



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1222 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ERICK OUMA ARINGO.....CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Eric Ouma Aringo filed this claim vide a Memorandum of Claim on 22nd July 2014 against the Respondent, Co-operative Bank of Kenya for unfair dismissal/constructive dismissal and non-payment of his terminal dues. He avers that he was employed by the Respondent on 24th July 2008 initially on a six months' probation period and thereafter confirmed as a Micro Credit Officer on 26th January 2009. That without any consultation or notice, the Respondent transferred him from the headquarters to its Kariobangi Branch where he reported on 20th January 2014.

That instead of performing his duties as Micro Credit Officer, he was assigned duties of a Teller, which he had not been engaged or trained for. That his thorough training at the Respondent's Management Centre as a Micro Credit Officer resulted in his good work performance that earned him prompt salary increments from Kshs.48,221.00 to Kshs.104,000.00 per month within a short period. That he was not happy with the change of duties and got frustrated and humiliated which made the employment relationship intolerable. That he thus gave the Respondent one month notice of resignation on 26th February 2014 effective from 26th March 2014.

He avers that he was at no time reprimanded and/or placed on any disciplinary program to justify the Respondent's actions which he terms as a repudiation of his employment contract. That the Respondent has without any lawful reason failed to pay his salary arrears and issue him with a certificate of service. That it has not responded to his claim communicated through his lawyers in the letter dated 27th May 2014. That since the Respondent discriminated him by singularly transferring him, he seeks compensation for the infringement of his fundamental rights. He further avers that his terms of employment were that upon termination/redundancy he would be entitled to the following terminal benefits:

- a. Notice period,
- b. Payment of days worked but not paid for,
- c. Service of 15 days for every completed year of service,
- d. Compensation for loss of employment,
- e. Unlawful deductions/ any withheld salary or allowances,
- f. Certificate of service,
- g. Pro-rata leave for the period worked.
- h. Any other statutory entitlements

That he has since suffered mental anguish particularly with the Respondent's failure to reconsider withdrawing the transfer letter and thus seeks remedies as hereunder:-

- (i) Unpaid salary for 26 days in March 2014 Kshs.104,000
 - (ii) 2 unutilised leave days (2/30 x 104,000) Kshs.6,933.30
 - (iii) Service pay [6 x (15/30 x 104,000)] Kshs.312,000
 - (iv) Pro rata leave (3 months/12 x 7/4 x 104,000) Kshs.45,500
 - (v) Compensation for unfair termination
(12 x 104,000) Kshs.1,248,000
 - (vi) Compensation for discriminatory transfer Kshs.3,000,000
- Total Kshs.4,716,433.30**

The Claimant prays that the Court do Order and Award that:

1. Grievant/Claimant resignation be declared as constructive dismissal by the Respondent.
2. The constructive dismissal of the Grievant/Claimant be and is hereby declared unfair, unlawful and hence null and void.
3. Singular transfer of the Grievant/Claimant be declared discriminatory, unfair, unprocedural and unjustified.
4. The Respondent do re-engage the Grievant/Claimant in work comparable to that in which the Grievant/Claimant was employed prior to his dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period he has been working and out of office/work.
5. Reinstate the Grievant and treat him in all aspects as if the Grievant's employment had not been terminated.

In the alternative to the prayer for reinstatement, the Claimant demands for monetary compensation as hereunder:-

- 1) The Respondent be ordered to pay the Grievant/Claimant terminal dues as enumerated under clause 2(1) sum of Kshs.4,716,433.30
- 2) Interest on clause 2(1) from date of constructive dismissal until payment in full at court rates.
- 3) General damages for infringing the fundamental rights of the Grievant/Claimant as the Court may deem fit to assess and grant.
- 4) The Respondent to pay legal costs in this suit.

The Claimant also filed his written statement dated 28th October 2015 stating that the transfer letter was only handed to him on 10th December 2013 and that his immediate supervisor told him she was not aware what was going on as the recommendations had been for a promotion and not a demotion. That due to the Respondent posting very impressive profits, all staff were destined to get a bonus during the period ending 31st December 2013 but he was singled out and denied a bonus for unknown reason and that the shock of transfer made him seek 10 days leave to reflect. That he realised the Respondent had intended to replace him with Anthony Munyiri whom he had trained and mentored after being posted to the Claimant's department in September 2013. That his other colleague in the micro credit department, Samuel Mburu Kamau was transferred and promoted to Branch Manager and that it is this selective promotion and demotion that made him feel discriminated against.

