



**REPUBLIC OF KENYA**

**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.6 OF 2014**

***(Formerly Cause No.1400 of 2012 at the Industrial Court in Nairobi.)***

***(Before D. K. N. Marete)***

JOSEPH ALEPER.....1ST CLAIMANT

TIMOTHY EKIDOR.....2ND CLAIMANT

VERSUS

LODWAR WATER AND

SANITATION COMPANY LIMITED.....RESPONDENT

**JUDGMENT**

This matter came to court vide an application by way of Notice of Motion dated 15th August, 2012 and brought to court by way of a Certificate of Urgency of the same date. A Statement of Claim of even date was also filed with the application. The issue in dispute is not cited therein.

The application was heard *ex parte* and on 16th August, 2012 this court granted orders as prayed in terms of prayers 3 and 4 of the Notice of Motion dated 15th August, 2012. The matter was to again variously come for hearing until the 17th September, 2012 when the parties entered into the following consent order;

- 1. This court is pleased to grant an order of injunction against the respondent whether by themselves, agents and or servants or whosoever otherwise from recruiting a general manager and commercial/administration manager or replacing the applicants in any manner whatsoever pending the hearing and determination of the suit.*
- 2. The court is pleased to grant an order of injunction against the respondent restraining them whether by self, agents and or servants or whosoever otherwise from terminating the service of the applicant, pending the hearing and determination of the suit.*

On the application dated 13th September, 2012 the court made orders as follows;

- 1. By consent the said application be mentioned on 24<sup>th</sup> September, 2012 to confirm if the applicants have received their August, 2012 salaries and benefits that accrue to them as employees of the respondents.*

With the disposal of the applications and all other matter remaining at bay, the hearing of the claim took off on 14th December, 2012.

As a reminder and opener, the claimants' case is that the 1st claimant was appointed by the Respondent as a Technical Manager vide a letter dated 21st January, 2010 on a contract for two (2) years with effect from 18th January, 2010. On 10th April, 2011, he was further appointed Managing Director for two (2) years vide a letter dated 10th April, 2011 and the effective date was 18th April, 2011.

The 2nd Claimant's case is that he was, vide a letter dated 23rd December, 2010 appointed to the office of Accountant by the Respondent for one (1) year. On completion of this term his contract was renewed by a letter dated 3rd January, 2010 which awarded him new responsibility as Commercial/Finance & Human Resource Manager.

The terms of employment of the claimants were;

*(a) 1<sup>st</sup> Claimant as Managing Director*

*(i) Basic salary Kshs.60,000.00*

- *Housing allowance Kshs.15,000.00*
- *Medical allowance Kshs.9,000.00*
- *Airtime Kshs.2,000.00*
- *Gross salary Kshs.86,000.00*

*The salary would be reviewed yearly.*

*(ii) Other entitlements*

*- Annual leave and leave allowance 30 working days per annum and leave allowance of 5% of annual basic salary.*

*(b) 2<sup>nd</sup> Claimant as Commercial/Finance and Human Resource Manager*

*Basic salary Kshs.50,000.00*

- *Housing allowance Kshs.12,500.00*
- *Medical allowance Kshs.7,500.00*
- *Airtime Kshs.2,000.00*
- *Leave allowance 5% of annual basic salary*
- *Gross salary Kshs.72,000.00*

It was also a term of contract that these contracts were terminable upon an issue of three months notice and also that the claimants would serve to the end of their terms.

It is also the claimants case that on 31st March, 2012 the Respondents Board of Directors of which the 1st Claimant is Secretary met to deliberate on the various issues including complaints against the Operations Manager/ acting Technical Manager, one, Patrick Njoroge where the 1st claimant was requested to list down issues relating to Mr. Njoroge's misconduct but instead of deliberating on these, the Board requested the 1st claimant to step out of the meeting whereby the Board resolved to suspend the 1st and 2nd claimants on twelve (12) false and malicious allegations.

The claimants further case is that the respondent also resolved to have the allegations against the 1st and 2nd Claimants investigated by external auditors which audit report discharged the two with a recommendation for review of the suspension. All this time, they were not informed of the allegations against them. The suspensions were subsequently lifted vide a letter dated 31st July, 2012 but this was coupled with an order for compulsory leave and information of the restructuring of their positions.

The claimants further aver that they came across an undated advertisement by the respondents in Lodwar town inviting applications to the positions of General Manager and Commercial/Finance Administration Manager which were their positions but renamed. It is also their contention that the advert carried higher qualifications intended to lock them out of the applications and advertised posts.

The claimants again aver and submit that they were on suspension for close to four (4) months in disregard of the Human Resource Policy and Procedures Manual of the Respondent which caters for only sixty (60) days, and also that the disciplinary procedure of the respondent was not pursued in their case thus subjecting them to unfair treatment with total disregard for law and procedure. This is also a breach of the claimants' constitutional rights and a contravention of *inter alia*, Section 5 and 45 of the Employment Act, 2007.

