



**Seth v Sunflag Textile & Knitwear Mills Ltd & 2 others (Cause E035 of 2022)  
[2023] KEELRC 3126 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3126 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E035 OF 2022  
DKN MARETE, J  
NOVEMBER 22, 2023**

**BETWEEN**

**ARUN KUMAR SETH ..... CLAIMANT**

**AND**

**SUNFLAG TEXTILE & KNITWEAR MILLS LTD ..... 1<sup>ST</sup> RESPONDENT**

**ALLIANCE GARMENT INDUSTRIES LTD ..... 2<sup>ND</sup> RESPONDENT**

**SUHRIT BHARDWAJ ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Claimant's Statement of Claim dated 14th January, 2022. The issue in dispute is therein cited as;

Unfair And Unlawful Termination Of Employment And Failure By The Respondents To Pay Terminal Benefits/dues To The Claimant.

2. The Respondent in a Response to Claim dated 30th March, 2022 denies the claim and prays that the case is dismissed with costs.
3. The claimant's case is that at all material times to this suit, he was a former employee of the Respondents between 2001 and 2019. He worked as the General Manager and later Chief Executive Officer of the Respondent and was based at Kitui and Pate Road Operations.
4. The Claimant's other case is that he was employed through the 3rd Respondent who is the Chairman and Managing Director of the 1st and 2nd Respondents and trades as SUNFLAG Group Kenya. He oversaw the management and running of Awassa Textile Industries Limited. Ethiopia a subsidiary of the Respondents at a special allowance of USD 2000.00 per month. Overall he earned Kshs.1,052,200.00 per month exclusive of this allowance.



6. The Claimant avers that on the 14th March 2019, the Respondents in bad faith and without the knowledge of the Claimant, the then Chief Executive Officer of the Respondents, maliciously appointed a General Manger to take over the responsibilities for the Respondent operations at the Pate Road Offices. This act rendered him redundant and embarrassed given the takeover of all his responsibilities and duties as the overseer of the operations of the Respondents. The Claimant further avers that he was asked to tender his resignation and hand over to the new officer.
7. The Claimant other case is that arising from the insubordination, embarrassment, non-payment of my special allowances and bad faith exhibited by the Respondents he tendered her resignation on 30th April, 2019 thereby vacating Sunflag Group Kenya. He deems this constructive dismissal and prays thus;
  - a. Accrued but untaken leave days  $1,052,200/26 \times 50 \text{days} = \text{Kshs.}2,023,461.54$
  - b. Service Pay:  $1,052,200/26 \times 15 \times 18 \text{ years} = \text{Kshs.}10,926,692.31$
  - c. Accrued Special Allowance for Awassa from May 2016 = USD. 2,000.00 X 36 months . 72,000.00
  - d. 12 months' salary for constructive dismissal/termination  $\text{Kshs.}1,052,200 \times 12 \text{ months} = \text{Kshs.}12,626,400.00$
  - e. Salary in lieu of notice –  $\text{Kshs.}1,052,200.00$
  - f. Certificate of service
  - g. General damages
  - h. Cost of this suit
    - i. Interests on (a), (b), (c), (d) and € from the date of filing until payment in full.
    - j. Any other or further relief that this Honourable Court deems just and fit to award the Claimant.
8. The Respondent's case is a denial of the claim. The 3rd Respondent particularly avers that he is wrongly enjoined in the suit neither having been the claimant's employer nor having an employer/employee relationship.
9. The Respondent's further case is that;
  - a. That the Claimant was employed by the 1<sup>st</sup> Respondent and his responsibilities included managing the operations of the 2<sup>nd</sup> Respondent which is a subsidiary company of the 1<sup>st</sup> Respondent.
  - b. That the Claimant was never a General Manager nor a Chief Executive Office nor an employee of the 3<sup>rd</sup> Respondent as pleaded.
10. Her further case and in reply to paragraph 6 of the memorandum of claim, the Respondents aver that the 3rd Respondent merely played an administrative role as an agent of the 1st and 2nd Respondents. He has never occupied the position of or played the role of an employer and as such, there exists no traceable nexus nor cause of action relating to him in this suit. Hence the notice for intended action to have his name struck out of the suit.
11. In reply to paragraph 8 of the memorandum of claim, the Respondents state as follows;



- a. The entity known as Awassa Textile Industries Limited in Ethiopia was not a subsidiary of the Respondents but an associated company of the 1st and 2nd Respondents with different directors and shareholders.
  - b. The 1st Respondent, as the employer of the Claimant, requested the Claimant to play an oversight role over the management of the said entity for a special monthly allowance of USD 2,000.00. Filed on: 2022-03-30 16:42:47+03 - BY: Mumia & Njiru Advocates - Reference: EZDWPJGQ - KSH. 500.00 3
  - c. As such the Claimant would visit the said entity once quarterly or thereabouts at the full expense of the 1st Respondent in spite of the special allowance that he was receiving.
  - d. The said entity was disposed of by way of sale in the year 2017 and was no longer associated with the 1st and 2nd Respondents.
  - e. The said disposal meant that the Claimant's role of overseeing the management thereof had come to an end. However, the 1st Respondent, in good faith, continued paying the Claimant the allowance without fail in appreciation of his years of service to the 1st and 2nd Respondents.
12. The Respondent's further case is a denial of paragraph 9 of the memorandum of claim and states that the Claimant was solely responsible for the operations of the 1st and 2nd Respondents during his tenure of employment. The overseeing of the management of Awassa Textile Industries Limited in Ethiopia was for a limited duration before the said entity was disposed of. Otherwise the Claimant has never been appointed by or given responsibilities for managing and running the affairs of any other company affiliated with the 1st and 2nd Respondents. He will thus be put to strict proof thereof.
13. In reply to paragraphs 14-19 (which are hereby denied and the Claimant shall be put to strict proof thereof), the Respondents states as follows;
- a. The management report for the year 2018 revealed a process loss of about 50 tonnes at the 1st Respondent's factory along Pate Road, translating to a waste of 4 tonnes per month on average. This was a legitimate cause for concern which was taken up by the directors of the 1st Respondent.
  - b. This finding called for a thorough internal audit to establish the cause of the excess wastage and to come up with ways of addressing the cause thereof.
  - c. The audit revealed a total process loss of 98.8 tonnes of material which is equivalent to approximately Kshs.75,000,000.00.
  - d. As a stop gap measure to stem the wastage and thus loss to the business, the directors of the 1st Respondent arranged for the transfer of an employee of an affiliated company, Mr. R. V. Iyer, to the 1st Respondent's Pate Road factory in March 2019. Mr. Iyer had joined Supra Textiles Limited, a company affiliated with the 1st and 2nd Respondents, on 12th February 2019.
  - e. The main reason for the transfer of Mr. R.V. Iyer to the Pate Road factory was to utilize his expertise in running the weaving machinery so as to stem the massive process losses. He was assigned the position of General Manager thereof.
  - f. The Pate Road factory already had a Plant Manager called Mr. Paramjeet Singh, who continued to operate as the plant manager.



- g. It is noteworthy that both Mr. R.V. Iyer and Mr. Paramjeet Singh reported to the Claimant who continued to be responsible for the operations of the 1st and 2nd Respondents, including the Pate Road factory.
  - h. There is no one time that the 1st and 2nd Respondents engaged any person to take over or share the responsibilities of the Claimant before 30th April 2019 which was his last working day.
  - i. Further, the Respondents deny engaging in any act which may be interpreted as subjecting the Claimant to insubordination or rendering him redundant. He retained his position and duties even with the appointment of Mr. R. V Iyer who was appointed only in relation to the Pate Road factory and reporting to the Claimant.
  - j. The Claimant voluntarily tendered in a resignation letter dated 1st April 2019, in which he gave the reasons for his resignation as:
    - i. A land court case in India which required his regular attendance and his personal attendance had become very difficult and tedious.
    - ii. He had personal family issues regarding property in India which really needed his presence to sort out within a short period.
    - iii. The prevailing circumstances had forced him to take that step and resign from the employment of the 1st Respondent.
  - k. The notice period for his position had been one month and this meant that his last working day was 30th April 2019.
  - l. Following the resignation of the Claimant, the directors of the 1st Respondent identified Mr. Sunil Malhotra who was then the Chief Executive Officer of Supra Textiles Limited to take over the responsibilities of overseeing the 1st and 2nd Respondents' operations once the Claimant's notice period came to an end. The handing over was done at the end of April 2019.
  - m. The Claimant remained in his role and position throughout his notice period and there is no one time that he was undermined or handled in a way to suggest insubordination or disrespect for his position.
  - n. Mr. Paramjeet Singh left the business on 17th January 2020 and his position has never been replaced to date. Mr. R. V. Iyer has been the General Manager of the Pate Road Factory to date and he now reports to Mr. Sunil Malhotra.
14. The Respondent again denies Paragraph 20 of the memorandum of claim and puts to the Claimant strict proof thereof. Further, the Respondents aver as follows;
- a. It is the Claimant who tendered-in a very cordial and friendly letter of resignation dated 1st April 2019 giving the requisite one month's notice.
  - b. Among the reasons he indicated for his resignation was his need to attend to family issues including a land dispute in the courts in India which he had discussed with employees of the 1st and 2nd Respondents and which they had no reason to doubt.
  - c. He did not cite any frustration or dissatisfaction with his work in his letter of resignation nor did he report any problems with his working conditions or the conduct of his employment to the directors of the 1st or 2nd Respondents either before or after his resignation.



