



**Muia v Chase Bank (Kenya) Limited (In Receivership) & another (Cause 73 of 2015) [2023] KEELRC 2124 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2124 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 73 OF 2015  
L NDOLO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**TERRY NJAGI MUIA ..... CLAIMANT**

**AND**

**CHASE BANK (KENYA) LIMITED (IN RECEIVERSHIP ..... 1<sup>ST</sup> RESPONDENT**

**SBM BANK KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The issue in dispute as stated by the Claimant in her Memorandum of Claim as amended on November 17, 2021, is ‘unfair and un-procedural termination of employment on June 21, 2014 and the 1<sup>st</sup> Respondent’s failure to remit contributions to the Liberty Pension Scheme.’
2. The 1<sup>st</sup> Respondent’s defence is contained in its Reply as amended on May 23, 2022. The 2<sup>nd</sup> Respondent’s line of defence as stated in its Memorandum of Reply dated March 18, 2022, is that it did not have any employment relationship with the Claimant.
3. The matter went to full trial where the Claimant testified on her own behalf. Geoffrey O Nyakundi testified for the 1<sup>st</sup> Respondent and Kevin Kimani testified for the 2<sup>nd</sup> Respondent.

**The Claimant’s Case**

4. In her Memorandum of Claim as amended on November 17, 2021, the Claimant states that she was employed by the 1<sup>st</sup> Respondent on November 24, 2010. She held various positions, culminating with her final posting as Relationship Officer-Money Transfer.
5. The Claimant claims to have had a clean employment record until June 21, 2014, when the 1<sup>st</sup> Respondent’s Officer allegedly coerced her to resign. The Claimant accuses the 1<sup>st</sup> Respondent of covert hostility, which forced her to resign from employment.



6. The Claimant further accuses the 1<sup>st</sup> Respondent of failing to enrol her to its Pension Scheme upon her confirmation. The Claimant states that she did not join the Pension Scheme until April 1, 2014.
7. The Claimant avers that sometime in February 2016, the Central Bank of Kenya placed the 1<sup>st</sup> Respondent under receivership, which action caused the 1<sup>st</sup> Respondent to lose control over its assets and liabilities.
8. The Claimant adds that *vide* a press release dated January 5, 2018, the Central Bank of Kenya accepted a binding offer by the 2<sup>nd</sup> Respondent for the acquisition of the 1<sup>st</sup> Respondent, by which the 2<sup>nd</sup> Respondent would acquire 75% of the value of the deposits under moratorium while the 1<sup>st</sup> Respondent would retain 25% of the value of the moratorium deposits. According to the Claimant, the 2<sup>nd</sup> Respondent would also take over staff and branch operations transferred from the 1<sup>st</sup> Respondent.
9. The Claimant seeks the following remedies:
  - a. A declaration that the termination of her employment by the 1<sup>st</sup> Respondent was unfair, un-procedural and in breach of her contract of employment;
  - b. A declaration that the Respondents' failure to remit pension was in breach of the employer's obligations and contract of employment;
  - c. 12 months' salary in compensation;
  - d. An order directing the Respondents to remit the total pension contributions in arrears tabulated from 1<sup>st</sup> April 2012;
  - e. Costs plus interest.

### **The Respondents' Case**

10. In its Reply as amended on May 23, 2022, the 1<sup>st</sup> Respondent confirms that the Claimant was its employee before its placement under receivership. The 1<sup>st</sup> Respondent adds that the Claimant held various positions from November 24, 2020 to July 24, 2014.
11. The 1<sup>st</sup> Respondent denies the Claimant's claim that her employment was unfairly or un-procedurally terminated.
12. The 1<sup>st</sup> Respondent further denies that it breached the Claimant's employment contract by failing to remit her pension contributions.
13. The 1<sup>st</sup> Respondent concedes that the Claimant served with diligence and dedication thus receiving various bonuses, salary reviews and promotions.
14. The 1<sup>st</sup> Respondent denies the allegation that the Claimant was coerced to resign and asserts that the Claimant resigned of her own volition, upon which she was released and paid all her dues. She was also issued with a Certificate of Service.
15. The 1<sup>st</sup> Respondent admits that the Claimant was to be enrolled into its Pension Scheme upon confirmation as per the contract of employment dated November 23, 2010. However, due to an unprecedented oversight, the pension contributions were not remitted between March 26, 2012 and April 1, 2014.
16. The 1<sup>st</sup> Respondent states that having only learnt of the anomaly through the Claimant's claim, it had since remedied the situation by remitting the total pension contributions due to the Claimant, inclusive of interest, to the Pension Scheme.



