



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1605 OF 2018

MAUREEN L. MUHILINAH.....CLAIMANT

VERSUS

SEVEN SEAS TECHNOLOGIES LTD....RESPONDENT

JUDGMENT

1. By a statement of claim dated 30th November 2018 and filed on 11th December 2018, and as amended by the Statement of Claim dated the 3rd of September 2020, the Claimant seeks the following remedies from the Court:

- a. A declaration that the Claimant's fundamental rights under Articles 41(1), 41(2)(b), 47 and 50 of the Constitution of Kenya 2010 have been infringed by the Respondent.
- b. A declaration that the termination of the Claimant's employment by the Respondent was un-procedural, unfair and unlawful.
- c. Compensation for unfair, unlawful and/or constructive dismissal from employment being her twelve months' salary of Kshs 2,910,200/-.
- d. Exemplary damages of Kshs. 5,000,000/-
- e. Certificate of service
- f. Costs of the Claim
- g. Interest on costs and the monetary orders from the date of filing of the Claim till payment in full.

2. The Claimant averred that she was offered employment by the Respondent Company as a Bid Manager, but later on the position was expanded to Bid and Knowledge Manager. The Claimant averred that she was once again given role as the Administration Manager. The Claimant averred that she was in the position of Human Resource Business Partner from January 2017 up to 30th September, 2018 with a monthly salary of Kshs. 242,600/-. She averred that she diligently, committedly and with due honesty served the Respondent throughout her employment term with the Respondent until her resignation. She averred that in the year 2018, during the course of her employment she was unlawfully denied payment of her accrued salaries and allowances before and after her resignation which was in response to unconducive working environment and exposure to intolerable working conditions and hardships that led to her resignation. The Claimant avers that on or about 2nd August, 2020 in a meeting held between her and the Respondent's Human Resource Director, the Respondent made false allegations against her performance of duties which, *inter alia*, made her involuntarily resign.

3. The Respondent filed a memorandum of Response and the amended memorandum of response to the claim. It prayed for the dismissal of the claim. The Claimant thereafter filed a reply to the Respondent's amended defence.

4. The Claimant avers that she has diligently performed her duties and that the allegations were a clandestine move by the Respondent's Human Resource Manager to create unconducive working environment forcing her to resign. The Claimant avers that she has diligently performed her work which saw her rise from being Bid Manager to Bid and Knowledge Manager, Administration Manager and subsequently Human Resource Partner. The Claimant averred that the Human Resource Manager thereon issued a stern directive to the Claimant, directing her to decide whether she wants to continue working. The Claimant averred that the Respondent withheld her salary whilst paying all the other employees, a fact which was, she says, acknowledged in the email communications, the amount in question being Kshs. 910,088.60. The Claimant averred that no reasonable reason was offered as to why her salary was being withheld and the said salaries were not paid even after a demand notice was given.

5. The Respondent avers that the Claimant left employment of her own volition and that the purported uncondusive work environment is untrue, superfluous and smacks of malice since from the time the Claimant was employed by the Respondent no complaint was ever raised relating to any uncondusive working environment. The Respondent averred that it never issued any threats to the Claimant and that the Company was faced with delayed remittances from its' partners which temporarily affected its' cashflow. The Respondent averred that it promoted the Claimant's career and career progression contrary to the claims made by the Claimant. The Respondent avers that the amounts demanded by the Claimant of Kshs. 1,844,992.60 is way overboard, unlawful and unjustified and prayed that the suit be dismissed.

6. The Claimant testified and adopted the witness statement dated 1st March 2018 as her Evidence in Chief. The documents in the list of documents was produced as appears in the list of documents as well as the Supplementary list of documents. She testified that the Respondent HR Manager would demean her and that the meetings with her were not conducive. She stated that the Respondent was facing financial problems but she later sought and found out that all the other employees had been paid except her. She stated that she was owed Kshs. 988,010/- and prayed that she be awarded the prayers set out in her statement of claim. In cross-examination she said she resigned and that she had worked for 4 years. She testified that she did not complain that she was being treated unfairly and that the HR Manager said that she had to make up her mind. She stated that the Respondent indicated that they were willing to pay the dues and that she resigned and now claims Kshs. 988,080/-. She said that she is not sure if others were not paid. On re-examination she testified that the email she used to resign is the one she sent on the 2nd August 2018 and that after the discussion they had she had responded via email and left.

7. The Respondent's witness was Ms. Consolata Waihiga Ndegwa who adopted the witness statement as part of her Evidence in Chief and produced the documents in the list of documents as Exhibits 1-12. She testified that she was the HR & Admin. Director at the time of the Claimant's resignation. She stated that she currently does not work for the Respondent and that she knows the Claimant. She stated that it is true that she had called the Claimant for a meeting and that she could not recall precisely but there must have been work that was not submitted or work not done. She stated that the Claimant had been promoted and there was increased work with no issue of poor performance. She stated that the Claimant was a good employee. She testified that the Respondent had partnered with a client that did not meet the obligation and that all staff were aware of the hardships. She stated that staff would be given a share of the funds and were kept informed of the matter. She testified that the staff were given allowances but no salary was paid. She stated that she was not paid neither was the Claimant and that the Respondent owed the Claimant Kshs. 910,088/-. She stated that those who resigned were notified of the payment to be made and that the Respondent was willing to pay the sum due. In cross-examination she said that she was the director at the time and that the CEO of the Respondent is her husband. Upon the question being put to her that she was wife of the CEO and had issues with the CEO praising the Claimant who was working well, she replied in the negative and stated that she recalls receiving email from the Claimant but she did not have the emails in Court. She said that she can recall she did specifically respond to the issue of performance and that she never raised any issue with the claimant. In re-examination she said that it was normal to meet employees for a meeting and that she did not have issues with Claimant and that no extraneous issues arose at any meeting.

8. The Claimant submits that she was constructively dismissed from employment of the Respondent. The Claimant relied upon the Court of Appeal's decision in **Coca Cola East Africa Ltd v Maria Kagai Lugaga [2015] eKLR** and Rika J.'s decision in **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Ltd [2014] eKLR** to contend that constructive dismissal requires that employer be in breach of the contract of employment, the breach must be fundamental as to be considered a repudiatory breach, the employee must resign in response to the breach and that the employee must not delay in resigning after the breach has taken place. The Claimant submitted that the actions of the Human Resource Director on 2nd August 2018 in confronting the Claimant in front of her colleagues humiliated her and made it unbearable for the Claimant to continue working for the Respondent. The Claimant submitted that the Respondent would have put any dissatisfaction with the Claimant's performance in writing and not to humiliate her before her colleagues. The Claimant submitted that the Respondent's behaviour seriously destroyed and undermined the Claimant's trust and confidence in executing her contractual obligation, which act is essentially a fundamental breach of the contract of employment by the Respondent leading to her resignation. The Claimant submitted that the Respondent witness failed to give a convincing explanation why she could not respond to the specific allegations of mistreatment raised by the Claimant in email communications. The Claimant submitted that the Respondent paid all other employees and discriminated against in respect to her accrued salary and other benefits which is a violation of the Claimant's constitutional right to lawful expectation and non-discrimination. The Claimant avers that the amount has not been paid to date. The Claimant submitted that she is entitled to the amount already admitted by the Respondent vide email to the Respondent, and the Respondent witness in Court as well as the reliefs set out in the amended statement of claim. There were no submissions on file for the Respondent.

9. The Claimant was constructively dismissed by the Respondent. Constructive dismissal is said to occur where the employer makes it so difficult for the employee to work forcing the employee to resign. The Claimant was forced to resign due to the embarrassing confrontation she faced from the Respondent's HR manager who was a director at the time and spouse of the CEO of the Respondent. As the Claimant was not paid her dues for a considerable period she was forced to resign thus fitting the definition of constructive dismissal in the **Coca Cola East Africa Ltd v Maria Kagai Ligaga (supra)** case. The Claimant is entitled to recover the unpaid sums duly admitted by the Respondent as well as compensation for the constructive dismissal. The Claimant is thus entitled to a judgment for:-

- i. Unpaid salaries – Kshs. 910,088/-
- ii. 4 month's salary as compensation – Kshs. 950,400/-
- iii. Costs of the suit
- iv. Interest on the sums in i) and ii) above at Court rates from the 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