



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 56 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DESH BHUSHAN TANEJA.....CLAIMANT

VERSUS

LINKSOFT GROUP LIMITED.....1ST RESPONDENT

LINKSOFT COMMUNICATIONS

SYSTEMS LIMITED.....2ND RESPONDENT

ANTHONY WAHOME..... 3RD RESPONDENT

JUDGMENT

The Claimant was employed as the Chief Commercial Officer vide the Agreement of 26th May 2011. Pursuant to the agreement, he was entitled to a monthly salary of USD 14,000.00, a net annual performance variable pay of USD 88,200.00, annual benefits of USD 125,000.00. He was also entitled to a refund of all travelling, hotel, entertainment, and incidental expenses incurred in the performance of his duties.

The 3rd Respondent executed the agreement on behalf of the Claimant's employer. Once the Claimant accepted the terms of employment, he relocated to Kenya with his family and commenced work on 4th July 2011.

During the pendency of the Claimant's employment, payment of his salary and rent would be delayed. On 27th August 2012, he issued his resignation notice and requested to be paid his dues. After the lapse of the 3 months' notice that he had issued, his contract was terminated.

As payment of his dues were in arrears, the Respondents proposed a pay out plan on grounds that they were struggling financially. However, the payments were not made as had been proposed, prompting the Claimant to instruct an advocate to issue a demand notice after following up on the same for over a year. The Respondents admitted to owing the Claimant and once again offered a pay-out but only managed to settle part of the sum claimed by the claimant.

Aggrieved by the circumstances that culminated to his resignation and the lack of payment of his dues, the Claimant filed this suit on 20th January 2015, seeking the following reliefs from this Court –

- a. A declaration that the failure by the employer to pay the Claimant his monthly salary was unlawful.
- b. A declaration that the disengagement of the Claimant comprised
of constructive and wrongful dismissal and termination.
- c. Basic pay at USD 14,000.00 a month, for the months of June 2012 to November 2012 plus 14 days leave pay resulting in a sum of USD 90,300.00 less amount paid leaving unpaid basic pay balance of USD 48, 528.00 net of all taxes.
- d. Benefits owed at USD 125,000.00 per annum, for 1 year 5 months (less sum received of USD 47, 938.00) resulting in a sum of benefits owed of USD 129,145.00 net of all taxes.
- e. Performance bonus at USD 88,200 per annum for 1 year and 5 months resulting in a performance bonus sum owed of USD

124,950.00 net of all taxes.

- f. Bank levies of the dishonoured cheque of USD 13.00.
- g. Maximum damages for wrongful dismissal and unfair termination permitted by law assessed at cumulative monthly gross salary (inclusive of all benefits) for 12 months.
- h. Costs of this suit on a full indemnity basis.
- i. Interest on c, d, e, and f until payment in full at commercial bank rates.
- j. Any other relief that the Court may deem just and fit to grant.

The Respondents filed their Statement of Response on 12th February 2015 seeking to have the matter dismissed with costs.

The Claimant testified as CW1. It was his testimony that the 12 instalments payment plan proposed by the Respondent related to the unpaid basic salary and did not include benefits under the employment contract and performance bonus. He testified that in February 2014, the Respondent paid him USD 41,772.00 and Kshs.44,250.00.

It was his testimony that his immigration pass indicated that he had been allowed to work with Linksoft Group of Companies. That though Linksoft Communication Limited acted as his obligor in his security bond, the document bore the stamp of Linksoft Group Limited. It was his testimony that there was no separation of the companies.

Upon cross examination, it was his testimony that he received salary from different accounts being: Linksoft Communication Limited, Linksoft Group Limited, and Linksoft International Limited. That sometimes he was paid in cash. That he could not ascertain whether the money came from the 3rd Respondent.

It was his testimony that his basic salary was paid in full though irregularly. He testified that he could not recall the months when his salary was not paid. He further testified that there was no threat from school regarding unpaid fees or from the landlord regarding unpaid rent.

