



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1938 OF 2014

JOSEPH MUMALI BARASA.....CLAIMANT

v

OTIENO ODONGO & PARTNERS CONSULTING ENGINEERING LIMITED.....RESPONDENT

JUDGMENT

1. Joseph Mumali Barasa (Claimant) instituted legal proceedings against Otieno Odongo Partners & Consulting Engineers Ltd (Respondent) on 31 October 2014 and he stated the Issues in Dispute as:

- a) Salary arrears
- b) Other contractual benefits arrears
- c) Constructive unfair termination.

2. In a *Reply to Statement of Claim* filed on 16 December 2014, the Respondent denied breach of contract or constructive dismissal.

3. The Cause was heard on 20 June 2019. The Claimant and the Respondent's Manager testified.

4. The Claimant filed his submissions on 17 July 2019 while the Respondent did not file submissions as Claimant served it with submissions 6 days before judgment.

5. The Court has considered the pleadings evidence and submissions and identified the Issues for determination as examined hereunder.

Constructive dismissal

6. There is no express statutory provision on *constructive dismissal* under the prevailing statutory framework in Kenya.

7. However, comparative and domestic case law is replete with discussions and recognition of the doctrine of *constructive dismissal*.

8. The doctrine of *constructive dismissal* was discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344. The Court discussed the rival tests and ended up endorsing the contract test.

9. The test, essentially as to what amounts to *constructive dismissal* as endorsed in the authority is that the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

10. From this test, the duty the Court is called upon to do is to look at the conduct of the employer which might have led to the employee leaving.

11. In the instant case, the Claimant testified that the continuous delay in the payment of salaries caused him financial distress and embarrassment, and that he could not meet his financial (mortgage and school fees) and family obligations. At one point, he stated that the salary arrears spread over 5 months.

12. The Respondent's witness did not deny that there were salary delays. It was asserted that the wages could not be paid when the public entities (Kenya National Highways Authority) which the Respondent had contracts with failed to make payments on time due to budgetary constraints.

13. The Court is alive to the challenges which bedevil contractual obligations by governmental bodies to pay contractors such as the Respondent, in time.

14. However, the payment of salaries when the same fall due is one of the *essentialia* of a contract of employment.

15. A failure to pay the wages would, in the view of the Court, be a fundamental breach on the part of the employer leading not only to frustration of contract, but a hostile work environment warranting an employee leaving and asserting *constructive dismissal*. Where an employee mutually agrees to accommodate the employer that would be a different scenario.

16. The Court therefore finds there was *constructive dismissal*, and it was not necessary for the Claimant to give notice in terms of the contract.

Breach of contract

Unpaid salaries

17. The Claimant sought Kshs 1,920,000/- on account of salary arrears.

18. During examination-in-chief, the Claimant testified that payment of salaries was erratic after he re-joined the Respondent in 2012 which continued up to 2014. To demonstrate that there were delays, the Claimant produced a *Memo* dated 5 May 2014 from the Respondent's Managing Director informing the employees of a 4 month salary delay.

19. The Claimant produced another *Memo* dated 22 May 2014 indicating that a 1 month salary delay had been resolved.

20. The Claimant also produced a letter dated 21 October 2014 from the Respondent being a reply to a demand letter from his advocate.

21. In the reply, the Respondent admitted that it owed the Claimant salary arrears amounting to Kshs 1,650,000/- and not Kshs 1,920,000/- after taking into account 3 months' salary in lieu of notice (the Claimant had given notice of resignation dated 30 September 2014 while the contract in place provided for 1 month notice or pay in lieu of notice).

22. The Claimant did not give the requisite notice in terms of the contract but because the Court has found there was *constructive dismissal*, it was not open to the Respondent to deduct the equivalent of 1 month salary in lieu of notice.

23. The Court finds that the Claimant is entitled to Kshs 1,920,000/- on account of salary arrears.

Unremitted deductions towards National Social Security Fund

24. The *National Social Security Fund Act* requires employers to deduct and remit contributions from its employees to the Fund.

25. The Claimant contended that the Respondent did not remit the sum of Kshs 31,200/- to the Fund over a period of 78 months.

26. To demonstrate that the Respondent did not remit the contributions, the Claimant filed in Court a *Provisional Member Statement of Account from the National Social Security Fund*. The statement show missing contributions spreading over several months.

27. The Respondent's witness however testified that the contributions towards the *National Social Security Fund* were later paid.