That even the Kariobangi Branch Manager questioned him as to why he had been demoted to a teller. That he was not given a desk/workstation and that he used to stand next to another teller, Jeremiah Oyengo, to see what he was doing so that he could learn. That the incident that humiliated him the most was when the Kariobangi Branch Operations Manager, Jane Mbijiwe converted his services and started utilizing him as the branch office messenger. That he used to handle, deliver and file mails. That he was being set up for failure which was materially equivalent to dismissing him from employment. That it was for these reasons that he submitted his resignation letter barely two months into his transfer as he felt he had no avenue to ventilate his frustration. That he had worked up to the 25th day of March 2014 expecting to be paid but only to find no salary. That the Respondent did not inform him that the salary was to be appropriated towards a staff loan. That since the said loan was pegged on a lower interest, he prays for this court to order that the staff rate should apply until judgment of this case. That the amounts paid through Alexander Forbes Financial Services by the Respondent were his contributions to the provident fund and not terminal dues.

The Respondent filed its Statement of Defence on 27th August 2014 admitting to have employed the Claimant. The respondent states that the claimant's employment was subject to the CBA entered into between Kenya Bankers Association and the Banking, Insurance and Finance Union (Kenya) wherein the Claimant was a member. That his employment was further subject to other terms and conditions set out in the Respondent's Staff Manual whose particulars are within the Claimant's knowledge. It admits transferring the Claimant by a letter dated 3rd December 2013 in conformity with the aforementioned Staff Manual and its Transfer Policy as provided in *App 22 of the said manual*. That between the time the Claimant reported to the Kariobangi branch and his voluntary resignation, he was undergoing training as a Teller,

evident by the fact that he did not have a User ID which is mandatory for a Teller. That the trainings are further evidenced in the annexures marked **App CBKL-3(b)** and **CBKL-3(c)**. That his previous role profile as a Micro Credit Officer (**CBKL-3(d)**) is evidence that the teller duties assigned to him were not demeaning. That the two positions fall under the same grade of a **Graduate Clerk** and so his transfer was consistent with the said grade. Further, that the Claimant had made an online application for a Customer Service Officer position in August 2013 but did not attend the interview.

It avers that the Claimant had been cautioned for not meeting the target evidenced by a memo dated 16th April 2012. That the respondent accepted the one month's notice of resignation by the Claimant vide its letter dated 4th March 2014. That his terminal benefits were computed and a net sum of Kshs.57,929.80 credited to the Internal Settlement Account because he was at the time of resignation indebted to the bank in the sum of Kshs.1,296,107.57 as tabulated in its said letter of 4th March 2014. That on 4th March 2014, the Claimant collected his retirement benefits of Kshs.517,077.67 and duly acknowledged the discharge form in respect thereto and but is yet to collect his certificate of service which was prepared on 14th March 2014. That his claim for compensation for discrimination lacks merit and the amount quoted is contemptuous and untenable. That the Claimant having opted to voluntarily resign cannot turn around and claim compensation for his own wrong and conceited judgment.

That the respondent indeed replied to the Claimant's lawyer demand letter through its letter of 3rd June 2014 in which it denied any liability. That *notice pay, service pay and compensation for loss of employment* are benefits dependent on the circumstances under which the termination of employment occurs. That since the claimant voluntarily resigned and was not dismissed or declared redundant by the Respondent, the abovementioned terminal benefits are not tenable and are inapplicable in his case. That the respondent paid the claimant's leave allowance of Kshs.7,111/= in January 2014 as provided in the CBA and so his claim for pro rata leave is without merit. That without prejudice to the foregoing, even if it was to unlawfully terminate the Claimant's employment but which it did not, his entitlement would only be one month's salary in lieu of notice. That it was not obligated either in law or under the terms of the Claimant's employment to issue to him any warning letter prior to the said transfer and subsequent allocation of teller duties. That the whole Claim is misconceived and baseless. That the Claimant is not entitled to judgment for the orders sought. The Respondent prays that the Memorandum of Claim be dismissed with costs.

The Respondent filed a Witness Statement dated 26th July 2016 made by its Employee Relations Officer, Vera Nyangada who states that upon employment, the Claimant was posted to the Bank's Kayole Branch where he worked until the date he was transferred. That the Claimant did not indicate the reason for his resignation and it was impossible for the Respondent to thus establish the cause thereof. That in regard to disciplinary records, the Claimant was previously issued with a verbal warning letter on 3rd March 2011 and a first warning letter was issued to him on 6th July 2009, both documents evidenced at **pages 1 and 2 of the Respondent's List of Documents**. That the Claimant's salary at the time of resigning was Kshs.98,005/=.

