



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.275 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

OSCAR OGOLLA OJEREA.....CLAIMANT

VERSUS

CREATIVE CONSOLIDATED SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant through a memorandum of claim dated 26th January, 2016 instituted proceedings against the Respondent for wrongful dismissal from employment.

2. The Respondent was served with the notice of summons on 26th January, 2016 but failed to file a response to the statement of claim.

Directions were given that the case proceeds as an undefended claim.

3. The Claimant then proceeded with the formal proof.

4. The Claimant filed affidavit to support his claim and written submissions dated 9th October, 2021.

5. In his affidavit of support of the claim the Claimant says that on 29th July, 2016 he was forced to resign from the Respondent’s employment as the Respondent did not use to pay his salary. He was entitled to Kshs.9,800/= per month. He says he was employed on 15th May, 2015 and left the Respondent’s employment on 29th July, 2016.

6. The Claimant says he used to work for 10 hours per day.

7. The Claimant states that he left the Claimant’s employment as he was not receiving his salary and so he considered himself to have been constructively dismissed from his employment.

8. The Claimant in his submissions urges the court to award him his prayers as follows:-

(i) Unpaid leave.....Kshs.9,800/=

(ii) Service.....Kshs.4,900/=

(iii) Unpaid salary 16 days.....Kshs.5,226.67/=

Total.....Kshs.15,222.67/=

Compensation for 12 months Kshs.117,600/= and aggravated damages and costs.

ISSUES FOR DETERMINATION

9. Did the Claimant’s resignation amount to constructive dismissal.

Was he entitled to the reliefs sought.

DETERMINATION

10. The Claimant resigned from his employment on 29th July, 2016 from the date he alleges he was employed by the Respondent being 15th May, 2015. He states he resigned because he was not paid his salary. In his letter of resignation he did not mention that there were any outstanding dues.

Actually he claims he resigned to pursue other domestic issues. He also undertook to speak good of the Respondent and even market it.

11. The only claim he makes in his prayers is of unpaid salary of 16 days.

That does not prove a perennial employer who withheld salary of his employee unreasonably.

Considering the Claimant resigned on 29th July, 2016 it is not clear what are the 16 days he is claiming he was unpaid. It is not clear if that was the month he resigned or not.

In that case it seems the suit filed by the Claimant was an afterthought after he resigned on his own accord from the Respondent's employment.

12. The Claimant did not give notice as is provided in Section 35 of the Employment Act.

There are no documents in court to show the type of contract of service and what kind of notice either party was required to give in order to terminate the contract.

The only information available is that the Claimant worked for the Respondent for one year and about two months.

13. The Claimant should have given the Respondent 28 days' notice to terminate his employment. Section 36 of the Employment Act provides that if either party does not give notice he should pay the other party remuneration which would have been earned by that other party in respect of the period of the notice required to be given.

14. The case of constructive dismissal which is alleged by the Claimant would not succeed where an employee voluntarily resigns.

In the case of **CATHERINE KINYANJUI VS MCL SAATCHI & SAATCHI CAUSE NO.1795 OF 2011** the court held that for a claim of constructive dismissal to succeed, the Claimant had to show the Respondent acted in a way that made it extremely hard for the Claimant to continue working.

Thus the Claimant having voluntarily resigned she could not rightfully bring a claim for constructive dismissal.

15. I have considered the evidence and the law and even if the Respondent did not put a defence the court is bound by the law and cannot deviate from it.

This was a clear case of voluntary resignation by the Claimant.

He required to give notice to terminate his services or pay 28 days equivalent of salary in lieu of notice.

16. The court's finding is that a case of constructive dismissal has not been proved, and so the claimant's case for compensation for constructive dismissal is dismissed.

17. Even if costs follow the event the Respondent will not be given any costs since he did not put a defence.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to

facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE