



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.479 OF 2016

ANDREW KHAEMBA.....CLAIMANT

VERSUS

AFRISCAN KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 5th December, 2016. The respondent was served and entered appearance on 10th April, 2017. There was no defence filed.

2. On 10th April, 2017 parties attended court for hearing directions and the respondent pleaded for time to file its documents which was allowed on or before the

7th May, 2017 when the court was to mention the matter and issue hearing directions. Parties were also directed to file their List of Agreed Issues.

3. On 15th November, 2017 when the matter was for mention in court the respondent had not complied. The respondent requested for more time and the court allowed the respondent to file defence and statement before 30th November, 2017. There was no compliance. No defence was filed.

4. On 6th April, 2018 the claimant filed application seeking to proceed with the hearing of the suit undefended noting the respondent had not filed any defence.

5. Rule 13 read together with Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that once a claim is served upon a respondent, appearance and defence should be filed within 21 days where such defence is not filed, upon application by the claimant, the court may direct the matter to proceed by way of formal proof. Rule 15(3) provides that;

(3) Where no defence or response is filed in Court within the prescribed period, the Court may, upon application by the claimant, direct that the matter proceed for formal proof.

6. On 9th April, 2018 the court allowed the claimant's application and allocated the matter to proceed by way of formal proof on 30th July, 2018.

7. The respondent were served and returns filed through affidavit of Mwololo Kilauni and confirming on 7th May, 2018 the respondent through their advocates were notified of the hearing date.

8. The claimant was therefore heard on his evidence in the absence of the respondent noting there was no defence and appearance at the hearing.

Claim

9. The claimant was appointed by the respondent company Farm manager on 1st July, 2011 and issued with the letter. The claimant worked diligently and in December, 2014 the respondent defaulted in payment of his salaries and often times paid erratically. In March, 2015 the claimant took his annual leave of 3 months which had accumulated over the years. He was not paid during this period of February, to May, 2015. He is still owed one (1) month payment while on leave.

10. While the claimant was on leave, the respondent officer called him for a meeting. Present were the Managing Director Mr Charles Mwangi and a director Mr Benjamin Mwangi. The claimant was advised that his services were no longer required and had the option to

resign or be terminated from his employment with the respondent.

11. The claim is also that during the period of employment the claimant went through great hardship with a salary. He was unable to pay his house rent and had to sell part of his properties. The claimant defaulted in the payment of school fees for his 4 children. He could not meet his daily upkeep and family. The claimant had a loan with Barclays Bank which went into serious arrears and is still struggling to pay up the loan.

12. Despite the frustrations the claimant did not compromise his work records. On 24th April, 2015 the claimant took the painful decision and handed over his resignation indicating that his last day of work would be 31st May, 2015.

13. The claimant had enrolled in a registered pension scheme wherein he contributed 5% of his gross salary and the respondent was to contribute an equal amount. Upon separation, the claimant discovered that the respondent had not remitted either his portion of its portion and for some time there were unpaid arrears amounting to Kshs.982, 456.00. The respondent also failed to make remittance due for March, April and May, 2015 amounting to Kshs.85, 462.00.

14. The claimant was last earning Kshs.284, 875.00 per month.

15. Despite various demands being made to the respondent, there is no response or effort to pay the dues owing. The claimant is seeking the following;

- a) *A declaration that the claimant's termination of employment was a case of constructive termination;*
- b) *Salary for the months of February, March, April, May and June, 2015 at kshs.1,424,275.00*
- c) *12 months compensation for unfair termination Kshs.3,418,500.00;*
- d) *Unpaid pension contributions Kshs.982,456.00;*
- e) *Interests on (b) and (d) at court rate from the date each payment fell due and payable until payment in full.*
- f) *Certificate of service*
- g) *Costs.*

16. The claimant testified in support of his claim and also filed his Witness statement.

17. The claimant's evidence is that upon employment by the respondent he worked diligently but was frustrated in his work due to the non-payment of his due salaries. This put him into serious crisis as he was unable to pay his rent, pay school fees for his children and as he had a loan with Barclays bank he was processing, this put him into serious financial strain. Due to these frustrations and following a meeting with the respondent senior officers who directed him to resign from his employment or be terminated, he opted to tender his resignation. The claimant tendered his resignation out of frustrations by the respondent as this had never been his intention. The claimant had not taken leave during the period of employment and when he took his due 3 months of annual leave; his due salaries were not paid.

18. The claimant also testified that he has made several demands to the respondent to pay the dues owing without success and thus necessitating this suit. The respondent failed to remit the pension dues deducted from the claimant and the portion due from them. The dues owing should be paid in full with interests and costs of the suit.

19. As set out above, there was appurtenance by the respondent but not defence. Despite the court allocating more time to the responding to file defence, there was no compliance. Despite the respondent being notified of the hearing date, there was no attendance.

20. I take it the respondent did not have any defence to offer and was not keen to attend and defend the suit.

21. Based on the pleadings and the evidence of the claimant, the same shall be assessed on the merits and the applicable law.