Evidence

The Claimant adopted his pleadings and witness statement as his evidence. He testified that the other two micro-credit officers that he used to work with were promoted to Supervisor River Road Branch (Dorcas Mware) while Caroline Abanyi was promoted to join the transformation team at the Respondent bank headquarters. That while they were all transferred on different dates, he was the first to be transferred and demoted to a teller which was demeaning because he had worked for 6 years. That he was also not paid transfer allowance. He stated that he was paid a bonus of Kshs.120,000/= in the previous year.

Under cross-examination, the claimant stated that the duties of a micro-finance officer was to vet clients who are interested in taking loans from the bank and to manage creditors. He confirmed that under **page 3 and 4 of the CBA under section (b) items (i) (ii) and (iii)**, the roles of a micro-credit officer and teller are all clerical but in different units. He also confirmed that no clause in the CBA required the employer to consult the employee with regards to transfer and that transfers are at the bank's discretion as per **clause 18.1 of the Transfer policy at page 37 of Respondent's response**. That he also did not have documents to show that he was qualified as micro-credit officer. He stated that the loan contract he had with the bank was different from the employment. In re-examination, he stated that the verbal warning issued to him in 2011 was not valid when he resigned in March 2014 and that his resignation was not related to the warnings as alleged by the Respondent.

RW1, VERA NYANGADA OMONDI adopted her witness statement as part of her evidence. She stated that the Claimant's duty was sale of bank's products such as loans to bank customers. She confirmed that the Claimant was not given notice of 2 weeks as per transfer policy. Under cross-examination, she stated that payment account name on **page 52 of the Respondent's response** belonged to the Claimant despite the difference in name. she further stated that the 2 weeks' notice was not mandatory. In re-examination, she stated that the policy of the bank is that bonus is at the discretion of the bank's management and that there was no provision for bonus in the claimant's letter of appointment. She testified that the Claimant resigned before the bonus was paid. She reiterated that it was the decision of the Human Resource to transfer the Claimant taking into account the business needs and skills and that the Claimant did not complain before his resignation.

Claimant's Submissions

The Claimant submits that his resignation was forced resignation/constructive dismissal as defined in **Pretoria Society for the care of the Retarded vs. Loots (1997) 6. ELLR** as a situation in the workplace which has been created by the employer and which renders the continuation of the employment relationship intolerable for the employee to such extent that the employee has no other option available but to resign. That the Respondent contravened **section 10(5) of the Employment Act** by unilaterally changing his duties in the guise of a transfer and that the CBA which was not relevant (24 months from 1st March 2013) cannot oust the contractual obligation of the parties. Further, that the Respondent's transfer policy cannot override the said Section 10(5) of the Act. That the facts and evidence on record in the instant case prove constructive dismissal since the Respondent did not give reasons why he was not issued with the user ID or a Teller desk after his induction course on 10th-11th February 2014.

That constructive dismissal has its roots in the law of contract under the doctrine of discharge by breach and that the same can be applicable

in Kenya because of the entrenchment of a justiciable right to fair labour practices under **Articles 41 and 259 of the Constitution**. That **Article 41(2)(a) and (b)** provide that every worker has the right to fair remuneration and reasonable working conditions. That the court in the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** held that there is need to interpret the Constitution in a manner that advances human rights and fundamental freedoms in the bill of rights and the doctrine that the Constitution is always speaking. He also cites the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** and submits that all the parameters set in all the cases he has cited fit the circumstances upon which he resigned and amount to constructive dismissal, hence unfair dismissal.

He submits that the Respondent did not comply with procedural fairness as under **section 41 of the Employment Act** since it failed to adhere to its own **Transfer Policy at clauses 4, 6 and 13**; and particularly failed to give him two weeks' notice on the intended transfer. That there was neither a request from Kariobangi Branch nor from him to be transferred and that the employer has the responsibility to demonstrate to the court that it has observed the dictates of procedural fairness. That the Respondent did not hear him to find out the reason for resignation submitting that the responsibility imposed under section 41 on fair hearing did not shift. That the Respondent further contravened **sections 43 and 45 of the Employment Act** since it failed to prove that its reasons for changing his duties without an application or transfer were valid. That it also failed to call the Kariobangi Branch Manager and its Operations Manager to adduce evidence and that the Claimant's evidence thus stands unchallenged.

