



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1588 OF 2010**

*(Before Hon. Lady Justice Maureen Onyango)*

**DAVID NELSON MISEDA.....CLAIMANT**

**VERSUS**

**SEVEN SEAS TECHNOLOGY LIMITED.....RESPONDENT**

**JUDGMENT**

Vide his statement of claim dated 16<sup>th</sup> December 2010 and filed in Court on 20<sup>th</sup> December 2010, the claimant avers that his employment was unfairly and unlawfully terminated by the respondent, a registered limited liability company.

His case is that he was employed by the respondent on or about 21<sup>st</sup> January, 2009 in the capacity of Business Manager-Africa Division earning a monthly salary of Kshs.185,000/- which amount was subject to review in accordance with work performance and merit.

The Claimant further contends that as an express term of his contract with the Respondent he was entitled to commission and performance bonuses by virtue of his membership to the Sales Organisation. Further that upon his separation with the Respondent he would receive his dues within a month of exit.

The Claimant avers that he worked diligently and to the Respondent's satisfaction leading to an increase in his salary from Kshs.185,000/- to 205,000/- with effect from 1<sup>st</sup> January 2010 as evidenced by Annexure "DNM 2", a copy of the undated salary review letter.

The claimant was posted to Ethiopia in the middle of 2009 where he was to head various projects. The Claimant contends that subsequently the Respondent's Addis Ababa Office was forced to shut down due to factors that were within the Respondent's control as a result of which the Claimant was recalled back to Nairobi.

The Claimant further contended that the Respondent irregularly and without notice began to make deduction on his salary of over Kshs.100,000/- as evidenced by the payslips which he attached to his claim.

The Claimant avers that on 28<sup>th</sup> June 2010 the Respondent called him to an ad hoc meeting wherein the Respondent induced him into tendering his resignation with the threat that if he failed to resign he would be dismissed on phantom charges and would lose all his terminal and/or contractual benefits. Annexed to the Claim and marked as "DNM 6" is a copy of the Claimant's resignation letter.

The Claimant contends that the Respondent through its actions contravened the provisions of Sections 17(1), 18(2), 25(1), 28, 36 and 43 of the Employment Act, 2007.

In his Memorandum of Claim the Claimant seeks the following reliefs:

- a) A declaration that his purported resignation was induced by coercion, force or threats and hence constructed termination.
- b) Unpaid salary for June 2010
- c) Unpaid dues in the sum of Kenya Shillings One Hundred and Seventy Four Thousand (Kshs.174,000/-)
- d) Unpaid commissions in the sum of USD 59,852.59
- e) Unpaid 15 days leave Kenya Shillings One Hundred and Fifty Thousand, Three Hundred and Thirty Three and Thirty Three Cents.

- f) Compensation for the termination
- g) Certificate of service
- h) Costs of this suit
- i) Interest
- j) Any other or further relief the Court may deem fit just to grant in the circumstances.

The Respondent in its Response to the Claim dated 4<sup>th</sup> February 2011 and filed in Court on 7<sup>th</sup> February 2011 admits having engaged the Claimant from 21<sup>st</sup> January 2009. The Respondent avers that the Claimant was only entitled to commission in accordance with the Company's policy which provided that the same was not automatic and was paid in accordance with the Company's reward policy as provided in the Claimant's employment contract.

The Respondent contended that contrary to the Claimant's assertion that his performance was good, the Claimant's performance was below target and that he was placed on a performance improvement plan, which performance the Respondent further contends did not improve and subsequently the Claimant failed to qualify for any performance related commission as is evidenced by annexure "SST 1" a copy of the Claimant's performance review form dated 30<sup>th</sup> October, 2009. The Respondent on this basis contended that the Claimant is not entitled to any commission as pleaded in his Memorandum of Claim.

The Respondent further denied that the Claimant was owed any leave days at the time of resignation as alleged and states that the Claimant is yet to comply with the Company exit procedures. It contended that the Claimant's salary increment was not due to exemplary performance but was a result of re-alignment within its organisational structure.

It is contended that the Respondent did not coerce or induce the Claimant to resign as alleged but rather the Claimant on his own volition and through his letter of resignation elected to resign from his position with the Respondent and that the Respondent had no choice but to accept the Claimant's resignation. It is further the Respondent's contention that the Claimant failed to comply with its exit procedure by failing to return all of the company's property prior to payment of his terminal dues.

The Respondent denied having made illegal deductions to the Claimant's salary as alleged. It is further the Respondent's contention that the Claimant failed to give it three (3) months' notice prior to his resignation as required by his contract of employment as a result of which the Respondent contends that the Claimant owes it three (3) months' pay in lieu of notice.

The Respondent by its counterclaim prayed for judgment as against the Claimant herein in the following terms:

- a) The sum of Kshs.581,933.29 together with interest thereon at court rates from 28<sup>th</sup> June 2010
- b) Return of the Respondent's documents and data in the possession of the Claimant
- c) General damages for lost business and opportunities
- d) General damages for loss of business reputation
- e) Interest in b) above at Court rates
- f) Costs of the counterclaim and interest thereon
- g) Such further reliefs as may be appropriate in the circumstances.

The Respondent urged the Court to dismiss the Claimant's Claim with costs to the Respondent and to subsequently allow its counterclaim as prayed.

The matter preceded for hearing on 29<sup>th</sup> September, 2017, 16<sup>th</sup> May, 2018 and 26<sup>th</sup> November, 2018 with the Claimant testifying on his behalf and Beatrice Njoki Kaindo, the Human Resource Officer of the Respondent Company testifying on behalf of the Respondent. Parties thereafter filed and exchanged written submissions.

### **Claimant's Case**

In his evidence the Claimant, CW1 reiterated the averments made in his Memorandum of Claim. He further testified that he commenced duty at the Respondent's Ethiopian offices on 1<sup>st</sup> January 2010 and that his main duties were to oversee sales and operations of the Respondent.

The claimant further testified that his salary was subsequently reduced by about 40 % and that he was not consulted before the salary reduction was effected. He further stated that no explanation was given by the Respondent on the reduction in salary from Kshs.205,000/- to Kshs.123,000/-. That he was recalled from Ethiopia on 10<sup>th</sup> April 2010 and was not given new duties by the Respondent.

The claimant stated that on 28<sup>th</sup> June 2010 he was invited for a meeting with the Respondent where he was asked either to resign from his position or be terminated and eventually lose his benefits as a result. He testified that he chose to resign and retain his terminal dues.

On cross examination the claimant insisted that his resignation from the Respondent's employment was forced and/or coerced. He further stated that the Respondent had promised that if he resigned from his position he would be given a good reference. He stated that he had no intention to resign.

On further cross examination the claimant stated that he did surrender to the Respondent at the time of separation all that he was required to release to the company.

On re-examination he insisted that he was forced and/or coerced to resign from the Respondent's employment. CW1 further testified that the Respondent asked him to resign immediately and not give any notice so as to receive his benefits. He further testified that his resignation was duly accepted by the Respondent. He urged the Court to award his Claim as pleaded.

RW1, BEATRICE NJOKI KAINDO, the Respondent's Human Resource Officer, adopted her witness statement dated 20<sup>th</sup> September 2018 and filed on 1<sup>st</sup> October 2018 as her evidence in chief. In the statement RW1 stated that the Claimant's performance in Ethiopia was below target and that following review he (the Claimant) was recalled from Ethiopia.

RW1 further testified that upon his return to Nairobi the Claimant opted to resign from his position and that the said resignation was not forced and/or coerced.

RW1 further stated that there was no meeting between the respondent and the Claimant during which the Claimant was forced and/or asked to resign as alleged by the Claimant.

RW1 contended that the Claimant has no claim for commission and urged the Court to dismiss the same. She further contended that the Claimant failed to comply with exit procedures as provided in its Human Resource Manual. She further contended that the Claimant's salary for June 2010 was duly paid.

In conclusion RW1 urged the Court to dismiss the Claim filed herein and allow the Respondent's Counterclaim in the terms prayed.

On cross examination RW1 confirmed that the Claimant's salary was reduced to Kshs. 140,500 and that the reduction in salary could be interpreted as a demotion.

RW1 also stated that she had no evidence that the Claimant's salary for June 2010 was paid.

### **Submissions by the Parties**

It is submitted on behalf of the Claimant that from the evidence on record it is clear that he faced a hostile working environment that affected his performance in Ethiopia. That he was recalled upon the Respondent's decision to close down its operations in Ethiopia.

The Claimant submits that the Respondent's acts amounted to constructive dismissal as he was forced and/or coerced to tender his resignation from his position after the Respondent unilaterally decided to reduce his salary without any explanation as to why the same was done. To fortify this argument the Claimant cited and relied on the findings in the case of **Coca- Cola East Central Africa Limited Vs Maria Kagai Ligaga (2015) eKLR** where it was held "*that constructive termination occurs where the employers behaviour is so intolerable that it makes it considerably difficult for the employee to continue working. The employee must demonstrate the employer has engaged in repudiatory breach. The employers action need not be coercive, threatening or in the nature of duress.*"

The Claimant submitted that the facts of this case disclose a case of constructive termination and he urged the Court to come to the same conclusion.