Determination

22. The claimant's claims are based on constructive termination of his employment by the respondent. The claim is that upon employment in June, 2011 the claimant was not paid for several months and eventually in March, 2015 he took his annual leave for 3 months within which time he was not paid his dues salary. In March, 2015 two of the respondent's officers called the claimant and directed him to resign from his employment or be terminated and on 24th April, 2015 the claimant looking at his circumstances and hardships the respondent had put him through took the option to resign. That this resulted in constructive termination of employment.

23. In the case of **Michael Njai versus Juan Torres & another Cause No.1927 of 2013** the court in addressing the question of what is constructive dismissal held that Constructive dismissal of an employee is a matter addressed by the court in various cases and thus relied on the case of **Maria Kagai Ligaga versus Coca Cola East Africa Limited, Industrial Cause Number 611 [N] of 2009** where the court made a finding that it occurs where the Employee resigns by reason of the Employer's conduct. Owing to the intolerable behaviour of the Employer, the Employee resigns, believing to have been fired. The question of what constitutes constructive dismissal from employment is

further gone into by the court in the case of **Joseph Aleper & another versus Lodwar Water and Sanitation Company Limited [2015] eKLR** where it was held that;

... *the two facets of the definition of constructive dismissal:*

- i. *The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.*
- ii. *The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.*

... [as held in] **in Emmanuel Mutisya Solomon V Agility Logistics**

Cause No.1418 of 2011 and ... in **Benuel Mariera V Awand Enterprises Limited Mbsa. Cause No 191 of 2013** defined constructive termination under both limbs and stated as follows:

“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.

24. In this case there is no defence to challenge the claims made by the claimant. The claimant has however attached crucial and relevant records of his employment to the Memorandum of Claim.

25. The claimant has however not attached one crucial record to this claim, the resignation letter. Such document emanated from the claimant and the main basis of his claim for constructive termination of employment. The contents therein become relevant and necessary to the court to refer in a case such as his seeking the court to make a finding that such resignation notice arose out of circumstances dictated upon by the conduct of the respondent. without such letter a crucial element of the claim is lost.

26. In a letter of demand written by the claimant to the respondent and dated 5th July, 2016 the claimants Advocate states as follows;

Re unpaid sums owing to Andrew Khaemba

...

Our client was working for you as a Farm manager. He left employment amicably, under a mutual agreement on how his dues were to be settled. As you are aware, you are yet to pay his salary for March, April, May and June 2015 totalling to Kshs.864,000.00.

You are aware that unremitted deductions totalling to Kshs.982,456.00 are yet to be addressed. There have been too many promises that have gone unfulfilled ...

26. On 25th July, 2016 the respondent replied noting the following *Re: Demands for payment*

...

Our client in response acknowledges that it owes yours salary amounting to

... Kshs.92,628.10 and the unremitted deductions amounting to ...

Kshs.982,456.00.

Out client opines to which your client has knowledge that it has been willing to pay the above aforesaid amounts but for the unprecedented and unforeseen rains that destroyed flowers

Our client is remorseful for taking long before starting to remit any amount and therefore proposes that it be accorded more time to complete all the payments ... it proposes that it will remit ... Kshs.50,000.00 in the month of September this year and thereafter it will remit ... Kshs.30,000.00 at the end of every succeeding month. ...

26. From the forgoing, from the claimant's demand, he appreciates that his separation with the respondent was mutual. He then proceed to make demand for the payment of his dues.

27. In the Memorandum of Claim the claimant at 6 the claimant avers that;

There was no payment of salary during the months of February, March, April and May when I was on leave. There was still one month leave for the year 2015.

28. As set out above, without the letter and or notice of resignation being filed setting out what led to the resignation of the claimant from his employment and based on the claimant's own communication to the respondent that termination of employment was amicable, I find no good case for the alleged constructive termination of employment. Where such constructive termination of employment was the issue, then the claimant by his own conduct contributed to the same when he opted to a mutual end.

29. The above set out, the claimant is entitled to his terminal dues for work done and not paid for.

30. The respondent has admitted in the shared communication to owing the claimant unremitted dues of Kshs.982,456.00. Such amounts and claim is not challenged. Such is payable to the claimant. Noting the withholding of the same since the year 2015 to this date and for which the claimant has been forced to file suit to obtain, such amounts should be paid with interests from the date when due on 31st May, 2015 and until the payment in full.

31. As noted above and as pleaded by the claimant, the salaries due relates to one (1) month and not February, March, April, May and June, 2015. The rationale is that by his own records, the claimant has admitted that he was paid the due salaries save for one month. The claimant then resigned as of 31st May, 2015. The claim for salaries up to June, 2015 is not justified. What is due is the one (1) month unpaid at the time to termination of employment. The amount due for the month is Kshs.284,875.00 and such amount being dues and owing for this period should be paid with interests at court rates from the date due and until payment in full.

32. The suit herein was not necessary had the respondent paid the terminal dues owing to the claimant. Costs are therefore payable to the claimant.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of Kshs.982,456.00 owing and unremitted dues, unpaid salary of Kshs.284,875.00 which shall be paid with interests at court rates from the date due, 31st May, 2015 until payment in full. the claimant is awarded costs.

Orders accordingly.

Delivered in open court at Nakuru this 17th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants.....

.....

.....