The claimants in the penultimate pray for;

- a. *A permanent order of injunction against the Respondent restraining the Respondent herein whether by themselves, agents and/or servants or howsoever otherwise from recruiting officers as specified in their undated advertisement whose closing date is 13<sup>th</sup> August 2012 or replacing the Claimants in any manner whatsoever.*
- b. *A permanent order of injunction restraining the Respondent herein whether by themselves, agents and/or servants or howsoever otherwise from terminating the services of the Claimants.*
- c. *A declaration that the Claimants are still in the employment of the Respondent with all the attendant rights, privileges and benefits and any decision or action taken or to be taken by the Respondent in purporting to terminate their services was/is unlawful, invalid, null and void.*
- d. *A declaration that the Claimants are entitled to work for the Respondent upto their retirement age of 60 years.*
- e. *In the alternative the Claimants be paid their dues and be compensated as follows:-*

1<sup>st</sup> Claimant

*(I) Salary the Claimant would have earned from 1<sup>st</sup> September 2012 to the expiry of the contract on 7<sup>th</sup> April, 2013 – Kshs 86,000x 8 months=Kshs.688,000*

*(ii) Three months salary in lieu of notice – Kshs 258,000*

*(iii) Gratuity Kshs.60,000/=x24months=1,440,000 x31%=Kshs.446,400/=*

*(iv) 12 month's salary compensation –86,000x12 months=Kshs.1,032,000/=*

*Total Kshs.2,424,400/=*

2<sup>nd</sup> Claimant

*(v) Salary the Claimant would have earned from 1<sup>st</sup> September 2012 to the expiry of the contract on 7<sup>th</sup> April, 2013 – Kshs 72,000 x14 months=Kshs.1,008,000*

*(I) Salary the Claimant would have earned from 1<sup>st</sup> September 2012 to the expiry of the contract on 31<sup>st</sup> December, 2013 – Kshs 72,000 x14 months = Kshs.1,008,000*

*(ii) Three months salary in lieu of notice- Kshs 216,000/=*

(iv) *Gratuity-Kshs.50,000/=x24months =1,200,000x31%=Kshs.372,000/=*

(v) *12 month's salary compensation- 72,000x12 months=Kshs.864,000/=*

*Total Kshs.2460,000.00*

(f) *Interest on (e) above at commercial rates till payment in full.*

(g) *The costs of this suit*

(h) *Interest on (g) above at Court rates.*

The Respondent in response to the claim admits the descriptive parts (1-3) and also paragraphs 4,5,6 and 8 (a) thereof. She, however, denies ever appointing the 2nd claimant as Commercial/Finance and Human Resource Manager and also the particulars of entitlement at paragraph 8 (b). It is the further contention of the respondent that if indeed he was ever appointed as Commercial/Finance Manager as aforesaid, this was done irregularly by the 1st claimant without the sanction and verification of the Board of Directors or any of its working committees.

It is further the Respondent's case that despite the claimants' contracts having exit clauses, these were not invoked by herself in terminating their contracts. Instead, at a meeting on 31st March, 2012, the Board of Directors had a discussion on the persistent wrangles between the 1st Claimant and the Operations Manager, one, Patrick Njoroge and after a submission of his side of the story, the 1st claimant was asked to step out, to allow the Board's deliberation of the issues. The allegation raised against the claimants were serious and therefore a resolution of investigations pending action. It was also decided that they be suspended, which decision was fair bearing in mind their positions in the establishment.

It is the Respondent's case that all this time they were informed of the allegations raised against them and on being cleared of the same, their suspension was lifted. It is also the Respondent's contention that the decision to overhaul the respondents organizational structure had been agreed on by the Board of Directors before suspension and any denial of knowledge is a deliberate concealment of facts to court by the claimants.

The respondent contends that the claimants case is misconceived, baseless, frivolous and vexatious and prays that the same be dismissed with costs.

At the hearing of the case on 20th December, 2013 CW1, Joseph Aleper, duly sworn testified on his employment and reiterated the claim. He testified that he was the Managing Director and was answerable to the Board of Directors. Under him was the Technical Services and Operations Manager and the Commercial Services and Human Resource Manager, namely, Patrick Njoroge and Timothy Ekidor. This was the Corporate Management Team of the Respondent. Over time, there developed wrangles between him and the Technical Manager involving sabotage of the company as follows;

- i. *Chlorine overdosing*
- ii. *Interference with normal water supply*
- iii. *Waiving of bills*
- iv. *leakage of confidential information*
- v. *He was mason grade 3 and therefore incompetent*

These were reported to the respondent.

On cross-examination, the 1st claimant reiterates his testimony and further testifies that he had been paid all his due salaries to the date of hearing he also testified that he knew the 2nd claimant who had been appointed to the office of Commercial Finance Manager on 3rd January, 2012 by the Chairman on approval by the Board. He worked under his charge. He testified that the advertisement for his position and raising of benchmark for application beyond his qualifications amounted to constructive termination

and therefore his claim.

CW2, Timothy Ekidor on 8th April, 2013 testified reiterating his case as per the claim. His contention, like that of CW1 is that the advertisement by the respondent for his position and which raised the qualification particulars beyond his qualifications was indirect termination of his employment and therefore this claim for competition. On cross-examination, he also testified that he had received salaries for all this period but this was as a consequence of a court order and not grace or the will of the respondent.

DW1 Thomas Akuja testified in support of the defence case, narrating the sequence of events and reiterating the defence case as per the Memorandum of Response by the respondent. He testified against the recognition of the 2nd claimants position and asserted that he only attended Company Management Team (CMT) meeting because the position had not been substantively filled. The 2nd claimant was and always remained an accountant.

DW1 further testified that in accordance to a recommendation in the audit report for restructuring, the respondents raised adverts for senior positions for which the claimants failed to apply despite being qualified for two of the same.

At re-examination, DW1 testified that he is not aware of any court orders on pay but has continued to pay the claimants their dues all this time.

The issues for determination therefore are;

1. Was there constructive termination of the employment of the claimants?
2. Are the claimants entitled to the relief sought?
3. Is the Respondent entitled to the counter-claim?
4. Who bears the costs of this cause?

The 1st issue for determination is whether there indeed was constructive termination of the employment of the claimants contract as is pleaded. The claimant in their written submissions dated 24th June, 2015 submit on a case of unfair termination of their services by the Respondents through suspension and subsequent advertisement of their positions and requiring higher qualifications than they could meet. This, coupled with continued failure to allocate them duties amounted to constructive dismissal. The claimants in their submissions also reiterate their respective case as per their pleadings and evidence and seek for relief as prayed.

The claimants submit two areas cognisable instances of constructive termination as follows;

- i. *At its Board meeting of 25<sup>th</sup> July 2012, the Respondent resolved to restructure the organization and advertise the Claimants' positions in such a way that the Respondents were locked out.*
- ii. *Even though the Respondent continued to pay the Claimants their salaries pursuant to a consent order recorded in Court and issued on 19<sup>th</sup> September 2012, the Respondent failed to allocate duties to the Claimants.*

What then is constructive termination of an employment contract? Black's Law Dictionary (9<sup>th</sup> Edition) defines constructive dismissal as:

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

The Claimants in their written submission ably make a rendition of the origins of the doctrine of constructive termination of employment and its application in our jurisdiction as hereunder;

*Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge*

by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221

This doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with Justice Radido when he stated in **Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd Cause No.64 of 2012** that:

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution.”

In the above quoted case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established as follows:

“If 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.”

Therefore a distinction should be made of 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.

The second facet of this definition is in fact what was stated by **Mbaru J in Emmanuel Mutisya Solomon V Agility Logistics Cause No.1418 of 2011**

Justice Linnet Ndolo 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.”

The Claimants' circumstances fell squarely under both limbs. That is their employment contracts were unilaterally altered by the Respondent through its action of advertising their jobs under different titles and qualifications that they could not meet. The Respondent also made it impossible for the Claimants to continue offering their services to the Respondent.

The respondents deny the claim. They submit that the restructuring exercise was undertaken after a report of external auditors recommended the same in a bid to enhance her performance. This was after investigations were made into various cases of misconduct on the part of the claimants. This restructuring

did not filter out the claimants but they failed to apply for any of the positions even after being asked to do so. It is their further submission of the respondent that the claimants have been paid their salaries to the end of their term.

The Respondents in their submissions further contend that the suspension of the claimants pending an audit of allegations against them was appropriate and they were informed of the allegations against them therefore validating the suspensions. This also was informed by their senior positions in the establishment. They deny liability in these terms;

*24. "Further see G.H.L FRIDMAN, "MODERN LAW EMPLOYMENT" "Remedies for Breach Of Contract" at page 495, when referring to Re English Joint Stock Bank, Yelland's Case (1867) L.R. 4 Eq.350 it stated that;*

*"If the employment was for a fixed term then the damages will be the loss of salary for the remainder of such term"*

*N/B The Claimants were paid for the remainder of the term to the fullest and/or until their respective contracts expired. Therefore, the Respondent owes nothing to them. This is expressly admitted by them in their evidence in court and in their submissions too."*

The issue of termination of the employment of the claimants tilts in their favour. Analysis of the case and evidence of the parties forms a case of constructive termination of the contracts of the claimants. This is because the earlier set up of facts of undertakings by the respondent, from suspension to internal audit of the respondents operations to denial of instructions and remuneration all point to a situation where the claimants were rendered unemployed by virtue of the misconduct of the respondent. They were not in any way responsible for their circumstances and situation. The Claimants were even deprived of their lawful dues under the contract of employment forcing them to result to court. I therefore make a finding that there was constructive termination of their contracts through the actions of the respondent.