- d. There is no shred of evidence that he was ordered to resign by any officer of the 1st or 2nd Respondents or that he was pushed out or compelled to leave the employment of the 1st Respondent.
  - e. Constructive dismissal cannot and does not arise. The Claimant cannot opt to eat his cake and still have it.
15. Further, the Respondents aver that the Claimant's final dues were tabulated and paid after a long period of much negotiation whereby the 1st Respondent accepted Filed on: 2022-03-30 16:42:47+03 - BY: Mumia&Njiru Advocates - Reference: EZDWPJGQ - KSH. 500.00 7 to write off a car loan of Kshs. 1,125,000.00, and added an ex gratia amount equivalent to USD 10,000.00 in recognition of his long years of service. The Claimant duly signed the Final Dues Settlement Slip as evidence of receipt of full and final dues on 17th December 2019.
16. The issues for determination therefore are;
1. Whether there was a constructive termination of the employment of the Claimant by the Respondents
  2. Whether the termination of employment of the Claimant by the Respondents was wrongful, unfair and unlawful
  3. Whether the Claimant is entitled to the relief sought.
  4. Who bears the costs of this cause.
  5. The 1st issue for determination is whether there was a constructive termination of the employment of the Claimant by the Respondents
16. The Claimant in his written submission brings out the case of constructive termination by the Respondent in that the work place was made inconducive to his continued stay thereby occasioning his resignation from employment.
17. The Claimant further seeks to rely on the authority of Rebecca Ann Maina & 2 others v Jomo Kenyatta university of Agriculture and Technology at page 4, where Nduma, J. Quoting Mbaru, J. In the case of Emmanuel Mutisya Solomon v Agility Logistics (ELRC NO. 1448 of 2011) defined constructive dismissal as follows;
- “A situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option but to resign.”
18. It is his case that his resignation was called for by the 3rd Respondent and impliedly by the conduct of Respondents in appointing Mr. Iyer to his position albeit in the disguised titled of General Manager.
19. The Claimant further seeks to rely on the authority of Linah Chebet Ngeny v Independent Electoral and Boundaries Commission [2017] eKLR, where court observed thus;
- “a scrutiny of the respective cases of the parties brings out a case in favour of the claimant. The claimant in her case and written submissions brings out a case of constructive termination of employment resulting from a bungled resignation by herself. She ably presents a case of duress and coercion on the part of the respondent that forced her to tender a resignation from employment. The circumstances of the meeting of the couple (read claimant) with the Director Human Resource and the deliberations thereof left the couple with no choice



but to concede to the respondent's offer of resignation instead of facing massive dismissal. This indeed was a devil's choice for them. From the tone and direction of the deliberations in this meeting, the couple was left with no choice but to separate employment wise. It was not choice at all. It cannot therefore be argued that the resignation from employment by the claimant was optional or voluntarily."

20. The Respondent denies the case of constructive termination as submitted by the Claimant. It is her case that there is not shred of evidence the Claimant was ordered to resign by any officer of 1st and 2nd Respondent or was in any way pushed out or compelled to leave the employment of the 1st Respondent.
21. Instead, the Claimant resigned and cited the following as reasons for so doing;
  - i. A land court case in India which required his regular attendance and his personal attendance had become very difficult and tedious.
  - ii. He had personal family issues regarding property in India which really needed his presence to sort out within a short period.
  - iii. The prevailing circumstances had forced him to take that step and resign from the employment of the 1<sup>st</sup> Respondent.
22. There was therefore no element of coercion or compulsion placed upon the Claimant to resign, or at all.
23. The circumstances of this case brings out a compelling case in favour of the Respondents. Her case overwhelms that of the Claimant. This is because the Claimant has failed to establish a case of constructive termination of employment as claimed.
24. On the contrary, the Respondent controvert she Claimant's case and reduces this to nothingness. On a test of preponderance of evidence and balance of probabilities, the Respondent's case takes sway. I therefore find a case of no termination of employment of the Claimant by the Respondent and hold as such.
25. On a finding of no termination of employment, issue number 2 becomes redundant. It is no longer an issue worth determining.
26. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not.
27. Having lost of a case of constructive termination of employment, he becomes disentitled to the relief sought.
28. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.**

**D. K. NJAGI MARETE**

**JUDGE**

**Appearances:**

Mr. Otieno instructed by Enock Otieno & Co. Advocates for the Claimant.

Mr. Njiru instructed by Mumia & Njiru Advocates for the Respondent.