It is submitted by the Claimant that his singular selection for teller duties without any criteria or reason amounted to discrimination and thereby infringed his fundamental rights and fair labour practices. That another element of discrimination was backdating his loan by one year contrary to bank policy by stating that the interest on loan would revert to commercial rates after **30 days from 26th March 2013** when his resignation was effectively from 26th April 2014. That the Respondent refusing to pay him runs contrary to **Section 5(2), (3)(a) and (3) (b)** of the Employment Act to wit;

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

.....

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

The Claimant submits that the standard procedure in banking is that both the account number and account name must match to have a valid transaction but the account name for the purported settlement account is given as **Peter Eric Ouma Aringo**. That the Respondent's computation and allegation of internal settlement is an imagination made to hoodwink the court and that its witness failed to demonstrate to this court that the internal settlement was for him and further, the details of the loan being serviced. That his claim for unutilised leave days is not denied/ disputed as under **section 10(7) of the Employment Act** and that pro rata leave as pleaded is because he had worked for three months in 2014 and therefore justified for leave under **Section 28(1)(b) of the Employment Act**. He urges the Court to exercise its discretion and award 12 months' compensation under **Section 49(1) (c)** and on discrimination, to award damages of Kshs.3 million or any other sum as it deems fit, as under **section 12 of the Employment and Labour Relations Court Act**.

Respondents' Submissions

The Respondent submits that under **Clause 18.1(5) of the Transfer Policy**, it is the bank's policy not to transfer an employee on disciplinary grounds as much as possible and so the Claimant's complaint to that effect has no merits. That the said two weeks' notice is not mandatory as it is subject to the bank's business exigencies as under **sub-clause 13 of Clause 18.1** which has a proviso that if the bank's business exigencies requires, the notice period provided of two weeks may be reduced to fit its business demand. That transfer of employees from one branch to another is also provided for under **clause AB 30 of the CBA** which further provides under **sub-clause 2** thereof for payment of disturbance allowance amounting to two months' basic salary except where the transfer is within the same town. That since the Claimant's transfer was within the same town, the issue of payment of disturbance allowance did not arise. It is submitted that the claimant's voluntary resignation cannot be construed as constructive dismissal as alleged. That in the evidence in chief of RW1, she stated that the Claimant was assigned a desk next to another teller who was to mentor him, which was the Respondent's culture of training employees. That this evidence was not shaken in cross-examination. It cites the case of **Henry Ochido -v- NGO Co-ordination Board [2015] eKLR** where the court while dealing with issues of transfer and constructive dismissal stated at paragraph 54 inter alia, that:

"...a work transfer is the prerogative of the employer. The Petitioner cannot claim a forced transfer save for the modalities that this was enforced contrary to section 10 of the Employment Act as set out above. I also find no evidence that the removal of the Petitioner from the Respondent's website caused the Petitioner public ridicule causing him to tender his resignation..."

It submits that the Claimant did not raise the issue of allegedly backdating the loan by one year in his pleadings or in evidence and that he

cannot therefore raise this new issue in submissions. It admits that the quoted date was a typographical error in that it was to be as at 3rd March 2014 and not 26th March 2013. That the Claimant did not tender any evidence to show that the calculation of interest on the outstanding loan amount was backdated to 26th March 2013. It therefore denies all the Claimant's allegations of discrimination submitting that his transfer was within the terms and conditions of his employment, the CBA and the Staff Manual. That for this allegation of discrimination to succeed, the Claimant ought to have tendered before this court evidence showing that its actions were in breach of **Article 27 of the Constitution** and **section 5 of the Employment Act**. That no such evidence was tendered by him and so the said claim must fail.

It is submitted by the Respondent that **Black's Law Dictionary, 8th Edition** refers to constructive dismissal as constructive discharge and defines it as "a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave". That in the case of **Coca Cola East and Central Africa Limited -v- Maria Kagai Ligaga [2015] eKLR**, the court of appeal stated at para 29 that the contractual test is narrower than the reasonable test and that the dicta in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 22** adopts the contractual approach test which they are persuaded is narrow, precise and appropriate to prevent overstretching the concept of constructive dismissal. That the court of appeal in the **Coca Cola case above** went on to outline the legal principles relevant to determining constructive dismissal at para 30. That the Claimant in this instant case expressly stated at **paragraph 4 of his resignation letter** that he has had a cordial relationship with the bank and its management and thanked it for the employment opportunity. It submits that in its opinion, the content of the said letter does not meet the threshold of a constructive dismissal as expounded by the court in the **Coca Cola case**.

