



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1845 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**MAUREEN WANJIRU MWANGI.....CLAIMANT**

**VERSUS**

**BLUE SEA ENERGY LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant herein avers that she was employed by the Respondent on 2<sup>nd</sup> May 2015 as a Public Relations and Corporate Affairs Manager, on contractual terms. She avers that she was entitled to a salary of Kshs.250,000 per month. That during the 5 months she worked for the Respondent, it partly paid her salary and did not settle the arrears. She seeks the following reliefs:

1. Kshs.1,180,000 being the accrued and allowance arrears owed to the Claimant from March 2015 to July 2015
2. Settlement of all outstanding NSSF and NHIF dues;
3. Interest on the above at court rates
4. Compensation for psychological trauma caused by continuous and consistent non-payment of salary and allowances without any just cause at all
5. Costs of this suit

The Respondent entered appearance but did not file a response to the claim. Consequently, the claim proceeded for formal proof.

In her testimony, the Claimant stated she was employed from 2<sup>nd</sup> March 2015 to 31<sup>st</sup> July 2015. She testified that during the entire period of employment, she was paid Kshs.70,000 in cash in two instalments. That she was also issued with a cheque of Kshs.200,000 but it was dishonoured by the bank upon presentation. She testified that in spite of calling the Respondent's Chief Executive Officer in an effort to receive her money she never received any response.

The Claimant submitted that her case has all ingredients of constructive dismissal as set out by the Court in **Milton M Isanya v Aga Khan Hospital Kisumu [2017] eKLR**. She further submitted that the failure to pay her salary and dues was a significant breach of her contract of employment. She relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where the court held that under the doctrine of constructive dismissal an employee is entitled to treat himself as discharged from the performance of his obligations.

She submitted that the Respondent's conduct constituted repudiatory breach of the contract of employment. She submitted that she resigned from employment after the failure by the Respondent to pay her salary as she could no longer report to work without pay. She further submitted that the Respondent created an intolerable situation.

**Determination**

Upon consideration of the pleadings, evidence and submissions by the parties, the issues for determination are whether the claimant was constructively dismissed and whether she is entitled to the reliefs sought.

In determining whether the Claimant was constructively dismissed, the court in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** held:

*“...The contractual test is narrower than the reasonable test. The dicta in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See **Pedersen -v- Camden London Borough Council [1981] ICR 674**). The criterion for evaluating the employers conduct is objective; the employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory (See **Office -v- Roberts (1980) IRLR 347**). The employee must be able to show that he left in response to the employer’s conduct (i.e. causal link must be shown, i.e. the test is causation).”*

The Claimant annexed several emails in which she sought payment of her dues. In an email to the Claimant dated 18<sup>th</sup> July 2015 from John Odhiambo the Respondent’s Chief Executive Officer he stated:

*“Dear Maureen,*

*...*

*In life sometimes we plan as men but an (un)avoidable circumstance come in between... in law they say...Force Majure.*

*We are aware of every single cent we owed to every one including*

*our suppliers and contractors. This does not mean that you shall not be paid what is rightfully yours.*

*As the Chief Executive Officer it’s my obligation to see on to this, which I shall.*

*Your concerns are much noted and I shall within the shortest time give a direction to this.*

*...”*

The Respondent did not file a response to the claim. The allegations pleaded in the claim remain uncontroverted. I therefore find that by its failure to pay the Claimant her salary, the Respondent constructively dismissed the claimant. Constructive dismissal is an unfair dismissal.

The Respondent’s Chief Executive Officer acknowledged owing the Claimant money. I therefore find that the Claim succeeds with respect to prayer 1 only for the sum of Kshs.1,180,000.00.

The claim for settlement of NSSF and NHIF dues fail for reason that the Claimant did not annex her statements with respect to these contribution, to prove that the Respondent did not remit her contribution.

The Claimant sought compensation for psychological trauma and not compensation for constructive dismissal. Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act set out the orders which this Court can award. For such claim to succeed the Claimant has to specifically plead and prove that she suffered trauma. In the absence of such proof, this Claim fails.

**Judgment is thus entered for the claimant against the respondent in the sum of Kshs.1,180,000.00.**

The Claimant is further awarded costs of the suit. Interest shall accrue at court rates from date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**MAUREEN ONYANGO**

**JUDGE**