28. The Claimant did not rebut the oral testimony that the contributions were remitted and the Court will therefore find that this head of claim was not proved.

29. Any case, there are provisions in the *National Social Security Fund Act* which address unremitted contributions and if there are any pending unremitted contributions, the Claimant may want to report to the Fund to take action.

Leave

30. Clause 4 of the employment contract dated 20 February 2012 provided for 21 days annual leave. It also provided that leave would not be carried forward.

31. The Claimant testified and contended that by the time of separation he had 10 accrued leave days which he quantified as equivalent to Kshs 142,857/-. The testimony was not challenged or interrogated in any serious manner by the Respondent.

32. In terms of section 10(3) as read with section 74 of the Employment Act, 2007, the Respondent should have produced the Claimant's leave records in Court. It did not and therefore, the Court will allow the head of claim.

Gratuity

33. The Claimant had distinct contracts with the Respondent (dated 1 November 2006, 7 January 2008, and 20 February 2012 and which was to run for 20 months).

34. There were several *deployment on consultancy services contracts* which appear to have been running in parallel to the employment contracts of service(s), but unfortunately there was no disclosure or interrogation of their utility or relevance.

35. The first contract dated 1 November 2006 was to lapse after 6 months (April 2007). The subsequent contract noted that this contract ended on 31 October 2007.

36. The contract dated 7 January 2008 indicated that it was to commence from 1 December 2007 and was to run for 12 months (renewable on mutual agreement. It did not provide for gratuity).

37. On 20 February 2012, the Respondent confirmed the employment of the Claimant as Materials Engineer for a period of 20 months. This contract did not provide for gratuity.

38. The Court therefore finds that the Claimant cannot claim gratuity based on contracts dated 7 January 2008 and 20 February 2012.

39. The Claimant sought *gratuity* arrears in respect of the 2006 contract.

40. Strictly, the contract was to run for 6 months, but the Claimant served beyond the contract and it formally ended on 31 October 2007. The Claimant was therefore eligible for gratuity for the 12 months.

41. However, according to the testimony of the Claimant, he served for 57 months under the contract but was paid gratuity for 20 months.

42. The Claimant therefore sought gratuity for the balance of 37 months, at the rate of 1/3 of the earnings.

43. Records produced by the Respondent showed that the Claimant was paid gratuity for November 2006 to July 2011 (4 years and 8 months) totalling Kshs 466,666/-.

44. The Respondent, it appears paid the Claimant gratuity beyond the strict contractual confines.

45. In the view of the Court, the Respondent by paying gratuity beyond the confines of the contract created a legitimate expectation upon the Claimant that he would be paid for the 57 months.

46. The Court finds that the Claimant is entitled to the balance of the gratuity for 37 months.

47. The Court finds that the legal principle set out in *Wells Fargo Ltd v Julius Ihomba Gatete* (2018) eKLR does not apply in the instant case as it turned on application and interpretation of the *Regulation of Wages (Protective Security Services) Order, 1998* as amended by the *Regulation of Wages (Protective Security Services) Order, 2003*. The Respondent was not operating within the protective security sector.

Appropriate remedies/orders

Pay in lieu of notice

48. With the conclusion that there was *constructive dismissal*, the Court holds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice (salary was Kshs 300,000/- per month).

Compensation

49. Compensation is a discretionary remedy.

50. In the view of the Court, this is not a suitable case to grant compensation considering the other payments paid/found due to the Claimant and because the Claimant did not serve submissions within agreed timelines.

Service pay

51. The Claimant sought Kshs 2,080,000/- as *service pay*.

52. The Claimant was a contributor to the *National Social Security Fund* and in terms of section 35(5) & (6) of the Employment Act, 2007 would not be entitled to *service pay*.

Certificate of Service

53. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

54. The Court finds and holds that the Respondent was in breach of contract, and that there was *constructive dismissal*.

55. The Court declines to grant compensation in respect of the *constructive dismissal* or any other relief, but for the breach of contract awards the Claimant

(a) Unpaid salaries	Kshs 1,920,000/-
(b) Leave	Kshs 142,857/-
(c) Gratuity arrears	Kshs 157,143/-
TOTAL	Kshs 2,220,000/-

56. Respondent to issue certificate of service within 21 days.

57. Claimant is denied costs because of late service of submissions.

Delivered, dated and signed in Nairobi on this 20th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kimeru instructed by Job Kimeru Advocates

For Respondent Mr. Onyango instructed by Rachuonyo & Rachuonyo Advocates

Court Assistant Lindsey