That the Claimant tendered his resignation two months after he was transferred which by itself disentitles him to claim constructive dismissal since he failed to leave immediately upon the transfer as was stated in the **Western Excavating case**. It also refers the court to the case of **Premier Construction Limited -v- Josephat Bwire Lukala & 5 others [2017] eKLR** where the court of appeal stated that constructive termination or dismissal will be imputed only where the employer is in breach of some fundamental terms of the contract of employment that makes it untenable for the employee to remain in such employment and resigning in response to that breach. The Respondent submits that none of the grounds that were cited in the **Premier case** and in the decisions referred to by the court of appeal therein have been proved in this case. It urges this Court to adopt the said decision and dismiss the claim herein. That the facts in the case of **Anthony Mkala** which is cited by the Claimant in his submission are different because the claimant in that case did not resign, which is a key element under the doctrine of constructive dismissal. That the claimant therein also underwent a disciplinary process before he was dismissed.

The Respondent submits that sections 41, 43 and 45 of the Employment Act which the Claimant relies upon are not relevant in this case because his cause of action is based on voluntary resignation as opposed to termination of employment by the Respondent. It relies on the case of **Robert Indiazi -v- Tembo Sacco Limited [2018] eKLR** where the Court held that:

"Since the claimant requested and was allowed to resign instead of being dismissed, he cannot complain about the process at the hearing as he did not allow it to proceed to its logical conclusion. I therefore find no proof of unfair termination as the claimant's employment with the respondent was terminated by way of his resignation..."

It submits that the Claimant is thus not entitled to any of the reliefs on the claims of constructive dismissal and discrimination. On reinstatement, it submits that the Claimant's actions of voluntarily resigning then claiming he was constructively/unfairly dismissed raises the question of trust and integrity on his part which are key in the Respondent's banking business. That it would therefore be impractical to reinstate him as he lacks honesty and integrity. Further, that **section 12(3) of the Employment and Labour Relations Court Act** does not permit reinstatement after 3 years of dismissal and even if this court was to exercise its discretionary powers, reinstatement only applies in cases of wrongful dismissal/ unfair termination but not where there is voluntary resignation. That the Claimant is not entitled to the alternative claim as prayed on the ground that he voluntarily resigned from employment. That the Claimant has failed to discharge the burden of proof of the alleged constructive dismissal which lies squarely on him, to the standard required by law to warrant a judgment in his favour.

Analysis and Determination

The issues for determination are whether the Claimant was constructively dismissed by the Respondent, whether the Respondent breached the Claimant's contract of employment and whether Claimant is entitled to the reliefs sought.

In the case of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited, Nairobi ELRC Cause No. 339 of 2011**, at page 10 Rika, J. further defined constructive dismissal as follows:

"...constructive dismissal occurs when 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."*

In the instant case, the Claimant remained in the Respondent's employment and resigned one month and one week after his transfer.

The CBA applicable to the claimant provided for transfer as follows-

ii) "Transfer – Permanent

An employee who is permanently transferred from one branch to another, other than in the same town shall be paid a Disturbance Allowance amounting to two (2) months basic salary that he is earning at the time that the transfer takes place. In addition the bank shall pay to the employee the cost of the transport charges involved in the transfer for the employee before the transfer takes place. The above conditions shall not be applicable to an employee who is permanently transferred at his own request."

Further the respondent's Transfer Policy applicable at the time material to this suit provided as follows –

"An employee of the Bank may be called upon to work in any of the Bank's branches and/or subsidiaries within the Republic of Kenya. As per the terms of employment for all employees, placements and transfers will be based on the interest of the bank.

...

The decision to transfer an employee will reside with the Human Resource Division who will transfer an employee after due consultations with respective heads of departments/branch managers and the Group Managing Director and CEO as appropriate and after taking all the circumstances, needs of the Bank and the employee's capability into account. That upon transfer of an employee as necessary, an immediate replacement will be availed.

It is the Bank's policy - as much as possible - not to transfer an employee on disciplinary grounds.

Employees shall remain in any one Branch/department for a minimum of three (3) years after which they will become eligible for transfer. However should business exigencies dictate, the period may be reduced/increased to fit business demand.

