit and in any event, he gave a handing over report upon exit. He testified that he was not served with a dismissal or termination letter.
29. The Claimant admitted that he did not cite the reason for his resignation in the letter of resignation alluded to above. He stated that he decided to exercise his right to resign as provided for under the contract.
30. In re-examination the Claimant alleged that he decided to be gentle in his resignation letter and that is why he did not disclose his reason(s) therefor. He alleged that his resignation was not voluntary but that he was forced out.
31. When questioned by the court the Claimant stated that he resigned because he was bound to be dismissed anyway and hence he resigned to avoid losing his terminal dues.
32. It is on the basis of the foregoing that the Claimant prays as per the memorandum of claim as set out in the introductory part of this judgment.

### **III. Respondents' Case**

33. The Respondents' case is contained in the response to the claim, the oral and documentary evidence adduced through RW1 and the written submissions by Counsel, as summarized hereunder.
34. For record, the Respondents raised a joint defence to the claim dated June 30, 2020 filed on even date and then filed an amended statement of defence dated July 13, 2021 on July 14, 2021. However, as noted in the preceding part of this judgment the Claimant never filed an amended memorandum of claim after obtaining leave to do so. The import of the foregoing is that the purported amended statement of defence is improperly on record as the same was filed without leave of court and in response to an amended memorandum of claim that was never filed on record. This court shall therefore consider the original statement of defence to be the one properly on record.
35. The Respondent admits the facts on the contract between the parties but denies that the Claimant was constructively dismissed or terminated and states that the Claimant resigned voluntarily as per the unambiguous letter of resignation alluded to in the foregoing paragraphs.
36. In the circumstances, the Respondents deny each and every claim by the Claimant and pray that this cause be dismissed with costs for want of merit.



37. The evidence on behalf of the Respondents was presented to court by RW1 the HR officer of the 1<sup>st</sup> Respondent. He confirmed that the 2<sup>nd</sup> Respondent owns the 1<sup>st</sup> Respondent and that the former allegedly makes policies for the later.
38. RW1 testified that the Claimant was issued with a show cause dated December 20, 2018 and he responded to it but then resigned before the intimated disciplinary process was concluded. He stated that he is not aware of the reason for the Claimant's resignation as none was indicated in the resignation letter. He stated that the Claimant did not clear with the 1<sup>st</sup> Respondent after resignation and hence his dues could not be processed and paid.
39. RW1 produced records showing that the Claimant took all his leave days except for 0.5 days. He testified that had the Claimant followed the due process and cleared as expected his dues would have been paid long ago.
40. It is on the basis of the foregoing that the Respondents pray that the Claimant's cause be dismissed with costs.

#### **IV. Issues For Determination**

41. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and written submissions by Counsel for both sides and the court identifies the following issues for determination –
  - a. Did the Claimant voluntarily resign from the employment of the 1<sup>st</sup> Respondent or was he constructively terminated or dismissed?
  - b. If the Claimant was terminated or dismissed, was the said termination or dismissal of the Claimant by the 1<sup>st</sup> Respondent unfair and unlawful?
  - c. Is the Claimant entitled to the reliefs sought in the claim?
  - d. Who meets the costs in this cause?

#### **V. Resignation Or Termination/dismissal?**

42. The terms and conditions of employment of the Claimant by the 1<sup>st</sup> Respondent are not really in dispute. As at the time of authoring the resignation letter dated February 4, 2019 the Claimant was on his second contract of employment with the 1<sup>st</sup> Respondent as the general manager of the 1<sup>st</sup> Respondent at a monthly salary of Kshs 800,000/-.
43. On December 20, 2018 the Claimant had been issued with a letter to show cause why disciplinary action should not be taken against him for engaging in other gainful employment which the employer felt was not in consonance with the Claimant's good performance and dedication to his duties as the general manager. The employer held the view that the said engagements were in conflict with the interests of the employer.
44. It is not in dispute that the Claimant then resigned before the disciplinary process was concluded and his resignation was accepted by the employer, but the parties agreed that the Claimant was to serve for the notice period of three months with full pay.
45. In his letter of resignation, the Claimant addressed as follows –

' Eng Edward Musebe Achieng,



PO Box 10051,00200,

NAIROBI.

