



**M'C Owino v Mac's Pharmaceuticals Limited (Cause E036 of 2021)  
[2023] KEELRC 1791 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1791 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E036 OF 2021**

**B ONGAYA, J**

**JULY 24, 2023**

**BETWEEN**

**DR OGUTU MAURICE M'C OWINO ..... CLAIMANT**

**AND**

**MAC'S PHARMACEUTICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant case and testimony is as follows. He was employed by the respondent on 02.06.1996 to May 2019 when he left. In April 2009 he had been promoted to the General Manager responsible for running the respondent's day to day operations. He had worked for about a year without pay while all other staff were paid as required and expected. He kept asking the Director about his withheld payment but never complained in writing because the Director was already aware. In May 2019 he informed the Director about the failure to pay his salary and that he would not report due to the failure to be paid. The Director told him it was okay. Thus by that Director's acceptance, the claimant left employment in May 2019 and thereafter the Director appointed the accountant to take over as the General Manager for the respondent. The claimant further testified that after he left he was given post-dated cheques in August 2019 to April 2020 with respect to the unpaid salaries and when the cheques kept bouncing he stopped banking them. Thereafter the payment stopped. He exited in May 2019 and later the accountant stopped picking his telephone calls and by email in March 2020 he was advised by the accountant that he would be advised when the payment would continue.
2. The claimant filed the statement of claim dated 08.01.2021 through Adera & Kenyatta Advocates. He prayed for judgment against the respondent for:
  - a. A declaration that the claimant's failure to pay the claimant's outstanding monthly salary arrears for 9 months amounted to unfair constructive termination of the contract of employment.



- b. The claimant to be paid outstanding monthly salary arrears and terminal benefits per paragraph 14 in the sum of Kshs. 5, 427, 500.00.
  - c. The respondent to pay costs of claim.
  - d. Damages for unfair and unlawful constructive termination being 12-months' gross salaries.
  - e. Such further just orders in the circumstances of the case.
  - f. Interest.
  - g. Certificate of service to issue per section 51 of the *Employment Act*, 2007.
3. Paragraph 16 particularised the claims as follows:
- a. One-month salary in lieu of notice Kshs. 150,000.00.
  - b. 9-months' outstanding monthly salaries Kshs. 1, 240, 000.00.
  - c. Service pay at 15 days per year for each of 23 years of service Kshs. 1, 725, 000.00.
  - d. 12-months' salaries compensation Kshs. 1, 800,000.00.
  - e. Outstanding leave allowance at 30% of claimant's monthly salary for 40 years Kshs. 450, 000.00.
  - f. Prorate unpaid leave days for 2019 Kshs. 62, 500.00.
  - g. Certificate of service.
  - h. Total claimed Kshs. 5, 427, 500.00.
4. The statement of response dated 26.02.2021 was filed through Chaudhri & Associates Advocates. The respondent admitted employing the claimant from 02.06.1996 to 20.04.2009 as the Registration/ Technical Sales Representative. On 20.04.2009 he was appointed as the General Manager. The respondent was entitled to terminate the contract without notice on account of gross misconduct. The claimant engaged in gross misconduct namely absenteeism, absconding duty, failure to execute contractual duty to prepare and file SOP's, wilful refusal to comply with lawful instructions and breach of trust. In June after long absenteeism the claimant reported at the office and declared to have resigned and demanded terminal dues. He admitted that he had been engaged to assess pharmaceutical companies in China during the period of his long absence. The parties engaged in a long discussion about the issue and it was agreed they separate upon payment of some gratuitous amount to the claimant's account in consideration of his long service. The claim for constructive termination was therefore denied. The claimant has neglected to collect the certificate of service.
5. The respondent counterclaimed that the claimant failed to file documents as required by the Pharmacy and Poisons Board. The respondent's business was thereby closed down and licence revoked. The respondent send employees on compulsory leave and business clients lost or diverted. The particulars of damage pleaded are lost business, sending innocent employees on unpaid leave, forfeiting commercial clients due to lack of business, and revocation of manufacturing licences. The respondent counterclaimed and prayed for damages for breach of the employment contract and, costs.
6. The claimant filed the reply to response and response to counterclaim dated 16.03.2023. The claimant stated that there was no disciplinary procedure instituted against him with respect to the alleged gross misconduct and sections 41, 43, and 44 of the *Employment Act* were never invoked at all. The claimant repeated allegations of unfair constructive termination. H stated that he performed all his functions as



related to requirements of the Pharmacy and Poisons Board. He prayed the counterclaim be dismissed with costs and his suit allowed.

7. The final submissions were filed for the parties. The respondent's witness (RW) was Meshack Ombati Obonyo, the respondent's Finance and Administration Manager. The Court has considered all the material on record and returns as follows.
8. To answer the 1<sup>st</sup> issue the court returns that the parties are in agreement they were in a contract of service.
9. To answer the 2<sup>nd</sup> issue, the court returns that the parties separated by mutual agreement. The claimant alleges he offered to leave on account of failure to be paid monthly salaries and the respondent accepted that offer. The respondent's account per pleadings and RW is that the claimant admitted to his gross misconduct and in view of his long service parties agreed to separate. Whatever was behind the mutual agreement to separate, it was by consent. The alleged separation did not amount to constructive unfair termination in the circumstances of the case.
10. The 3<sup>rd</sup> issue is whether the claimant is entitled to salary claims as alleged. The respondent's pleaded case is that the claimant had been absent and in gross misconduct so that salaries would not be due for no work done. The respondent's further pleaded account was that the claimant would be paid an undisclosed amount of money to appreciate his long service. The parties separated in May 2019. 12 months from then would be May 2020. However, the suit was filed in January 2021. The Court finds that the alleged unpaid monthly salaries were a continuing injury ceasing in May 2019 and the 12 months of limitation from the cessation thereof as prescribed in section 90 of the *Employment Act* had lapsed when the suit was filed in January 2020. The claim as made for the claimant would collapse. The claim for a month's notice payment is inconsistent with the finding of separation of the parties by mutual agreement. The basis for the claim for service pay has not been pleaded or established by evidence and submissions. Similarly, the claim for outstanding leave and upon the formula as pleaded is not justified at all. The particulars of the prorated leave for 2019 and as related to the unjustified formula for leave claim is found unjustified. The court returns that in any event the respondent has shown that for a considerable period of time the claimant was absent from duty and which is inconsistent with the claimed leave. The respondent has admitted that the claimant is entitled to the certificate of service but had failed to collect it.
11. To answer the 4<sup>th</sup> issue, the court returns that the counterclaim is in the nature of a claim for special damages for alleged breach of the contract of service but the special damage has not been specifically pleaded and then strictly proved. The court finds that the claim for general damages in that regard was misconceived. The Counterclaim will be declined as misconceived and unjustified.
12. The court has considered the parties margins of success and each will bear own costs of the proceedings.  
In conclusion judgment is hereby entered for parties for:
  - a. Dismissal of the claimant's statement of claim and the respondent's counterclaim.
  - b. The respondent to deliver the certificate of service within 30 days from the date of this judgment.
  - c. Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24<sup>TH</sup> JULY, 2023.**

**BYRAM ONGAYA**



**PRINCIPAL JUDGE**

