



REPUBLIC OF KENYA



KENYA LAW
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**Mwiti v Housing Finance Company (HFC) Limited (Cause 545 of 2018)
[2023] KEELRC 2659 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2659 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 545 OF 2018
B ONGAYA, J
OCTOBER 30, 2023**

BETWEEN

FREDRICK KIOGORA MWITI CLAIMANT

AND

HOUSING FINANCE COMPANY (HFC) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 16.04.2018 through Mutuma Gichuru & Associates. The claimant was employed by the respondent since December 2012 until 15.02.2018. He held various designations including Relationship Officer, Personal Banker, and finally as a Business Development Officer. The employment ended when the claimant resigned by the letter dated 15.02.2018. The claimant alleges that the contract of employment was constructively terminated and unfairly so. He prays for judgment against the respondent for:
 - a. A declaration that the claimant was constructively dismissed hence entitled to compensation for unlawful and unfair termination.
 - b. A declaration that the respondent blatantly violated the claimant's contractual, constitutional and statutory rights guaranteed under Articles 27 (1) and (2), 28, 41(1) and 47 of *the Constitution* of Kenya 2010.
 - c. A declaration that the claimant is entitled to the reliefs sought.
 - d. 12 months' salary for unlawful termination 12 x Kshs.81,898.00=Kshs.982,776.00.
 - e. Notice pay one-month salary Kshs.81,898.00.
 - f. Service pay 15 days for 5 years served Kshs.204,500.00.



- g. Compensation for 28 years for loss of job till retirement date 81,898.00 x12 x28 =Kshs.27,517,728.00.
- h. General damages for violation of constitutional rights Kshs.5,000,000.00.
- i. Issuance of a certificate of service.
- j. Costs of the suit.
- k. Accrued pension scheme contributions.
- l. Interest on d, e, f, g, I and j above at Court rates until payment in full.
- m. Any other relief the Court considers fit to award in the circumstances.

2. The claimant alleged the particulars of constructive dismissal as follows:

- a. Inventing, fishing, fabricating and crafting of false, unfounded and baseless allegations against the claimant from his own report with a view to subjecting him to disciplinary action.
- b. Forcing or asking the claimant on 07.02.2018 prior to the disciplinary hearing to take 2 days leave.
- c. Subjecting the claimant to 3 unnecessary or unjustified suspensions on diverse dates between 18.01.2018 and 14.02.2018.
- d. Subjecting the claimant to an unjustified, unlawful, unfounded, discriminatory and un-procedural disciplinary process contrary to the Constitution and Employment law.
- e. Allocating the claimant lesser, demeaning and inferior duties beyond the scope of the contract of employment.
- f. Coercing or unduly influencing the claimant to resign on 15.02.2018 on threats of summary dismissal and promises of good testimonials.

3. The statement of defence was filed on 08.05.2018 through Maina Muiruri & Company Advocates. The respondent admitted employing the claimant as a Relationship Officer on 01.09.2014 (then at Housing Finance Company of Kenya) and the respondent took over the mortgage finance business and continued to work as a personal banker until he resigned on 15.02.2018. The respondent further pleaded as follows:

- a. The claimant was addressed a letter to show cause dated 09.08.2016 about fraudulent transactions on a customer's account with a reminder letter for a response dated 10.08.2016. The claimant replied by his letter dated 10.08.2016 and the matter rested with a 1st warning letter dated 15.08.2015. The warning was on account that the claimant failed to call an employer to confirm that the customer who wanted to open an account was indeed a genuine employee in that regard.
- b. The claimant received another notice to show cause on 27.01.2018 upon allegations that he held a meeting and communicated with fraudsters targeting dormant accounts in the bank and which was contrary to the bank's code



of conduct and which also amounted to a criminal offence. The claimant admitted meeting the fraudster on 12.12.2017 who informed the claimant about the mission to defraud the bank by targeting dormant accounts. The claimant attempted to pull in his supervisor by organising a second meeting with his colleague and the fraudsters and took a list of bank accounts by the fraudsters and caused a colleague known as Moshe to look into one of the accounts on his behalf alleging that the claimant had logged out of the bank system.