Musebe xxxx@gmail.com

February 4, 2019.

Mr Joshua Kulei,

Sovereign Group of Company,

PO Box 45657,00100,

NAIROBI.

Dear Mr Kulei,

REF: Resignation As A general Manager African Diatomite Company Limited

Please accept this letter as my formal resignation from my role as General Manager at African Diatomite Industries Limited. My last day with African Diatomite Industries Limited will be May 4, 2019.

Thank you for the support and the opportunities you have provided me over the course of the last four (4) years. You and our ADIL team have created a climate that makes it a pleasure to come to work at African Diatomite Limited each morning.

To ease the transition after my departure, I will be happy to assist you, if required, with finding my replacement and carrying out the induction. Please let me know.

I wish you the best as you plan to implement the turn-round strategy at African Diatomite Industries Limited.

Yours sincerely,

**Eng Edward Musebe Achieng.'**

46. As can be discerned from the tone and the wording of this letter, the resignation was cordial and friendly. No bitterness or regrets were expressed in the letter. Notably, no reason(s) was given for the resignation.
47. It is in the foregoing background that the Claimant set in motion his departure from the employment of the 1<sup>st</sup> Respondent. In fact, by mutual agreement, as stated above, the Claimant worked through the notice period of three months until May 3, 2019 when he left employment. In the letter of acceptance of the resignation dated February 27, 2019 the chairman of the Respondents thanked the Claimant for service rendered and wished him well in his future endeavors.
48. Counsel for the Claimant has submitted that the Claimant was constructively dismissed and relied on the decision of the Court of Appeal in *George Onyango Akuti V Security Services Kenya Limited (2013) eKLR* and *Joseph Aleper & Another V Lodwar Water and Sanitation Company Limited (2015) eKLR* in setting out the circumstances under which constructive dismissal may be established.
49. On the other hand, Counsel for the Respondents has cited *Ghadhi & Another V Ruda (1986) KLR 556* in demonstrating that the Claimant voluntarily resigned from employment. Counsel has also cited *Milton M Isanya V Aga Khan Hospital Kisumu (2017) eKLR*, *Martha Wangari Kariuki V Muli Musyoka & Another (2021) eKLR*, and *Bernard Muriuki Gikandi V Kenya Wildlife Service (2022)*



eKLR in his argument that the evidence on record clearly and logically demonstrates that the Claimant voluntarily resigned from employment.

50. Now, the Claimant is an educated individual, a professional engineer, and a lecturer. He is certainly an enlightened modern citizen of the world who understands or ought to understand his basic constitutional and legal rights very well. If the Claimant felt that his resignation had been ignited by the harsh and unbearable working environment created by the employer, nothing would have been easier than for him to state exactly that in his letter of resignation. The Claimant was under no legal or moral obligation or duty to please and or spare the employer by sugar-coating and failing to disclose the reason(s) for his resignation. The Claimant was not under duress or even pressure from anyone to resign and had no excuse for failing to state the reason(s) therefor.
51. If the Claimant resigned to pre-empt the disciplinary process that had commenced, then the resignation was voluntary and certainly premeditated. If the pending disciplinary proceedings is what the Claimant deemed to have amounted to the unbearable or intolerable working environment that the Claimant alluded to in his testimony, then the Claimant completely messed up the situation through his cowardly and miscalculated move.
52. The Claimant testified that he consulted some HR experts and weighed his options and then decided to resign. He did not avail any evidence that the employer had a pre-determined mind to terminate or dismiss him.
53. For the foregoing reasons this court arrives at the inevitable conclusion that the Claimant voluntarily and of free will resigned from the employment of the 1<sup>st</sup> Respondent and attached no reason(s) therefor. The allegation that he resigned due to the unbearable working environment that had been created by the employer is without any basis, an afterthought, and only intended to mislead this alert court. The situation is hereby arrested through a declaration that the Claimant voluntarily and willfully resigned from the employment of the 1<sup>st</sup> Respondent. This court is in concurrence with the able arguments advanced by Counsel for the Respondents on this issue.
54. The foregoing holding resolves issues (a) and (b) in the list of issues identified for determination.

