



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 99 OF 2019**

**GODFREY ALLAN TOLO.....CLAIMANT**

**VERSUS**

**TOBIAS O. OTIENO.....1<sup>ST</sup> RESPONDENT**

**CORTEC SYSTEMS AND**

**SOLUTIONS LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction:**

1. By a memorandum of claim filed on the 19<sup>th</sup> of February 2019, the claimant alleges that he was employed by the 2<sup>nd</sup> respondent as a General Manager-project Management and Operations effective from 1.2.2016 for a gross monthly salary of Kshs. 1,035,000. In addition he was entitled to earn dividends annually effective from the date of employment as a shareholder and equity owner of shares in the 2<sup>nd</sup> respondent's branch in Uganda and Nigeria at 10% and 5% respectively.

2. He further averred that the employer breached the said contract by failing to pay all the said salary and dividends as set out in the letter of appointment. He further averred that on 24.1.2018 the 1<sup>st</sup> respondent, served him with a termination letter in which he admitted liability to pay him terminal dues of Kshs.6, 567,335.45. In his view the termination was unfair and it amounted to constructive dismissal. He further averred that the respondents also violated his human rights and fundamental freedoms and sought the following reliefs:

- (a) A declaration order that the 2<sup>nd</sup> respondent violated the claimant's rights as set out by the law;
- (b) A declaration that the claimant is in breach of the co-signed letter of employment and liable therefrom;
- (c) A declaration that the actions of the respondents amount to constructive dismissal of the claimant;
- (d) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are in various, severe and irrevocable breach of contract with the claimant;
- (e) A declaration that the retention of the claimant after handing him his termination amounted to a new, unspecified employment and/or partnership of the claimant and the respondents;
- (f) An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to meet all the financial obligations for the full term of the job contract and/or terms of employment for breach;
- (g) An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to repay all wages owed to the claimant under the Letter of Appointment and terms of employment in this suit;
- (h) An order compelling the 2<sup>nd</sup> respondent to compensate the claimant for his two years of service in terms of service pay and other pay as the honorable court may so order;
- (i) An order of compensation for violation of the claimant's rights and an inquiry as to the quantum be gone into;

- (j) An award of general damages for breach of legitimate expectations and breach of contract;
- (k) An award of punitive damages be awarded in favor of the claimant;
- (l) An award of damages for pain and suffering;
- (m) The 1<sup>st</sup> and 2<sup>nd</sup> respondents to bear costs of this suit with interest thereon from the date of the judgement;
- (n) Any other order and/or relief this court may deem fit and just to make and/or grant.

3. The respondents entered appearance on the 25<sup>th</sup> of February 2019 and filed a Response to the Memorandum of Claim on the 11<sup>th</sup> of June 2019 wherein they admitted that the claimant was employed by the 2<sup>nd</sup> respondent on the 1<sup>st</sup> of February 2016 as General Manager- Project Management and Operations. However, the respondents averred that the claimant was unable to meet his obligations leading to the business of the 2<sup>nd</sup> respondent declining and the laying off of the company's employees due to lack of revenue.

4. The respondent further stated that the claimant's overall performance was wanting and his interest was only in the ownership of the 2<sup>nd</sup> respondent company. They further averred that the claimant made work amongst his colleagues impossible by bossing them around, thereby forcing the 2<sup>nd</sup> respondent to restructure its operation and process after its business dwindled.

5. It is further the respondents' case that the claimant's separation with the 2<sup>nd</sup> respondent was negotiated at the instance of the claimant who wished to find greener pastures. They denied that the claimant was not coerced to continue as the project manager for the project involving Konza Technopolis Development Authority (KOTDA), and averred that it was the claimant who requested to be allowed to participate in the project which he claimed to have a special interest in. Consequently they averred that the claimant was not entitled to payment of any salary after the separation on 31.1.2018.

6. However, the respondent stated that it paid the claimant all the said mutually agreed terminal dues of Kshs. 6,056,528.79 except Kshs. 1,593, 778.79 which it was taking steps to settle.