The Claimant submitted that the decision to unilaterally reduce his salary by the Respondent was contrary to the provisions of Section 10(1) of the Employment Act.

The Claimant further submitted that his case has all the ingredients for constructive termination as highlighted in the case of **Kenneth Kimani Mburu & Another -V- Kibe Mungai Holdings Limited (2014) eKLR**.

In conclusion the Claimant urged the Court to allow his Claim as drawn.

The Respondent on the other hand submitted that the Claimant was duly paid his salary for June 2010 as is evidenced by the annexure "DNM 5 b), a copy of the payslip.

With regard to the reduction in the Claimant's salary the Respondent submitted that the Claimant had requested for a salary advance in January 2010 for Kshs.60,000/- which was duly paid to him on 8<sup>th</sup> January, 2010. The Respondent further contended that the amount was recoverable within 3 months thus explaining why there was a reduction in the Claimant's salary.

The Respondent further submitted that the Claim for unpaid commissions and leave are in the nature of special loss which must be specifically proved. The Respondent cited and relied on the Authority of **Godfrey Julius Ndumba Mbogori & Another -V- Nairobi City**

## County (2018) eKLR.

The Respondent further contended that it did not terminate the Claimant's services but rather it was the Claimant who chose to resign voluntarily from his position at the Respondent Company. The Respondent further submitted that the Claimant is yet to comply with its exit procedures as he is yet to return the clearance form duly filled. It is the Respondent's submission that there is no evidence of any coercion to resign. To fortify this argument the Respondent relied on the Court's finding in the case of **Kenneth Kimani Mburu and Another Vs Kibe Muigai Holdings Limited**.

The Respondent submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim and urged the Court to dismiss the same with costs to the Respondent.

In conclusion, it was the Respondent's submission that it is entitled to the counterclaim as the Claimant failed to give three months' notice as required prior to his resignation.

### Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent from 21<sup>st</sup> January 2009 until June 2010. The Issues for determination therefore are:

1. Whether the Claimant voluntarily resigned or was constructively dismissed by the Respondent.
2. What remedies is the Claimant entitled to.
3. Whether the respondent is entitled to judgment as prayed in the counterclaim.

#### 1. Whether the Claimant was forced to resign or she voluntarily resigned.

The Claimant in his pleadings, evidence and submissions contends

that his resignation from the Respondent's employment was not voluntary. He claims to have been coerced into tendering his resignation which he further claims was instigated by the Respondent's decision to unilaterally reduce his salary by KShs.100,000/- as evidenced by his payslips marked "DNM 5a), DNM 5b) and DNM 5c)."

The Respondent on the other hand explains the reduction in salary to be in respect of deduction on account of a salary advance which was to be paid back in three months.

The question therefore remains did the Respondent's action amount to constructive dismissal?

#### What is Constructive Dismissal

Black's Law Dictionary (9<sup>th</sup> Edition) defines constructive dismissal as—

**A termination of employment brought about by the Respondent making the employee's working conditions so intolerable that the employee feels compelled to leave.**

Constructive dismissal or discharge has been defined by the Court in **Nathan Ogada Atiagaga -V- David Engineering Limited Cause No. 419 of 2014** as follows:

*"Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge."*

Further, in **Cause Number 611 [N] of 2009** between **Maria Kagai Ligaga vs. Coca Cola East and Central Africa Limited [unreported]**, the Court held that

*"Constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed."*

*The basic ingredients in constructive dismissal are:-*

- 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.*

**Do the circumstances of the instant case disclose constructive**

**dismissal?**

The claimant testified that in January 2010 his salary was increased from Kshs.185,000 to Kshs.205,000 after a performance review. He was thereafter posted to Ethiopia to work in a new market where he encountered a difficult working environment which made it difficult for him to meet targets. This applied to the other staff from Kenya who was posted to Ethiopia, as is evident from correspondence on record. His name is Chris Tioko.

The claimant testified that the office in Ethiopia was eventually closed, as it was not picking up. Upon his return to Kenya his salary was reduced from Kshs.205,000 to Kshs.123,000 as is evident from the payslips for April and May 2010.

The claimant's testimony was that upon returning to Kenya from Ethiopia he was never assigned any duties. This is not denied by the respondent.

The respondent's witness attempted to explain the deduction of salary, stating that it was a deduction in respect of a loan recovery for a salary advance to the claimant but this is not reflected in the payslips which refer to the basic salary for April and May 2010 as Kshs.123,000 as opposed to March and June 2010 payslip where the basic salary is reflected as Kshs.205,000. Further in the payslip for March 2010 there is a recovery of Kshs.20,000 under the item "*Company Loan*". The payslip for June also has a recovery of Kshs.29,156.22 on account of BOA loan.

Further, in the resignation acceptance letter, the final dues are expressed as follows –

*"Ref: SST-ACK/2806/2010*

*July 20<sup>th</sup> 2010*

*Dear David*

***Ref: Resignation Acceptance***

*Further to your letter dated 28<sup>th</sup> June 2010 announcing your formal resignation from Seven Seas Technologies, we wish to acknowledge receipt and accept your resignation.*

*According to your employment contract, you are required to provide the organisation with one month's notice to facilitate your handover.*

*Your final dues will be computed as follows:*

- *Salary for June 2010*
- *Outstanding amounts owed*
  - o *April 2010- Kshs.82,000*
  - o *May 2010-Kshs.82,000*
- *Less other deductions and remittances (loan, lunch etc)*
- *Less statutory deductions on the above payments(PAYE/IMS5F/NHIF)*

*You will be required to return all company property (access card, medical cards etc) and complete a clearance form.*

*We thank you for your time with us and wish you the best in your future endeavours.*

*Regards*

*SIGNED*

Angela Gachui

Chief Talent Officer

The correspondence at page 40 of claimant's bundle is also telling. At 11.10 am on 21<sup>st</sup> June 2010, Angela Gachui, the Chief Talent Manager wrote to the claimant thus –

*“From: Angela Gachui (mailto:agachui@sevenseastech.com)*

*Sent: Monday, June 21.2010 11:10 AM*

*To: Miseda David; Sanjeet Thethy*

*Subject: Salary*

*David*

*Hope you had a pleasant weekend.*

*This is to confirm that I have given, instructions for this month's pay to be reverted to the original pay.*

*We will need to have conclusive discussions this week regarding*

*1. your revised role since returning from Ethiopia*

*2. The pay commensurate with this position.*

*I will schedule the same with Sanjeet and Mike-*

*Regards*

*Angela*

*Angela Gachui*

*CHEF TALENT OFFICER J Shared Services J Seven Seas Technologies Group.”*

At 11.33 the claimant responded –

*“On 21 June 2010 11:33, David Miseda <dmiseda@sevenseastech.com> wrote:*

*Angela,*

*Thanks for the feedback. What about the months of April and May? The reduction was effected immediately I returned from Addis. Please advice.*

*Regards*

*David”*

At 3.06 pm, Angela again wrote: -

*“From: Angela Gachui [agachui@sevenseastech.com]*

*Sent: Monday, June 21, 2010 3:06 PM*

*To: David Miseda*

*Cc: Sanjeet Thethy*

*Subject: Re: Salary*

*David,*

Once we have had this discussion on your role moving forward as well as recap the discussion you had with Mike, then we will agree on how to handle April and May. This is why I would like us to have this discussion very urgently, so that we clear this issue out.

Thanks for your patience.

Angela”

The foregoing correspondence is proof that as at the date of the email correspondence on 21<sup>st</sup> June 2010, the claimant’s salary had been reduced and he had not been assigned any role.

Further, the letter of resignation refers to a discussion. The letter reads as follows –

“David Nelson Miseda,

P. O. Box 14108 00100 GPO,

Nairobi.

Monday 28<sup>th</sup> June 2010

Dr. Sanjeet Thethy

The Business Development Director,

Seven Seas Technologies Limited,

P. O. Box 14462-00800,

Nairobi.

Dear Dr. Thethy,

**Resignation from Seven Seas Technologies.**

The above matter refers. Further to our discussion today, I hereby tender my resignation from Seven Seas Technologies effective Monday 28<sup>th</sup> June 2010.

During my employment in Seven Seas, I have learnt a lot from

you and my colleagues and will treasure these moments for a long time.

I wish to request that you put in place a handover process that will enable me clear with the Company and handover appropriately.

I take this opportunity to thank you for giving me the chance to serve as Business Manager in the Africa Division and later as Country Manager of Seven Seas Ethiopia. I wish you and the entire Seven Seas team. God’s blessings in your future endeavours.

Yours faithfully

SIGNED

David Nelson Miseda

cc: 1. Group Chief Executive Officer, Seven Seas Technologies

2. Chief Talent Officer, Seven Seas Technology”

RW1 did not deny any of these facts which are also not explained in the witness statement. Under cross examination RW1 admitted that “There was a reduction in the salary. That can be interpreted as a demotion.” In the letter accepting the claimant’s resignation there is no reference to recovery of salary in lieu of notice.

From all these facts I would agree with the claimant that at the meeting referred to in his letter of resignation, he was given an option to either resign and be paid terminal dues or be dismissed and lose his terminal dues as well as have a blot in his career record.

Under the threat of dismissal with loss of terminal dues, the reduction of salary for April and May 2010, and the non-allocation of work from March 2010, it is not difficult to agree with the claimant that the environment under which he was working was hostile hence he was coerced into resigning. He would not have been expected to write a hostile resignation letter if he expected to receive his terminal dues as promised in the meeting.

I have also taken into account the fact that there were no minutes of the meeting of 28<sup>th</sup> June 2010 at which the claimant states he was given the option of either resigning or being dismissed. RW1 stated that she joined the employment of the respondent on 12<sup>th</sup> May 2014, long after the claimant left employment. She could therefore not testify about what transpired at the meeting leaving the claimant's version unrebutted.

In the case of *Milton M Isanya vs Aga Khan Hospital (2017) eKLR* while dismissing a claim for constructive dismissal the court stated that:

*“In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.”*

From the foregoing I find that the resignation of the claimant was not voluntary and therefore amounted to a constructive dismissal.

#### **Whether the Claimant is entitled to the reliefs sought**

Having found that the Claimant was constructively dismissed, he is entitled to one month's salary in lieu of notice in the sum of Kshs.205,000.

#### **Unpaid Salary for June 2010**

The Claimant denied having been paid his salary for June 2010. The Respondent on the other hand contended that the Claimant was duly paid his salary for June 2010. RW1 however stated that she had no evidence in Court to support this assertion.

The letter accepting the claimant's resignation which is dated 20<sup>th</sup> July 2010 states the respondent would pay him salary for June 2010 and the withheld salary for April and May 2010. This is evidence that by 20<sup>th</sup> July 2010 he had not been paid salary for June 2010 and is therefore entitled to the same.

#### **Unpaid Dues in the sum of Kshs.174,000**

The claimant is entitled to the payment of unpaid Dues being shortfall of salary for April and May 2010 at Kshs.82,000 for each month. This is admitted in the letter of 20<sup>th</sup> July 2010 from the respondent. The payment however amounts to Kshs.164,000 and not Kshs.174,000 as claimed. The claimant is thus entitled to payment of Kshs.164,000/= which I award him.

#### **Unpaid leave days**

The claimant prayed for and testified that he was entitled to 15 days leave that he had earned but not taken. This was not challenged by the respondent. No documents were filed by the respondent to prove the number of leave days outstanding to the claimant's credit as required by Section 10(3)(a)(i) and 74(1)(f) of the Employment Act. I therefore find the claim by the claimant unchallenged and uncontroverted and award him pay in lieu thereof at Kshs.150,333/=.

#### **Unpaid Commission in the sum of USD 59,852.59**

The correspondence attached to the claimant's memorandum of claim at pages 7 and 9 show that the claimant was entitled to Bonus for the Doshen Project being payment from Afcor. The amount due is however not stated. At page 10 is correspondence to the effect that payment would be made at the end of the year with 50% based on target achievement and 50% after receiving full payment. Hilary Kweya, in the email correspondence of 5<sup>th</sup> March 2010 confirmed that payment was received.

At page 24 and 52 of the claimant's bundle in his response to the respondent's response to claim and counterclaim are the details of the cost of the project and calculation of the bonus. These were not controverted by the respondent at the hearing. The claimant testified that his contract provided that he was entitled to Commission at 5% and described the category of products for which Commission was payable.

Although it is the respondent who is in possession of the records, it did not submit any to court. Neither did the respondent rebut the evidence of the claimant in any other form.

Section 10(7) provides that where an employer fails to produce documents that are or ought to be within its possession in a matter pending in court the burden of disproving the averments of the employee shift to the employer. In the present case, I find that the claimant has on a balance of probabilities proved that he was entitled to bonus as prayed. I thus award him the same in the sum of USD 59,852.59 as prayed.

In conclusion therefore, I enter judgment for the claimant as follows–

1... One month's gross pay in lieu of notice

(based on payslip for June 2010)..... Kshs.222,500

2... Salary for June 2010..... Kshs.222,500

3... Withheld salary for April and May 2010..... Kshs.164,000

4... Pay in lieu of 15 days annual leave earned

but not taken..... Kshs.150,333.

5... Unpaid Commissions..... USD 59,852.59

6. The respondent shall pay claimant's costs for the suit.

7. Interest shall accrue from date of judgment.

**Counterclaim**

No evidence was adduced in support of the counter claim. No mention of the counterclaim is made in the respondent's witness statement and neither were any questions put to the witness in respect thereof. I thus find that the counterclaim has not been proved and dismiss the same with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**