17. In its Memorandum of Reply dated March 18, 2022, the 2<sup>nd</sup> Respondent states that there was never an employer-employee relationship between itself and the Claimant.
18. The 2<sup>nd</sup> Respondent therefore challenges the jurisdiction of this Court to entertain the Claimant's claim against it. The 2<sup>nd</sup> Respondent adds that the Claimant's Memorandum of Claim does not disclose any cause of action against it.
19. The 2<sup>nd</sup> Respondent maintains that it was not privy to the employment relationship between the Claimant and the 1<sup>st</sup> Respondent.
20. The 2<sup>nd</sup> Respondent concedes that it acquired the following assets from the Receiver of the 1<sup>st</sup> Respondent:
  - a. 75% of the value of deposits that were under moratorium at the time the 1<sup>st</sup> Respondent was placed under receivership;
  - b. Transfer of staff and branches of the 1<sup>st</sup> Respondent's operations.
21. The 2<sup>nd</sup> Respondent asserts that it never took up any of the 1<sup>st</sup> Respondent's liabilities.
22. It is the 2<sup>nd</sup> Respondent's case that it is not liable for any loss to the Claimant and any award in this case can only be made against the liquidators of the 1<sup>st</sup> Respondent, with the Claimant ranking as an unsecured creditor in the hierarchy of creditors.
23. The 2<sup>nd</sup> Respondent challenges the jurisdiction of the Court to deal with the claim for pension which it states is a preserve of the Retirement Benefits Authority and the Retirement Benefits Tribunal.

### **Findings and Determination**

24. There are three (3) issues for determination in this case:
  - a. Whether the Claimant has made out a case of constructive dismissal;
  - b. Whether the 2<sup>nd</sup> Claimant is properly joined in these proceedings;
  - c. Whether the Claimant is entitled to the remedies sought.

### **Constructive Dismissal?**

25. The Claimant's case is that the 1<sup>st</sup> Respondent forced her out of employment and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintain that the Claimant voluntarily resigned from the 1<sup>st</sup> Respondent's employment.
26. The law is now settled that for an employee to prove constructive dismissal they must first demonstrate conduct by the employer that made the work environment intolerable and second, link the employer's conduct to the resignation.
27. In *Nathan Ogada Atiagaga v David Engineering Limited* (Cause No 419 of 2014) constructive dismissal was defined in the following terms:

“Constructive dismissal occurs when an employee resigns because their employer's behavior 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.”

28. In the now famous case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following principles to be considered 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.

29. In its decision in *Stella W Muraguri v Edward Kamau Muriu & 4 others* [2022] eKLR this Court stated as follows:

“The threshold for constructive dismissal is achieved where the involuntary resignation has a direct causal link with the employer’s conduct, which may reasonably be described as intolerable.”

30. The Claimant’s resignation letter dated June 21, 2014 states as follows:

“To the Human Resource

Chase Bank Kenya

PO BOX 66049-00800

Nairobi

June 21, 2014

Dear Sir/Madam

Re: Resignation

I am writing to inform you of my decision to resign with immediate effect.



I appreciate the interaction and opportunities I have had.

I wish the Company all the best for the future.

Yours sincerely,

(signed)

Terry Njagi Muia”

31. Neither the resignation letter nor the Claimant’s testimony before the Court disclosed any acts by the Respondents that may have caused the Claimant to resign. In the absence of any such evidence, the only conclusion to make is that the Claimant has failed to prove constructive dismissal. Her claim for unlawful and unfair termination of employment must therefore fail.
32. In response to the claim for unremitted pension contributions, the 1<sup>st</sup> Respondent produced an updated statement showing that the missed contributions had been remitted to the Pension Scheme. There is therefore nothing more to say on this issue.

### **Final Orders**

33. In light of the foregoing findings, I do not find it necessary to determine the issue of the 2<sup>nd</sup> Respondent’s joinder.
34. Finally, the Claimant’s entire claim fails and is dismissed.
35. Each party will bear their own costs.
36. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Walela for the Claimant

Mr. Cheptumo for the 1<sup>st</sup> Respondent

Mr. Omino for the 2<sup>nd</sup> Respondent