It was his testimony that the board members gave him the option of resigning or being dismissed. He explained that a 21 million dollar business deal could not be signed for failure to meet the customer's requirements. Further, a 15 million dollars deal was cancelled because they could not deliver. He contended that the respondent missed business opportunities because they could not bring in business, which was through no fault of his own.

He testified that his work entailed looking for new business and customer satisfaction but it was not his job but that of the 3rd Respondent's, to ensure that they had the money or teams to deliver the new business. It was his testimony that he exceeded his targets. He maintained that the company's poor performance was not attributable to him.

On re-examination, he testified that as conceded in Mr. Wahome's letter, he was owed salary for a period of 6 months. He further testified that when he was requested to resign, his 3 months' salary, benefits and performance bonus were in arrears. He further testified that he had been told that he would only get the basic salary for the notice period and not the benefits.

He explained that his understanding on the issue of benefits was that they would be paid annually, and any unpaid amount would be given to him.

Respondent's Case

The 1st Respondent contends that the 2nd Respondent is one of its subsidiaries while the 3rd Respondent is its Chief Executive Officer and its subsidiaries. The Respondents aver that the Claimant was offered the employment agreement of 26th May 2011 by Linksoft International Mauritius Limited, a subsidiary of the 1st Respondent. The 1st and 2nd Respondent deny that reference was made to them in the agreement.

The Respondents aver that during the subsistence of his employment, the Claimant did not perform as required. There was no evident growth of revenue and Linksoft International Mauritius Limited experienced loss.

The 1st Respondent contends that the dishonoured cheque charges came about due to failing to bank the cheque for over a period of 6 months.

The 3rd Respondent testified as RW1. It was his testimony that the Claimant was an employee of Linksoft International Limited, a company based in Mauritius which he also oversaw. He testified that the Claimant's principle duties were-

- a. To develop new business.
- b. Management of key vendor accounts.
- c. Growth of the organization's revenue.

d. Service delivery oversight.

It was his testimony that the Claimant did not meet the targets that had been set in his contract. That the Claimant was required to grow business outside the pre-existing ones.

It was his evidence that a sister company only came in to assist another company to do its accounts at the end of the year. He asserted that the separation between the Claimant and his employer was mutual and not coerced.

He testified that payments were made to the Claimant as part of what was agreed. In particular, the basic salary and benefits not exceeding USD 125,000.00. He contended that the contract did not provide for the Claimant to be reimbursed the difference between the benefits paid and the entitlement. He testified that there is no basis for an award of a performance bonus as the Claimant did not meet his performance targets.

He admitted that the Linksoft Group Limited's letterhead was used to engage the Claimant but contended that he was invited to join Linksoft International Mauritius Company. He contended that the company existed as there was a certificate of incorporation proving its existence and that the Claimant had received cheques from the said company. He testified that it was not unusual for companies to assist each other.

Upon cross examination, it was his testimony that the contracting was the right party to be sued and having shared dealings did not alter this fact. He averred that the purpose of the shared dealings was to ensure that employees remained compensated even in the absence of cash flow. He listed the companies as Linksoft Communications Kenya, Linksoft Communication Nigeria and Linksoft Communications Uganda. It was also his testimony that the 2nd Respondent had changed its name to Linksoft Integrated Systems because it expanded its scope.

It was his testimony that the Claimant's consolidated salary was USD 14,000.00 net of taxes. That the claimant was also entitled to annual variable pay of USD 58,000.00 net of taxes, annual variable performance pay of USD 88,000.00 net of taxes based on achieving that percentage. That this was to be paid in arrears on a quarterly basis.

He admitted that sometimes salary and rent payment was delayed. It was also his admission that even after the Claimant had issued his resignation, the final dues had still not been paid. He states that at the time of resignation, the Claimant was owed 2 to 3 months' salary.

It was his testimony that the sum of Kshs.47,938.00 had been advanced leaving USD 41,772.00 and Kshs.44,250.00.

It was his testimony that the Claimant's employment letter was by Linksoft Group, on behalf of Linksoft International Mauritius Limited. He conceded that there was no entity known as Linksoft International Mauritius Limited but contended that "Mauritius" was added to all the companies domiciled in Mauritius.

He contended that the shared services were billed to the related companies. It was his testimony that Moses Ngiela who accepted the claimant's resignation was an employee of Linksoft Group Limited, authorized to sign documents on behalf Linksoft International Limited.

Upon re-examination it was his testimony that the different companies were assisting each other to meet their financial obligations. He maintained that the Certificate of Incorporation of the Linksoft International Limited was authentic. He asserted that the Claimant's performance had been dismal as they were not meeting targets.

Claimant's Submissions

In his submissions filed on 31st October 2019, the Claimant submits that the failure to pay his emoluments amounted to constructive dismissal as the resignation was forced by the circumstances. He relies on the case of **Joseph Barasa v Otieno Odongo [2019] eKLR** where the Court held that the Respondent's failure to pay the Claimant's salary for a period of 5 months amounted to constructive dismissal.

It is also his submissions that he is owed performance-based variable pay in the sum of USD 124,950.00 net of all taxes which was never paid during the subsistence of his employment. It is his position that his performance was outstanding hence he was entitled to the same.

The Claimant submits that the 3rd Respondent is personally liable for the claims made in this cause as he entered into an agreement in his capacity as an agent on behalf of a company he knew did not exist as was held in the cases of **Kelner v Baxter [1866] LR 2 CP 174** and **Phonogram Limited v Lane [1982]**.

The Claimant submits that the 1st and 2nd Respondents are jointly liable with the 3rd Respondent as he used them as a decoy to avoid legal obligations. He submits that the 3rd Respondent admitted to closing one company and to transfer of the company's assets to another as evidenced at page 61 of the Respondents' Bundle of Documents.

It is the Claimant's submissions that the Respondents are also jointly liable because their operations were completely intertwined as they shared Human Resource and staff and that salary payments were made by either of them. Additionally, the 2nd Respondent was the 1st Respondent's alter ego. He therefore urges this Court to lift the corporate veil and find the Respondents jointly and severally liable.

He relies on the cases of **Githunguri Dairy Farmers v Ernie Campbell [2018] eKLR**, **Ricatti Business College v Kyanzavi Farmers [2016] eKLR** and **Republic v Public Procurement Administrative Review Board Ex parte Transcend Media [2018] eKLR** where the respective Courts observed that the corporate veil could be lifted to unveil the real shareholders or agents controlling the activities of a company where there is a motive to be dishonest, act improperly or defeat the enforcement of the law.

Respondent's Submissions

In their submissions filed on 16th December 2019, Respondents submit that the Claimant's employer was Linksoft International Mauritius Limited as evidenced in the certificate of incorporation annexed in their supplementary bundle of documents.

They further submit that they are separate entities and the fact that the 1st and 2nd Respondents occasionally paid the Claimant's salary does not detract from the obligations of the hiring company, Linksoft International Mauritius Limited. They further submit that they were not privy to the employment agreement hence cannot be held liable. They rely on the case of **Charles Opati Ogeyo v We Tilley (Muthaiga) Limited [2014] eKLR** where the Court held that the act of paying the Claimant's salary did not make the Respondent the Claimant's employer.

The Respondents submit that the Claimant is not entitled to the claim for performance bonus of USD 124, 950 net of all taxes since his performance was lacklustre. They contend that during the Claimant's tenure, all Linksoft African entities experienced loss and the revenue growth referred to by the Claimant were already existing before he was employed. They rely on the cases of **Rita Gaki Gitobu v Telkom Kenya Limited [2014] eKLR**, **Sammy Kipyego Barchoka & Another v Postal Corporation of Kenya [2017] eKLR** and **Stephen Kachila v Bamburi Cement Limited [2015] eKLR** where the respective Courts observed that a bonus was payable subject to an employee's performance.

The Respondent submits that the claim for benefits is baseless as the same were paid directly to the relevant service providers once the Claimant presented the receipts. Further, he has not adduced evidence to show how the benefits were accrued.