## **VI. Reliefs**

55. Having held that the Claimant willingly and voluntarily resigned from employment, this court shall now consider each of the reliefs sought by the Claimant as set out in the introductory part of this judgment.
56. Prayer (a) is for a declaration that the Claimant was unfairly and unlawfully terminated and or dismissed. In the foregoing part of this judgment this court has found that the Claimant was neither dismissed nor terminated but rather willingly and voluntarily resigned. It is so declared and hence this prayer is denied.
57. In prayer (b) the Claimant has prayed for various liquidated sums totaling to Kshs 10,876,923.05 as tabulated in the claims arrangement. The first item is for unpaid salary for the month of April, 2018. This claim is not denied and the same is granted as prayed in the sum of Kshs 800,000/-. The other sum claimed is Kshs 123,076.90 for days worked in May, 2019. The Claimant worked for three days in May, 2019 and based on the monthly pay of Kshs 800,000/- the pay for three days amounts to Kshs 80,000/- and the same is awarded.
58. The other item under this head is unpaid leave in the sum of Kshs 2,153,846.15. RW1 availed evidence based on records to the effect that the Claimant had a balance of 0.5 leave days. It is clear from evidence that the Claimant was not sure how many leave days he was owed from the word go. He at first claimed



- four days in his letters dated 10<sup>th</sup> and June 17, 2019 subject to confirmation by HR, only to turn around and make this huge claim on this item in the memorandum of claim. This court is persuaded by the evidence from the Respondents based on the records availed and the Claimant is only entitled to 0.5 days in unpaid leave days earned. The court awards Kshs 13,333/- for this item.
59. On gratuity the Claimant prayed for Kshs 600,000/- and the said sum is admitted by the Respondents as per the submissions by their Counsel and the testimony of RW1. The Claimant is awarded the sum of Kshs 600,000/- as pleaded.
  60. The last item is housing allowance in the sum of Kshs 7,200,000/-. The basic contract of employment between the Claimant and the Respondents is the agreement dated January 31, 2018. Clause 5.1 of the said agreement provides that the Claimant shall be paid a basic salary of Kshs 800,000/- per month. It does not provide for house allowance. However, clause 21.6 of the agreement provides that 'Other terms and conditions of employment which are not covered by this agreement shall be subject to the Company's policies as may be amended from time to time and the applicable law'.
  61. As noted elsewhere in this judgment, the Claimant was on his second three-year contract when he resigned. He had completed the first contract ostensibly on the same terms and he did not raise the issue of house allowance upon conclusion of the first contract. Likewise, he had not raised the issue over one year into the second contract. He only raised the issue in this cause as he had not raised the same in his letters to the Respondents dated 10<sup>th</sup> and June 17, 2019. The claim on house allowance was as well not raised in the demand letter by Claimant's Counsel dated February 27, 2020. Clearly, the claim on house allowance is an afterthought by the Claimant. But nonetheless this court shall interrogate the issue on merit as hereunder.
  62. Counsel for the Claimant has cited [\*Grain Pro Kenya Inc Ltd V Andrew Waitbaka Kiragu \(2019\)eKLR\*](#) in advancing the argument that since the contract failed to provide for house allowance the court ought to award the same under Section 31 of the [\*Employment Act\*](#).
  63. The Respondents' Counsel argues that the Claimant was subject to the 2<sup>nd</sup> Respondent's human resource policy and procedure manual and that clause 8.6.2 thereof provided that the salary package for the Claimant was consolidated to include house allowance unless the contract provided otherwise.
  64. Now, there is no dispute that the 1<sup>st</sup> Respondent is owned by the 2<sup>nd</sup> Respondent. However, there is also no dispute that the two Respondents are distinct legal entities each with its own legal and juridical personality. It would therefore be wrong and erroneous to assume that the policies of one automatically applied to the other.
  65. The contract dated July 31, 2018 is specifically between the Claimant and the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent was not a party thereto. There is no specific term or clause in the contract that stipulates that the HR manual for the 2<sup>nd</sup> Respondent shall apply in the employment contract that was created between the Claimant and the 1<sup>st</sup> Respondent. There is no evidence availed by the Respondents to illustrate that indeed the policies and manuals of the two Respondents applied across and or interchangeably.
  66. In the circumstances, this court comes to the inevitable conclusion that the 1<sup>st</sup> Respondent, as the employer, failed to provide housing to the Claimant and failed to pay house allowance in lieu thereof. This court is therefore legally bound to intervene under Section 31 of the [\*Employment Act\*](#) and remedy the Claimant for the unpaid house allowance.
  67. However, it is important at this juncture for this court to make it clear that the subject matter of this cause is the employment contract between the Claimant and the 1<sup>st</sup> Respondent as contained in the