**The claimant's case:**

7. The suit proceeded for hearing on the 19<sup>th</sup> of June 2019, where the claimant, CW-1. He adopted his witness statement and supplementary statement filed on the 15<sup>th</sup> of February 2019 and 17<sup>th</sup> of January 2019 respectively as evidence in chief. He also produced his bundles of documents filed on 15.2.2019 as exhibits but abandoned the supplementary bundle of documents dated the 17<sup>th</sup> of June 2019.

8. The claimant also abandon prayers (a) to (d) of their claim, and urged the court to grant the rest of the reliefs sought in the Claim.

9. On cross examination by Mr. Angwara, Advocate, the claimant reiterated that he was the General Manager in charge of operations and projects for the 2<sup>nd</sup> respondent, and that his salary was delayed from July 2017-January 2018. The claimant stated that on the 24<sup>th</sup> of January 2018, the CEO told him that his services were no longer required as the company was changing strategy.

10. The claimant admitted that they had agreed to a separation with the respondents effective the 31<sup>st</sup> of January 2018. He further admitted that the letter dated the 24<sup>th</sup> of January 2018, was prepared by the Human Resource manager on the basis of his discussion with the CEO on that day. He also admitted that the letter contained the separation terms agreed with the CEO being a separation package of Kshs. 6,056, 528.79 which was to be paid on the 31<sup>st</sup> of January 2018 upon the claimants exit.

11. The claimant admitted that he receiving small sums from the respondent including Kshs, 539, 607.08 on 26.1.2018, Kshs. 400,000 on 31.1.2018, Kshs. 139,000 on 1.2.2018, Kshs. 150,000 on 12.2.2018, Kshs.573,000 on 2.3.2018, Kshs. 200,000 on 20.6.2018 and 1,100,000 on 23.5.2019 totaling to Kshs. 4,362,750 out of the agreed Kshs. 6,056,528.79. Consequently, the claimant stated that the amount a balance of Kshs. 1,693, 778.79 is still owing to him under the separation agreement.

12. On re-examination, the claimant testified that the letter dated the 24<sup>th</sup> of January 2018 referred to termination of employment and not mutual separation as alluded to by the respondent. He denied that he never left employment on the 31<sup>st</sup> of January 2018 and contended that he did so on the 20<sup>th</sup> of June 2018. He further stated he was not paid salary for February-June 2018 but confirmed that the letter dated the 24<sup>th</sup> of January 2018 never proposed for that pay. He contended that it was the CEO who, during the meeting held on the 24<sup>th</sup> of January 2018, requested him to continue serving as the Project Manager for the project involving Konza Technopolis Development Authority (KOTDA).

13. The claimant also testified that he was never served with any complaint, show cause letter or warning about the performance of his duties. Finally, he stated that he was yet to receive all his dues.

14. On further cross-examination by Mr. Angwara, Advocate, the claimant admitted that he was paid Kshs. 2,000,000 in the month of June 2018 after the release of the funds for the Konza, KOTDA project. However, he denied that there was no agreement that his dues would come from the Konza project.

**Respondent's case:**

15. The respondent's Human Resource manager, Agnes Jemutai Kipsutto, testified as RW-1. She adopted her witness statement filed on the 17<sup>th</sup> of June 2019 as her evidence in chief. She also produced the three documents in the list dated the 18<sup>th</sup> of June 2019, which were marked as exhibit D 1-3.

16. In brief, she confirmed that the claimant was employed by the 2<sup>nd</sup> respondent for a period of 1 year and 11 months. She stated that the termination letter dated the 24<sup>th</sup> of January 2018 was based on agreement between the claimant and the CEO. She stated that the separation package was agreed at Kshs, 6, 056, 528.79, and it was fully paid to the claimant. She stated that the reason for delaying payment of salary was caused by the delay of the claimant in finalizing projects, which were the source of his pay. She stated that the delay in the payment of salary was to all the employees. She maintained that the claimant never completed any project.

17. On cross-examination, she stated that the claimant's salary was payable per month and that the salary was in arrears at the point of separation. She admitted that the contract was violated by the failure to pay salary when it fell due but maintained that the claimant delayed projects which led to lack of revenue from which to pay salaries.

18. She admitted that the claimant was to exit the company on the 31<sup>st</sup> of January 2018 but the termination letter stated that the Konza project was to remain attached to the claimant. However, she reiterated that the project was never completed.

19. She further admitted that the claimant's appointment letter provided for his entitlement to shares in the company's branches in Uganda and Nigeria. However, she stated that the company does not exist in Uganda and Nigeria.

20. On re-examination she stated that the claimant never signed the contract of service but only the 1<sup>st</sup> respondent signed. She stated that the claimant was not laid off but he negotiated a mutual separation with the CEO since the company was not doing well financially. She maintained that the delay in salaries was not deliberate. She reiterated that the claimant's pay upon separation was to come from the Konza project, and that the claimant was paid from the proceeds.

#### **Claimant's submission:**

21. The claimant filed his written submissions and a supplementary submission dated the 10<sup>th</sup> of June, 2021 and 1<sup>st</sup> September, 2021 respectively. In brief the claimant submitted that his employment contract was breached by the employer after failure to pay his salary as and when it fell due.

22. The claimant further submitted that he was constructively dismissed from employment by the letter dated 24.1.2018. He argued that the said termination letter also purported to re-engage the services of the claimant with respect to Konza Project but without pay. He also stated that the termination unlawful and unfair for being done without following any lawful termination procedures.

23. The claimant maintained that the termination was not mutual and contended that the respondents in breached terms in the letter of appointment. He submitted that the said employment letter was breached by the respondents' failure to pay the claimant the salary due to him for the months of July-December 2017. He contended that the said actions by the respondents amounted to constructive dismissal. He stated that he was yet to be paid dividends for his shares in Coretec Uganda 10% and Nigeria 4%.

24. The claimant relied on the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Company Limited cause no. 64 of 2012 and Milton M. Isanya versus Aga Khan Hospital Kisumu (2017) eKLR.**

25. The claimant also submitted that the respondents violated his rights as enshrined in the constitution of Kenya, specifically article 27 (1) and article 41 (1) and (2). He stated that these rights were breached by failure by the respondents to pay him wages for over 6 months prior to his termination and forcing him to work for a further 5 months while holding his wages hostage.

26. He also submitted that the respondents failed to pay him the monies contained in the separation agreement and that the amounts deposited in court, is yet to be transferred to him. Further he submitted that the actions of the respondent holding the claimant's salary amounted 5 months from his date of termination amounted to forced labor.

27. On whether the claimant suffered damages, he submitted that the respondent subjected him to unfair labour practices, dehumanizing and degrading conditions in violation of his rights as a human being, a citizen and an employee. The claimant further submitted that the attempt to lay off the claimant was not preceded by any notification and clearance of any labour office/ministry of labour as required by the law.

28. On costs, the claimant submitted that he sought legal representation at his own cost and that the respondents have shown no interest to pursue an amicable settlement in the matter.

#### **Respondents' submissions:**

29. The respondents submitted that they suffered financial deficiency due to the claimant's poor performance as the person expected to bring revenue to the company. As result of the lack finances many employees were laid off but the claimant negotiated a mutual separation with the CEO. The respondent maintains that the separation was to be on 31.1.2018 and the respondent was to pay a separation package of Kshs. 6,056,528.79.

30. They further submitted that during the discussion on the mutual separation, the claimant requested to be allowed to follow through the Konza projects in order to ensure that it was completed and paid for since his terminal dues were to come from that project. However,

they maintained that they paid the claimant Kshs.400,000 on 31.1.2018, Kshs. 139,000 on 1.2.2018, Kshs. 150,000 on 12.2.2018, Kshs. 573,700 on 2.3.2018, Kshs100,000 on 19.3.2018, 2000,000 on 20.6. 2018 and Kshs. 1,100,000 on 23.5.2019. They reiterated that remaining balance of Kshs. 1,593,778.79 was deposited in court for him to collect.

31. They submitted that constructive dismissal did not take place as alleged and maintained that the separation was through mutual agreement. They also contended that the claimant never continued working after the said separation but he was granted his request to secure his payment by retaining visibility of the Konza project. They placed reliance on **Paulin Wagechi Warui v Safaricom limited [2020] eKLR** where the court held that employment contract can be dissolved by consent of the parties.

32. According to the respondent they nothing to the claimant and the suit should be dismissed with costs. They contended that the claim for compensation lacked merits because the contract was terminated through a mutual agreement. They also contended that gratuity was not provided for in the claimant's contract of service and therefore they urged the court to reject the claim for the same.

#### **Issues for determination and analysis:**

33. Having carefully considered the pleadings, evidence and submissions the issues for determinations are:

**(a) Whether the claimant was constructively dismissed from employment or there was mutual separation;**

**(b) Whether the claimant is entitled to the reliefs sought.**

#### **Constructively dismissal or mutual separation**

34. In the case of **Milton M Isanya versus Aga Khan Hospital Kisumu (2017) eKLR**, Maureen Onyango J, expressed herself as follows:

***“In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.”***

35. Further, the court defined constructive dismissal in the case of **Nathan Ogada Atiagaga versus David Engineering Limited (2015) eKLR**, as follows:

***“Constructive dismissal, occurs when an employee resigns because their employer's behaviour 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.”***

36. The claimant in this case, did not tender any resignation from employment, despite the respondents' conduct of delaying his salary for a period of six months, from July-December 2017. The claimant only expressed his disappointment with the respondents conduct via email dated the 22<sup>nd</sup> of January, 2018, wherein he sought to find out why his salary had delayed yet his colleagues' salaries were being remitted on time, and then gave the respondents up to the 24<sup>th</sup> of January 2018 to respond to his email. The respondents' did not give a favourable response.

37. Instead, as agreed by both parties in their evidence, a meeting was held between the claimant and the 2<sup>nd</sup> respondent on the 24<sup>th</sup> of January, 2018, where the respondents intimated to that they no longer required the services of the claimant. They then agreed on a separation with effective from the 31<sup>st</sup> of January, 2018 plus a separation package of Kshs 6,056,528.79. The claimant did not therefore resign from his position despite the treatment from the respondents, but rather, it was the respondents who expressed their desire to part ways with the claimant.

38. The court of appeal in **Coca Cola East and Central Africa Limited versus Maria Kagai ligaga, (2015) eKLR**, set out the legal principles for determining constructive termination and the principles are as follows:

***“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 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.”**

39. For constructive dismissal to be inferred, the employee must have resigned within reasonable time from his employment, with or without notice as a result of the employer’s hostile treatment or hostile working conditions at his workplace. The employer must also not have expressed the desire to terminate the employee. My analysis of the evidence on record, reveals that the claimant was not constructively dismissed from employment.

40. The evidence points to the fact that the termination of the claimant’s contract was through a mutual agreement on 24<sup>th</sup> January, 2018. The termination was therefore neither unfair nor unlawful within the meaning of Section 45, of the Employment Act. It was not also through redundancy under section 40 of the Act but by consent of the parties. It is an established principle of law of contract that parties to a contract, including a contract of employment, can terminate their relationship voluntarily through mutual agreement. It means therefore that what the parties can voluntarily enter into mutually, they can also walk out of the same voluntarily by consent and upon agreed terms.

#### **Whether the claimant is entitled to the reliefs sought:**

41. Other than the declaratory reliefs stated in the Memorandum of Claim, the claimant also sought monetary awards amounting to Kshs. 207, 363, 400. Given that the claimant’s termination was not unfair, compensation under Section 49 (1) of the Employment Act does not arise. The claim for 3 months’ salary in lieu of notice amounting to Kshs. 3, 150,000, must also fail because it was part of the separation package contained in the separation agreement of 24<sup>th</sup> January, 2018 which is discussed below.

42. The claimant is also seeks to be paid for the months of February-June 2018, during which period the claimant had been working on the Konza project. That period was after the mutual separation on 31<sup>st</sup> January, 2018. The claimant has not adduced any evidence to prove the agreed terms of engagement during that period. The respondents denied that they employed the claimant after 31<sup>st</sup> January, 2018 and maintained that they only allowed the claimant’s request to retain visibility in the project as his security for payment. Without any evidence of the terms of fresh contract after the termination of the earlier contract, the claim for salary for February to June 2018 fails.

43. The claimant also sought for gratuity pay at 15 days’ pay for every year worked, amounting to Kshs. 1, 050, 000. However, the same is not grounded on the terms of service under his contract of employment. Gratuity is not provided in the Employment Act and as such an employee can only claim the same if it is provided in the contract of service, collective agreement or employer’s HR policy. In this case the claimant did not show that his contract entitled him to gratuity.

44. The claimant prayed for accrued leave days amounting to Kshs. 901, 250. However, the same is declined because the issue of leave was part of the separation agreement and will be discussed it below.

45. The claimant stated that the respondents did not remit the statutory deductions being PAYE and NHIF, this claim was not disputed by the respondents. I thereby order that the respondents remit any unremitted statutory deductions to the respective authorities.

46. Regarding compensation for shares in Coretec Uganda 10% and Coretec Nigeria 4%, the respondent stated that the company did not take off in Nigeria and Uganda, and the claimant is therefore not entitled to any compensation. The claimant did not adduce evidence to the effect that Coretec was operational in the two countries. Without such proof, the court cannot be sure that they exist. As such the orders for award of compensation is declined.

47. The claimant’s claim for general damages for loss of salary from 1<sup>st</sup> July, 2018 to retirement is declined as the claimant had already exited the company and there was no right accruing thereafter. In **Engineer Francis N. Gachuri versus Energy Regulatory Commission (2013) eKLR**, the court stated as follows:

***“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word ‘permanent employment’.”***

48. The claim for general damages for breach of legitimate expectation and breach of contract, punitive damage, damage for pain and suffering and compensation for violation of the claimant’s rights must fail, because the claimant admitted that a separation agreement was entered into between him and the employer that settled his expected dues. The dues have already been partly paid and the balance secured by a deposit court.

49. In **GMV versus Bank of Africa Kenya Limited**, the court expressed itself as follows:

***“Ultimately, the purpose of compensatory awards is not to punish errant employers, however egregious their decisions against their employees be; the objective is to ensure economic injury suffered by the employee, is adequately redressed. The Court does not encourage multiplication of remedies claimable by employees, arising out of the same cause of action, but in which different legal regimes are invoked to justify different remedies.”***

50. Further, in the case of **D.K Njagi Marete versus Teachers Service Commission, (2013) eKLR**, the court stated as follows:

***“What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”***

51. As regards the issue of separation agreement, there is evidence that on 24<sup>th</sup> January, 2018 the claimant and the respondents agreed to end their contract of employment. The claimant admitted in his evidence that the termination letter dated 24<sup>th</sup> January 2018 was on the basis of the separation agreement between him and the respondents and the agreed exit package. He did not state that the said agreement was entered into through coercion, misrepresentation, fraud or undue influence from the employer. He further admitted that the employer paid part of the agreed package which he did not return.

52. In my view, the claimant is bound by the said oral agreement entered between him and the employer. The agreement terminated the employment contract and entitled the claimant to an exit package of Kshs. 6, 056,528.79. The same was made up of Salary arrears of Kshs. 2,539,607.08, salary for January, 2018 being Kshs.723,749.97, three months' salary in lieu of notice plus severance pay of Kshs. 2,171,249.91, and accrued leave of Kshs.621,921.83.

53. The claimant acknowledged receipt of kshs.400,000 on 31.1.2018, kshs. 139,000 on 1.2.2018, kshs. 150,000 on 12.2.2018, kshs. 573,700 on 2.3.2018, kshs100,000 on 19.3.2018, 2000,000 on 20.6. 2018 and kshs. 1,100,000 on 23.5.2019. The respondents demonstrated that they paid the above sums in furtherance of the separation agreement and that the remaining balance of kshs. 1,593,778.79 was deposited in court for him to collect. The claimant has not denied the aid deposit.

54. My interpretation of then said agreement is that it constituted a binding contract with the result that the employment contract between the parties ended, and the claimant became entitled to payment of Kshs.6,056,528.79. The claimant is therefore not entitled to any further reliefs in relation to the said separation. The respondents have already paid Kshs. 4,462,700 to the claimant's bank Account. They also deposited the balance of 1,593,778.79 following a court order dated 14<sup>th</sup> June 2019 but the said sum was less by Kshs 50.

55. Having considered the material placed before the court, I enter judgment for the claimant in the sum of Kshs. 1,593,828.79. The said sum will be settled by the amount deposited in court plus Kshs. 50 to be paid by the 1<sup>st</sup> respondent. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures, restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**