The Respondents submit that the Claimant should pay for the dishonoured cheque charges having failed to bank the cheque in good time and contend that another check was immediately re-issued once it was realized that the previous one had been dishonoured. They further submit that the Claimant resigned on his own volition hence not entitled to the claim for 12 months' compensation for unlawful termination on account of constructive dismissal as evidenced in his letter of resignation.

Analysis and Determination

I have carefully considered the pleadings filed, the evidence adduced and the submissions by the parties. The issues for determination before this Court are-

- a. Whether this Court has jurisdiction to hear and determine this suit.
- b. Whether the Claimant's resignation amounted to constructive dismissal.
- c. Whether the Claimant's employment was unfairly terminated.
- d. Whether the Claimant is entitled to the reliefs sought.

Jurisdiction

The Respondents have submitted that this Court lacks the jurisdiction to hear this matter as none of the Respondents were the Claimant's employer.

It is common ground that the Claimant entered into a contract with Linksoft International Mauritius Limited. The letter was however on the letterhead of the 1st respondent and did not bear any address for the said Linksoft International Mauritius Limited, physical, postal or email. The address on the letterhead is Linksoft Group, Marcus Garvey Road, off Argwings Kodhek Road, postal Address 67136 – 00200 Nairobi with the email address being info@linksoftkenya.com. The landline telephone numbers are for Nairobi with one Kenyan mobile number.

The claimant worked in Kenya and resided in Nairobi. The name in the Certificate of Incorporation of the said Linksoft International Mauritius Limited bears the Linksoft International Limited and not Linksoft International Mauritius Limited.

The Claimant has submitted that Linksoft International Mauritius Limited does not exist whereas the Respondents insist on its existence.

In the Claimant's resignation letter of 27th August 2012, he refers to a Linksoft International Limited. The letter of resignation was accepted without any reservation. The subject of the letter was **"Resignation from the Services of Linksoft International Limited (Linksoft Group Limited)"**. The respondents agreed to pay the claimant his terminal benefits.

The Respondents have contended that the admission of the sums due to the Claimant was only done because the 1st Respondent was the holding company of the Claimant's employer and that such admission did not make the Claimant, the 1st Respondent's employee.

However, RW1 admitted that that the directors of Linksoft Group and Linksoft International Limited were the same. He testified that the Claimant was not paid by Linksoft International Limited and gave instances where Linksoft Communications Limited and even Linksoft Group Limited made payments on behalf of Linksoft International Limited. According to him, payments were made according to the company that had money at that point in time.

RW1 also testified that the legal manager for Linksoft Group Limited and the HR provided shared services to all the companies and that the

companies shared office space and insurance cover. He also conceded that the entry permit for the claimant had the name of Linksoft Group Limited but contended that the respondents had no control over what the immigration wrote in the receipt.

I find the invocation of the corporate veil by the respondents herein is ill intended as they seek to avoid the liability of paying the Claimant his dues, yet they paid his dues during the subsistence of his employment. I am guided by the decision in **Githunguri Dairy Farmers v Ernie Campbell [2018] eKLR** where the Court opined that the corporate veil could be lifted to unveil the real shareholders or agents controlling the activities of a company where there is a motive to be dishonest, act improperly or defeat the enforcement of the law.

The 3rd Respondent has been properly joined to these proceedings as he was the only acting constant in the conglomerate of companies for which the claimant worked, and admitted to working for all the Linksoft Group of Companies registered in Kenya and abroad. I also find that because of the confusion created by the respondents as to the identity of the claimant's employer, he was right in suing both the 1st and 2nd respondent who at one point or another paid his salary and whose work he performed. This court thus has jurisdiction to hear this matter.

Constructive Dismissal

The Claimant has averred that his employment was constructively dismissed as he only resigned due to the circumstances that made it impossible to perform his tasks. That his salary and rent was either delayed or unpaid; and that he was not provided with the infrastructure and personnel necessary to conduct his duties. Further, it emerged during trial that the claimant had been coerced into resigning, an averment that the respondents did not satisfactorily controvert.

His resignation letter of 27th August 2012 read as follows-

“This has further reference to the discussion/meeting I had along with you, CEO and COO of Linksoft on 27th August 2012 wherein it transpired that Linksoft does not need my services owing to the difficult market conditions. Hence I am submitting my resignation from the services of Linksoft International Limited (Linksoft Group Limited) with immediate effect and serve you three months’ notice in line with the contract term.”

The Court in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR** expressed itself on the concept of constructive dismissal as follows:

“The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer’s behaviour must be shown to have destroyed or seriously undermined trust and confidence...”

Further, the Court in **Milton M Isanya v Aga Khan Hospital Kisumu [2017] eKLR** set out the basic ingredients in constructive dismissal as-

- a. *The employer must be in breach of the contract of employment;*
- b. *The breach must be fundamental as to be considered a repudiatory breach;*
- c. *The employee must resign in response to that breach; and*
- d. *The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”*

The claimant testified that at the meeting of 27th August 2012, he was given two options, to resign and get his benefits or to be terminated without benefits. He resigned the same day. The respondents did not contest the contents of the resignation letter to the effect that the claimant had been compelled to resign in order to become entitled to his benefits.

For these reasons I find that the claimant was constructively dismissed. A constructive dismissal is an unfair dismissal.

Reliefs Sought

On the issue of the reliefs sought, the Claimant is entitled to compensation for unfair dismissal. Taking into account the length of service and the circumstances under which his employment was terminated as well as all the relevant factors of the case, I award him three months’ salary as compensation in the sum of **USD 42,000** (based on his basic salary of USD 14,000).

On the claim for performance bonus, the contract indicated that it was payable subject to performance. Further, its issuance is at the employer’s discretion. From the job description provided by the Claimant, one of his primary responsibilities involved identifying and maximizing revenue streams to meet revenue targets as well as meeting business targets for the group and ensure profitable growth.

The Respondents submitted that the Claimant was not entitled to the same as his performance had been dismal. It was their case that there was no increase in revenue during the Claimant’s tenure. However, RW1 conceded that the Claimant would ordinarily not be responsible for lost business.

The minutes of 1st November 2012 at page 69 to 83 of the Respondent's bundle of documents indicated that there was a decrease in revenue. Further, from the revenue report tracker for 2012, there was no constant increase in revenue as it reduced on certain months. Lastly, the Financial Results YTD of September 2011 at page 101 indicated that the YTD revenue for Kenya was 54% below the budget.

In light of the foregoing, I find that the Claimant has not established a case to warrant the granting of the performance bonus hence is not entitled to the same since it is awarded at the Respondent's discretion.

As regards payment of unpaid basic pay of USD 48,528 net of all taxes, RW1 admitted that the Claimant was paid all his dues save for a small balance. The Claimant submitted that the outstanding amount is **USD 48,528**, net of all taxes. As such, he is entitled to the same which I accordingly award him.

As regards the benefits owed of USD 125,000.00 per annum, the Claimant was entitled the same as per the contract. The final dues computation at page 158 indicates that the Claimant's dues for June up to July were computed exclusive of benefits. Further, RW1 admitted that the Claimant had been informed that he would not get the benefits for the months of October and November. The Respondents have not adduced any evidence to prove that the benefits were paid. Nevertheless, the Claimant has not adduced any evidence to prove that he is owed benefits for 1 year 5 months. As such, he is only entitled to the benefits from June to November. At the rate of USD 125,000 per annum he is entitled to **USD 52,083.35** which I award him.

The Claimant has made a case for the award of the bank charges. He did not deny the respondent's averment that he banked the cheque several months after it was issued and without first checking with the respondents. I thus find no basis for the claim and dismiss it.

The total award is USD 142,611.50

The Claimant is awarded costs of the suit. Interest shall accrue at court rates from date of judgment till payment in full. The judgment has been made as against the 1st and 2nd Respondents jointly and severally.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH 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 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 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