- c. The claimant was called and given two days off duty to travel to Nairobi from his Embu station and he fully participated in the ensuing disciplinary proceedings. He attended and participated in the proceedings, asked questions and signed for his presence. He was then given a date for ruling and never complained about the disciplinary proceedings being shambolic or unfair as alleged in the memorandum of claim.
 - d. On 15.02.2018 the claimant travelled to Nairobi to receive the ruling on the disciplinary proceedings but changed his mind and resigned voluntarily probably fearing a summary dismissal would be imposed.
 - e. The respondent prayed that the memorandum of claim be dismissed with costs.
4. The claimant testified to support his case. The respondent's witness (RW) was Gloria Lilechi, the respondent's Human Resource Manager. The final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 5. To answer the 1st issue the Court finds that the parties are in agreement that at all material times they were in a contract of employment as pleaded and as per the evidence on record.
 6. To answer the 2nd issue the Court returns that the contract of service was terminated by reason of the claimant's resignation letter dated 15.02.2018. The claimant wrote that he wished to resign from his position as a Business Development Officer effective 15.02.2018 and he requested that the one-month notice be waived. He further thanked the management for giving him an opportunity to serve the respondent company. The respondent accepted the resignation with regret as per the letter dated 26.02.2018 and the respondent offered to pay salary and allowances up to 15.02.2018 and accrued leave days.
 7. To answer the 3rd issue, the Court returns that the resignation has not been established to amount to unfair constructive termination. Both parties have cited the Court of Appeal decision in Coca Cola East Africa -Versus- Maria Kagai Ligaga [2015] eKLR. The Court of Appeal stated the legal principles to determine constructive dismissal as the basic ingredients of constructive dismissal to be considered in toto included:
 - a. the employer must be in breach of the contract of employment;
 - b. the breach must be fundamental as to be considered a repudiatory breach;
 - c. the employee must resign in response to that breach; and,
 - d. the employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.



8. The Court has also considered the evidence. It is that the respondent initiated the disciplinary proceedings but prior to the decision being declared thereon, the claimant opted to resign. The resignation by the claimant's own testimony was voluntary and the alleged coercion is not established at all. The claimant in cross-examination testified thus, "I was required to report any breach or fraud immediately to the Bank. Resignation of 15.02.2018 effectively terminated my employment. I signed the resignation letter. I have no evidence to show I was coerced to resign. There was handwritten paper in the room. I was alone. I have resignation letter written on a plain paper. The three present gave me the paper to write and sign before leaving the office." By that evidence the Court finds that the resignation was voluntary and it is not established that the respondent in any manner had breached the terms and conditions of the contract of service. In view of the allegations against the claimant, it appears to the Court that the respondent was entitled to exercise the employer's prerogative to commence and continue the disciplinary action but which aborted at the tail end of decision making by reason that the claimant opted to resign. The particulars of unfair constructive dismissal and breach of constitutional and statutory or contractual provisions are found not established at all. The respondent's case and submissions in that regard are upheld.
9. Per the Black's Law Dictionary (Tenth Edition) constructive dismissal or discharge means, "An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee leaves the employee almost no option but to quit." The Court has considered the claimant's pleadings, testimony and submissions and finds that the claimant has failed to establish that the respondent created working conditions that left the claimant with little or no choice but to resign. The disciplinary process was underway per the contract and the relevant statutory provisions. The disciplinary proceedings having aborted by reason of the resignation, the merits of the aborted proceedings appear to the Court to be remote to the actual ending of the employment relationship. While being alleged and submitted for the claimant that he had been assigned lesser and demeaning duties outside his contractual duties, the same has not been shown to have been a grievance raised while the contract of service prevailed as is found to be an unfounded afterthought. In any event, the resignation letter does not state such a grievance as precipitating the resignation and the Court considers that the claimant must be bound by the terms of his own voluntary letter of resignation.
10. To answer the 4th issue, the Court finds that constructive dismissal not having been established, the claimant has failed to justify the remedies as prayed for except the certificate of service to which he is entitled per section 51 of the [Employment Act](#). Service pay is not due as claimed in view of section 35 of the Act and the claimant having been a member of NSSF and a contributory pension scheme. Each party to bear own costs taking into account the respective margins of success.
11. In conclusion judgment is entered for the parties for:
 - a. the respondent to deliver the certificate of service in 30 days; and,
 - b. each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 30TH OCTOBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