The 2nd issue for consideration is whether the claimants are entitled to the relief sought. They are. Having passed the test on issue No.1 above, the claimants would be entitled to relief for constructive termination of their employment. It is notable, however, that the claimants, despite the respondents reluctance and cessation of payment of their remuneration before the court orders at the onset of this suit, these were paid all through to the end of the term of the contract, thanks to a court order directing the same. This is not in dispute. They would therefore not be entitled to salaries upto the end of their contracts. It would also not be feasible, in the circumstances to award any salary in lieu of notice.

The 3rd issue for determination is whether the respondent is entitled to the counter-claim. The counter-claim is premised on DW1's evidence disowning the respondents elevation of the 2nd Claimant from the position of Accountant to Commercial/Finance and Human Resource Manager. It is evidence that such promotion was not known to him and was not authorized by the Board of Management of the Respondent. The 2nd Claimant had served as Technical Services Manager. This was a manipulation of terms by the 1st claimant and he should now be prepared to meet the counter-claim, being costs incurred in retaining the 2nd claimant in his unauthorized position. At cross-examination, this did not come out clearly and therefore cast a shadow on this line of evidence. The Respondent submits as follows;

*32. LOWASCO contends that managing director wrongfully and unprocedurally appointed the accountant as Commercial/Finance & HR Manager, without the sanction, authority and or approval by its Board of Directors or any of its working committees. The managing director knowingly and willfully failed, refused and neglected to uphold LOWASCO's policy on Recruitment and Selection as stipulated in Section 2.1 of the Human Resource and Procedures Manual-2011.*

*34. LOWASCO therefore claims from the Managing Director, a refund of all the moneys that it has paid to the accountant since January 2012 pursuant to the aforementioned illegal contract. By reason of the matters stated in the foregoing paragraphs 28 to 36,*

*LOWASCO further contends, that it is entitled to a **set off** against any amounts that may be found to be due and payable to the Managing Director and to be indemnified by the managing director against any sums that may be found to be due and payable to the accountant on the basis of the aforesaid illegal contract.*

The claimant does not address the issue of the counter-claim in her written submissions. However, this is visited during the evidence of CW1 who at cross-examination testifies that CW1 that CW2 was issued with a contract as Commercial Finance Manager on 3rd January, 2012 on the approval of the Board. His letter of appointment was signed by the chairman of the Board.

The issue of the appointment of CW2 to the elevated position of Commercial and Finance Manager is contested. The parties adduced contrasting evidence on the subject. It is the Respondents contention and submission that CW1's appointment as Accountant expired on 3rd January, 2012 and was not renewed. He continued to serve the respondent in this capacity until he was suspended on 2nd April, 2012. It is the Managing Director who purportedly renewed the Accountants position vide a letter dated 3rd January, 2012 and designated him as Commercial/Finance and Human Resource Manager with effect from the date of the letter. The Respondent does not in any way explain why this anomalous action was sustained by the respondent up to the time of suspension. It does not seem likely that this would have continued for so long without the knowledge of the respondents Board of Directors. Is there a possibility of acquiescence on the part of the respondent? This is probable and the denial comes in at the point of disagreement and this suit. On a scale of balance of probability, this matter goes against the respondents case for the counter-claim and I find as such. I therefore dismiss the counter-claim as made by the respondent.

The pendency of this claim to times after the end of the contract poses further challenges in that some prayers made in anticipation of expeditious conclusion and determination of the issues in dispute is now negated by this delay. I therefore go to the relevant and applicable prayers and also the alternative prayers and award relief as follows;

(i) 1st Claimant:

i. Gratuity	Kshs. 446,000.00
ii. 4 months compensation for unlawful termination	
of employment = 4 x Kshs. 86,000.00	Kshs. 344,000.00
<b>Total</b>	<b>Kshs. 770,000.00</b>

(ii) 2nd Claimant

i. Gratuity	Kshs. 372,000.00
ii. 4 months compensation for unlawful termination	
of employment = 4 x Kshs. 72,000.00	Kshs. 288,000.00
<b>Total</b>	<b>Kshs. 660,000.00</b>

iii) The respondent shall bear the costs of the cause.

Delivered, dated and signed this 29<sup>th</sup> day of July 2015.

**D.K.Njagi Marete**

## **JUDGE**

### Appearances

1. Ms Eunice Otieno Arwa instructed by Arwa & Associates for the Claimants.
2. Ms Sinkiyan instructed by Tobiko Njoroge & Company Advocates for the Respondent.