



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 635 OF 2016**

**DANCUN MAKARIO SIRIBA.....CLAIMANT**

**VERSUS**

**JAMES ISABIRYE MUGOYA.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that he was employed by the respondent between 1<sup>st</sup> October, 2013 and September 2015. He was appointed to the position of Business manager at a salary of USD 5,000 and Kshs 100,000/= per month. According to the claimant his contract was to expire on 31<sup>st</sup> September, 2016.
2. His duties included managing business processed to cut costs and improve efficiency, managing Bank relations, negotiating prices with clients and dealing with the company Secretary over filing of returns. On or about the month of January 2015, the respondent stopped paying his salary despite the fact that he continued to discharge his duties. He however continued to work from February, 2015 until September, 2015 when he stopped working after exhausting all his savings and could no longer afford to render his services to the respondent.
3. The respondent on its part denied the claimant's claim stating that there was never an employer –employee relationship between the claimant and the respondent. The respondent further stated that on 6<sup>th</sup> August, 2013 the claimant was offered employment as the Business Manager in the Mugoya Group of Companies for all inclusive package of net USD 5,000 plus Kshs 100,000/= per month.
4. In his oral evidence the claimant additionally stated that he used to work for Mugoya Group of Companies and that the companies were owned by the respondent. According to him the respondent called him and asked for his C.V which he gave and was later invited by the respondent for lunch. The respondent informed him that he wanted to hire him to help run his businesses.
5. The appointment was to be for three years, He accepted the job offer but was not issued with a letter of appointment. It was his evidence that by the time he left employment his relationship with the respondent was not bad except for payment issues. His last salary payment was in January, 2016 which were arrears for previous months. He never received his salary thereafter although he continued to work until September, 2015 when he decided to quit.
6. In cross-examination he stated that there was no entity called Mugoya Group of Companies and that it was a conglomeration of many companies. The cheques were issued from either personal account or through one of the companies. The claimant further stated that he never resigned in writing and that he never informed the respondent of his decision to leave. At the close of the claimant's case the respondent informed the court that he would not be calling any witness and opted to close its case.
7. The respondent herein has denied that the claimant was his employee. According to the respondent, the claimant was employed by an entity known as Mugoya Group of Companies which he claimed was a body corporate capable of suing or being sued. The respondent however did not produce any evidence in the form of certificate of incorporation to show that indeed there existed such a corporate body. This therefore lent more credence to the claimant's allegation that there was no such entity as Mugoya Group of Companies but that this was a conglomeration of companies under the direct control of the respondent. The respondent did not deny this fact.
8. By an email dated 9<sup>th</sup> November, 2013 attached to the claimant's bundle of documents, the respondent herein writes to the claimant in part as follows:

*“We met and I quite like you in addition to the contents of your C.V consequently and in line with what I suggested to you, I have the pleasure to offer you a position in the Mugoya Group of companies in a new role as the “Business Manager” reporting to me as of now”*

9. According to the claimant and which was not refuted by the respondent, under Mugoya Group of companies there was Transfleet Limited, Kingoroni Limited, Arborelom Plaza Limited and Kingoroni EPZ Limited among others.

10. The respondent as shareholder or director or whatever capacity he held in these companies offered the claimant a job in what he himself stated in his email as “Mugoya Group of Companies” It was therefore his responsibility as an employer and as required by Section 9(2) of the Employment Act to draw or cause to be drawn a contract of employment assigning the claimant to an appropriate employer. The respondent did not do this hence the claimant remained his employee performing duties in any of his group of companies.

11. The claimant pleaded and testified that he worked for the respondent from 1<sup>st</sup> October, 2013 up to September 2015 when he resigned because the respondent was not paying his monthly salary. This claim was merely denied by the respondent perhaps based on the erroneous belief that there was no employer-employee relationship between the claimant and respondent. No evidence was therefore produced to show such salary was ever paid to the claimant. The claimant claim therefore remained uncontroverted.

12. Concerning termination of service the claimant stated that he worked between February and September, 2015 when he resigned without any salary. He was therefore forced to resign. Omission to pay salary to an employee is in breach of contract of employment and a ground upon which an employee aggrieved can resign and validly sue for constructive dismissal.

13. A constructive dismissal is a termination of service by an employee due to unbearable working conditions created by the employer which gives an employee very little option but to terminate the contract. It is therefore an unfair termination of service within the meaning of section 45 of the Employment Act.

14. In conclusion the claimant has proved his claim and the court awards him as follows:

a) Salary for February through to September, 2015 USD 5000 plus Kshs 100,000 per month

USD 40,000 Kshs 800,000

b) Eight months’ salary for unfair termination of service. USD 40,000

Kshs 800,000

USD 80,000 Kshs 1,600,000

c) Costs of the suit

d) Items (a) and (b) shall be subject to taxes and statutory deductions.

e) The decretal sum shall attract interest at court rates from date of judgement until payment in full.

15. It is so ordered.

Dated at Nairobi this 8<sup>th</sup> day of February, 2019

**Abuodha Jorum Nelson**

**Judge**

Delivered this 8<sup>th</sup> day of February, 2019

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**