agreement dated January 31, 2018 as alluded to above. The earlier contract between the parties allegedly running from 2015 to 2018 has not been availed to this court and the court is oblivious of the terms thereof and there is no room for speculation on what those terms were. Therefore, any house allowance payable is only in regard to the contract that was running as at the time of the Claimant's resignation.

68. The Claimant worked for 15 months from February 1, 2018 to May 3, 2019. At 15% of the basic pay of Kshs 800,000/- per month, the house allowance payable for the period worked is Kshs 1,800,000/-. This is the amount that this court shall award in house allowance.
69. Suo moto, this court orders that the Claimant is entitled to be issued with a certificate of service under Section 51 of the Employment Act and the 1<sup>st</sup> Respondent is hereby ordered to issue and deliver to the Claimant such certificate of service within 30 days of this judgment.

## VII. Clearance

70. During the hearing the Respondents advanced the argument that the Claimant had not cleared with the employer for his failure to have a clearance form completed and delivered. The Respondents did not file a counter-claim against the Claimant and the court has not been informed of any cause pending between the parties over anything that the Claimant failed to do before, during, or upon leaving the employment. There is no allegation that he owes anything to the Respondents. It is over four years since the Claimant left the employment and he produced in court a detailed handing-over report that he submitted to the Respondents. What then is the alleged clearance or clearance form intended to achieve?
71. It is in the considered opinion of this court that the Respondents unfairly and unlawfully applied the so-called clearance or clearance form as a scapegoat in unlawfully failing to pay terminal dues to the Claimant. This court holds that the said clearance process is unnecessary and irrelevant in this matter and the same shall not be used by the Respondents to deny payment of dues and awards to the Claimant as ordered in this judgment.

## VIII. Costs

72. Costs follow event and the Claimant is awarded costs of this cause based on the award and orders made.

## IX. Disposal

73. In disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the Claimant willfully and voluntarily resigned from the employment of the 1<sup>st</sup> Respondent.
  - b) However, the Claimant is awarded a total of Kshs 3,293,333/- made up as follows-
    - i. Unpaid salary for April, 2019 Kshs 800,000/-
    - ii. Salary for 3 days worked in May, 2019 Kshs 80,000/-
    - iii. Unpaid leave days Kshs 13, 333/-
    - iv. Gratuity pay Kshs 600,000/-
    - v. House allowance Kshs 1,800,000/-Total Kshs 3,293,333/-
- \*This award is subject to applicable statutory deductions.



- c) The Respondents are ordered to issue and deliver a certificate of service to the Claimant within 30 days of this judgment.
- d) All the other claims are denied for the reasons detailed in the judgment.
- e) The Claimant is awarded costs in this cause.

**DATED, DELIVERED VIRTUALLY, AND SIGNED, AT NAKURU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

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**DAVID NDERITU**

**JUDGE**