...

An employee shall be given at least two (2) weeks' notice on transfer. However should business exigencies require, the notice period may be reduced to fit business demand. Handing over for substantive positions should be for a period of 2 weeks in accordance with the Bank's handing over and taking over procedures.

Transfers will be effected in a manner that will cause the least possible disruptions to staff and branch operations."

The claimant was transferred from Kayole Branch to Kariobangi Branch by letter dated 3rd December 2013. His letter of transfer is reproduced below –

"PF. NO. 3264/GT/akm

3rd December 2013

Erick Ouma Aringo

Thro'

The Manager

Kayole Branch

REF: TRANSFER TO KARIOBANGI BRANCH

We write to advise that you have been transferred to the above mentioned Branch to perform the duties of a Teller effective immediately.

Please arrange to hand-over any of your pending assignments as directed by your In-charge prior to your departure, then report to the Manager – Kariobangi Branch for allocation of duties. Your In-charge is hereby requested to conduct your performance assessment for the period covered prior to your release.

By a copy of this letter, the Manager – Kariobangi Branch is advised to set your new draw a Role Profile for your responsibilities.

SIGNED

MRS. W. WELTON

DIRECTOR

HUMAN RESOURCES DIVISION"

There is no record of any complaint by the claimant in respect of the transfer. There is further no record of complaint by the claimant about the change of his designation from his former position as Micro Credit Officer to Teller.

The claimant resigned by letter dated 26th February 2014, just shy of three months after his transfer.

The claimant testified that he was not given two weeks' notice as provided in the transfer policy, a fact that was admitted by RW1 and is evident from the letter of transfer.

The claimant's letter of resignation is reproduced below –

Erick Ouma Aringo

Kariobangi Branch,

P.F. No. 3264

Tel: 0715 409 096

26th February 2014

The Director

Human Resources Division,

The Co-operative Bank of Kenya Limited

NAIROBI

Through

Branch Manager

Kariobangi Branch

Dear Madam

RE: RESIGNATION FROM EMPLOYMENT

This is to tender my resignation from employment with the bank.

I would wish to give a notice that I intend to leave the bank's employment service in the next days,

will remain on duty up to 26th March 2014 to continue performing my responsibilities and clear with the bank as I serve my notice of resignation.

I have had a cordial working relationship with the bank and its management and I take this opportunity to thank you for having given me an employment opportunity.

Thank you and God bless you.

Yours Faithfully

SIGNED

ERICK OUMA ARINGO"

The claimant's letter of resignation does not mention any frustration. In fact, he gave notice with assurance to the respondent that he will continue performing his responsibilities and clear with the bank as he served the notice period up to 26th March 2014.

In the last paragraph of his letter, he thanks the bank for the cordial relationship with management and for giving him an opportunity to work with the bank.

This is in stark contrast with his allegations of mistreatment and frustration making it impossible for him to work with the bank to warrant his resignation.

The bank had a right to transfer the claimant as demonstrated by the provisions of the CBA and the Transfer Policy. Further, the claimant admitted that the position of Micro Credit Officer was in the same grade of graduate Clerk as was the position of Teller. His transfer was thus not a demotion.

Further, the claimant left employment on 26th March 2014 but did not send a demand letter to the respondent until 27th May 2014, a duration of two months.

The claimant's allegations that he was required to work as a Teller, a position to which he had no training is inconsistent with the evidence on record which is that he was undergoing training as Teller.

In the case of *Coca Cola East and Central Africa Limited -V- Maria Kagai Ligaga [2015] eKLR*, the Court of Appeal applied the following tests for constructive dismissal –

“The legal principles relevant to determining constructive dismissal include the following:

- a. What are the fundamental or essential terms of the contract of employment?*
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*
- c. The conduct of the employer must be a fundamental or 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.*
- d. An objective test is to be applied in evaluating the employer's conduct.*
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.*
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”*
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”*

From the foregoing, I find the facts of this case inconsistent with a finding of constructive dismissal. I find that there was no breach on the part of the respondent that would justify the claimant to repudiate the contract. I further find the conduct of the claimant, including his timing of action in resigning and in filing suit, as well as the wording of his letter of resignation, to be inconsistent with a man who is so frustrated by the circumstances under which he was working as to justify his resignation in protest. I find no proof of constructive dismissal.

The result is that the claim by the claimant is unmerited and is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE