



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E144 OF 2021

HARRISON MACHARIA MAINA.....CLAIMANT

VERSUS

LEO DESIGN LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Statement of Claim dated 15th February 2021. In the claim he sued for the alleged constructive dismissal from employment. The Claimant avers that he was an employee of the Respondent working as a Technician on monthly gross salary of Kshs. 93,818/-. The Claimant averred that he was initially employed in 2007 by Italian Styles Limited, which was taken over by LEMOC Limited on 1st June 2009 and that on 6th December 2017, he was issued with a notice of employment transfer from LEMOC Limited to the Respondent Company with effect from 1st January 2018. Further, he was to serve the Respondent in the same capacity retaining the same terms and conditions. He also avers that the course of employment in 2015, the Respondent bought and assigned to him a motor vehicle Nissan Note registration number KCC 470L for personal and employment purposes and which vehicle he has been in continuous lawful care and possession of to date. The Claimant averred that the common understanding and knowledge he had with the Respondent was that the said motor vehicle would eventually be sold to him at nominal price when he leaves the employment considering he has been fuelling, maintaining, servicing and providing security for the same with his own money from 2015. The Claimant avers that on 20th June 2020 he received from the Respondent a notification to proceed on indefinite unpaid leave with effect from 22nd June 2020, which subjected him to utter suffering, psychological torture and poverty. The Claimant avers that after unsuccessfully attempting to discuss his employment with the Respondent, he was forced to involuntarily write a resignation letter dated 29th October 2020 per adventure that he would be paid his terminal benefits to assist his family. The Claimant avers that the Respondent has to date however refused or/and failed to process and pay his terminal dues and other benefits and that the Respondent's conduct aforementioned amount to constructive dismissal without due process of the law. The Claimant avers that his resignation was therefore not voluntary but forced due to circumstances created by the Respondent and that his constructive dismissal amounts to unfair and unlawful, malicious wrongful and unconstitutional termination of employment as particularised in the Statement of Claim. He contends that between 2017 and 2020 he worked for the Respondent during off days and public holidays and without taking his annual leave and that the Respondent has refused to refund his contribution to the Lamoc Welfare Group which it sponsors and manages. He further avers that by virtue of his unpaid terminal dues, unpaid allowance of off days and public holidays and shares being withheld by the Respondent he is entitled to both legal and equitable lien rights and interests over the said motor vehicle KCC 470L as security until full payment of the terminal benefits. The Claimant thus prays for judgment against the Respondent for:

- a. A declaration that the Claimant has been constructively dismissed from employment unfairly.
- b. A declaration that the Claimant's employment was unlawfully, wrongfully and unfairly dismissed by the Respondent.
- c. The Respondent do pay the Claimant's terminal dues.
- d. An order that the Respondent be restrained permanently from repossessing, claiming or in any way interfering with the possession of motor vehicle registration number KCC 470L assigned to the Claimant.
- e. The Respondent do transfer the motor vehicle Registration No. KCC 470L as assigned to the Claimant.
- f. Compensation for unfair dismissal assessed at twelve months.
- g. The Respondent do refund the Claimant's contributions at LEMOC Welfare Group.
- h. The Respondent pay off days and public holidays allowance of Kshs. 325,208/-.

- i. Unpaid leave of Kshs 375,272/-.
- j. 1 month salary in lieu of notice amounting to Kshs. 93,818/-
- k. Certificate of service
- l. Costs of this claim.
- m. Interests on (c),(f), (g), (h), (i) and (j) above
- n. Any other further relief that the court may deem fit to grant.

2. During the hearing of the case the Claimant adopted his filed Statement and list of documents as evidence in court. He testified that he is in Court because his employer failed to pay his dues and the contributions of the welfare and pending leave. He stated that he was employed in 2009 and transferred to Design in 2017 and that he was terminated last year. He stated that he has used the vehicle given to him by the Respondent for 6 years, which period he fuelled and had it maintained. He prays for service, pending leave, the shares for the welfare and for him to retain the vehicle and stated that he need the Respondent to compensate him for terminating him without giving him any notice. The Claimant submits that even though constructive dismissal is not defined under the Employment Act, it is generally intolerable working environment created by the employer and which compels the employee to terminate the employment relationship. He cites the case of **Max Masoud Roshankar & Another v Sky Aero Limited [2015] eKLR** where the Court stated:

“...Constructive dismissal, also called Constructive discharge, occurs when employees resign 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 resign rather than outright firing the employee, the employer is trying to effect a constructive discharge. In the case of **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011** the court held that the basics are that constructive dismissal may be defined as 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 available but to resign...”

3. He submits that the concept of constructive dismissal is underpinned on the notion that there is an implied term of contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Further, breach of that implied term will entitle the employee to treat themselves as wrongfully dismissed. It is the Claimant's submission that constructive dismissal is unfair termination of employment relationship and offends Sections 41, 43 and 45 of the Employment Act and Article 41(1) of the Constitution. The Claimant submitted that subjecting an employee to indefinite unpaid leave is unfair and contrary to the best labour practices and that the same is an unknown practice under the Employment Act and that failure to pay an employee is breach of a fundamental term of employment relationship that discharges an employee from such employment engagement. The Claimant submitted that it is against this background that the Respondent's decision to place him on indefinite unpaid leave amounts to unfair and intolerable working environment constituting constructive dismissal. To this end he relies on the case of **Humphrey Sitati v Board of Management Lenana School [2020] eKLR** where the court observed that:

“The alleged indefinite suspension without pay was indeed not backed by the contract of service or any law....

The said suspension of the claimant without pay amounted breach of a repudiatory term of the contract of service and the claimant was entitled to treat the contract as terminated by the respondent. That conduct by the employer amounted to constructive dismissal and I so hold.”

4. The Claimant further submitted that he has established a rational and objective reason for the legitimate expectation that the motor vehicle No. KCC 470L would be transferred to him on nominal price. He cited the the case of **Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR**, the Court held as follows:

“The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker....”

5. The Claimant submits that he attached documents for maintenance, fuelling and service which are marked in exhibit “**HMM5A, 5B, 5C, 5D and 5E** and that there is legitimate transaction that has crystalized into the Respondent complying with the legitimate expectation. That the Respondent allowing him to continually possess the said motor vehicle even after subjecting him to indefinite unpaid leave estops the Respondent from repossessing, disposing or interfering with the said motor vehicle. The Claimant submits that in the circumstances of this case, he has established constructive dismissal on the balance of probability and demonstrated legitimate expectation on transfer of motor vehicle and that he has also demonstrated all the other claims. He submits that his evidence has not been controverted by the Respondent and that he should therefore be given the said motor vehicle and awarded unpaid public holiday and weekend days allowances, and refund of his welfare contributions. The Claimant submits that since he worked for the Respondent with dedication and commitment and was not issued with warning letter or subjected to disciplinary action, he is entitled to compensation assessed at 12 months. The Claimant submits that he is also entitled to aggravated damages for the Respondent maliciously subjecting him to indefinite unpaid leave for over 12 months.

6. The Respondent did not appear at the hearing and the determination is made without their submissions. The Claimant is admittedly a former employee of the Respondent. He resigned from employment and he asserts that he has legitimate expectation that he is entitled to the vehicle KCC 470L. He asserts that he has maintained the vehicle with his own money and that there was a tacit agreement with the Respondent for the purchase of the vehicle at nominal fee. The Claimant resigned after the Respondent sent him on indefinite unpaid leave on 20th June 2020. As the Claimant's termination fits in the mould of constructive dismissal the Court finds he is entitled to seek recompense for the said constructive dismissal. The Claimant would only be entitled to recover the dues in respect of public holidays for the year 2020 as the claims should be filed within 12 months and he failed to seek relief for the non-payment of dues in 2017, 2018 and 2019. He also did not prove he was not given leave and indeed the statement of Mr. Edwin Sikochi the Accountant of the Respondent shows the Claimant went on leave and never sought payment of dues in lieu of leave. The year 2020 was when the Claimant was on unpaid leave and he would only be entitled to leave pay for 2020.

7. The Claimant to return the motor vehicle KCC 470L to the Respondent within 14 days of this judgment. The vehicle should be in good shape as the Claimant indicated to the Court that he has carefully maintained it and he did not indicate any damage to the vehicle when he testified before Court and sought relief which the Court granted in the Ruling dated 29th June 2021. In the final result the Court enters judgment for the Claimant for:-

- i. A declaration that the Claimant has been constructively dismissed from employment
- ii. The Respondent to settle the terminal dues as follows:-
 - a. One month's salary in lieu of notice – Kshs. 93,818/-
 - b. Leave pay for 2020 – Kshs. 93,818/-
 - c. Public holidays in 2020 – nil as no days in the schedule fell on a public holiday
 - d. 6 month's salary as compensation for unlawful dismissal – Kshs. 562,908/-
 - e. Payment of Kshs. 393,649/- as terminal benefits calculated but unpaid.
 - f. Kshs. 150,000/- for the repairs and servicing of KCC 470L the property of the Respondent.
 - g. Costs of the suit
 - h. Interest on sums in a), b), d) e) and f) above at Court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2021

NZIOKI WA MAKAU

JUDGE