



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 339 OF 2011

[Consolidated with Industrial Court Cause Number 337 of 2011]

BETWEEN

KENNETH KIMANI

MBURU..... 1ST
 CLAIMANT

SAIDI EMMERICH

..... 2ND
 CLAIMANT

VERSUS

KIBE MUIGAI HOLDINGS LIMITED
RESPONDENT

Rika J

CC Leah Muthaka

Ms. Kashindi instructed by Hamilton Harrison & Mathews Advocates for the Claimants

Mr. Ashitiva instructed by Nyachae & Ashitiva Advocates for the Respondent

ISSUE IN DISPUTE: UNLAWFUL TERMINATION

AWARD

1. Two separate Claims Numbers 337 of 2011 and 339 of 2011 were filed on the same day, by the two different Claimants against the same Respondent. Saidi Emmerich is the Claimant in Cause Number 337 of 2011, and Kenneth Kimani Mburu the Claimant in Cause Number 339 of 2011. Kibe Muigai Holdings Limited is the Respondent in both Claims. Similar witnesses were called by the Respondent in either case. Although the Claimants filed separate pleadings, and each proceeded to give evidence in their respective files on different dates, the Respondent’s evidence is recorded in Cause Number 339 of 2011 and answers both Claims. Similar issues of the law and fact are involved, and the Court ordered on 29th July 2013, after the closure of the proceedings, that the files be consolidated, with Cause Number 339 of 2011, being the reference file, for ease of writing the of Award.

2. Both Statements of Claim were filed on 8th March 2011. The Claimants subsequently filed Supplementary Claims, and Further Supplementary Claims. These pleadings were amended to have Kibe Muigai Holdings Limited as the Respondent, in the place of the original Respondent who was named as Kibe Muigai t/a Kibe Muigai Holdings.
3. The Respondent filed its Statements of Response on 7th April 2011. The Respondent filed Further Response on 3rd October 2012 and Amended Further Response on 5th March 2013.
4. The 2nd Claimant Saidi Emmerich gave evidence on 27th November 2011, and called one witness Lilian Debora Sitawa on 22nd February 2013 when the 2nd Claimant closed his case.
5. The 1st Claimant Kenneth Kimani Mburu testified on 3rd April 2013 and called the same lady Lilian Debora Sitawa as his witness on 13th June 2013, when the 1st Claimant's case closed.
6. Kibe Muigai gave evidence on behalf of his Company the Respondent herein, responding to both Claims on 13th June 2013. The Respondent's other two witnesses Shadrack Karabilo and Kioko Musyoki gave evidence on 17th June 2013 when the hearings closed. The dispute was last mentioned on 29th July 2013, when the Parties appraised the Court on the filing of their Final Arguments, and were advised Award would be delivered on notice. Upon assessing the proceedings in the two files, the Court later on the day made an order that the two files be consolidated for the purpose of preparation of this single decision.

Case for the 2nd Claimant SAIDI EMMERICH

7. Saidi Emmerich states he was employed by the Respondent, between 10th October 2009 and 31st October 2010, as the Food and Beverage Manager. The Respondent operates hotel business. Emmerich's duties included preparation of food and beverage operating policies; preparation of standard manuals for the operations of the hotel; coordinating all processes and inputs by various consultants to ensure timely and successful opening of the hotel; and sourcing and procuring food and beverage operations equipment from China. As of 31st July 2010, the 2nd Claimant's salary was Kshs. 100,000.
8. The Respondent failed to pay the 2nd Claimant his salary for August, September and October 2010, amounting to Kshs. 300,000. Due to the Respondent's failure to pay the 2nd Claimant's salary, the 2nd Claimant could not continue working. He ceased working in circumstances he considers to amount to constructive dismissal. He seeks payment of his salary at Kshs. 300,000; one month salary in lieu of notice at Kshs. 100,000; 12 months' salary in compensation for unlawful termination; costs; and interest.
9. The 2nd Claimant testified he reported to the General Manager Kenneth Mburu (1st Claimant). He was not told at any time that he was engaged as a Consultant. He worked continuously. It was incorrect to allege he underperformed. Opening of a Hotel involves physical and human resource planning. The 2nd Claimant testified he was sent by the Respondent to China to buy equipment. He gave the Respondent his CV on employment, and there were no issues raised by the Respondent on the validity of the documents. He was employed through an agreement signed between him and Mr. Kibe Muigai on 10th October 2009.
10. Emmerich testified on cross-examination that the agreement formed the entire contract of employment. He was responsible for the preparation of the Food and Beverage Policy. The contract stated under Article 2, that there would be a salary recommended by the Human Resources Manager based on comparative salary surveys, and approved by the Board. There were two phases- pre-opening and post-opening phase- in the hotel business. The 2nd Claimant left work during the first phase. Article 1 of the agreement was in operation. His duty went beyond fixing of the prices for food and beverage. He purchased equipment as shown at page 45 of his Further Supplementary Claim. Page 98 to 112 relates to Standards. These were researched from the internet by the 2nd Claimant. He also recorded these standards from his previous industry experience. Emmerich testified he did not acknowledge his sources. The

deliverables were to be discussed, printed, bound and signed by Kibe Muigai. The 2nd Claimant did not deliver and the documents were not bound and received by Kibe Muigai. Emmerich explained that Kibe Muigai became irregular at the workplace, making it difficult for the 2nd Claimant to deliver. A contract of employment would have timelines, provide for annual leave and termination. The agreement between the 2nd Claimant and Kibe Muigai Holdings Limited did not have these clauses. He did not give 30 days' notice of termination when he left work. He had done so at his previous place of work, the Hotel Intercontinental. His contract at the Intercontinental had a termination clause.

11. Redirected, Emmerich conceded that he endured frustration in his work. The agreement was drawn by the Respondent. It was not unusual to research in the Internet. He did not misuse any sources. He used to meet Kibe Muigai twice at the beginning of the engagement. Muigai became rare as days went by. Emmerich never got to do the practical part of the menu. The vision was to harmonize the business with nature. He did not achieve this because Kibe was not co-operating. He was paid Kshs. 100,000 in the beginning either in cash or cheque.

Case for the 1st Claimant KENNETH KIMANI MBURU

12. Mburu states he was employed by the Respondent between 1st December 2009 and 31st October 2010. He was employed as the General Manager at Respondent's Hotel Ravine, now Hotel Emerald. He signed a contract of service with Kibe Muigai on 4th November 2009. His duties included coordinating all inputs and consultants to ensure timely and successful opening of the Hotel; preparing pre-opening plans and budgets; and upon opening the Hotel, overseeing and coordinating the general operations of the Hotel.

13. As of 31st July 2010, the 1st Claimant earned a monthly net salary of Kshs. 280,000. He was entitled to health insurance for himself and three members of his family. The Respondent did not pay him salary and benefits for the months of August, September and October 2010. He considered himself, as in the case of the Co-Claimant, to have been constructively dismissed. He seeks an Award against the Respondent for payment of his arrears of salary for the months of August, September and October 2010 at Kshs. 280,000 per month- total Kshs. 840,000; 12 months' salary in compensation for unlawful termination; Kshs. 280,000 as one month salary in lieu of notice; costs; and interest.

14. Mburu testified he was to oversee various Consultants in the pre-opening of the Hotel. His duties were captured under Article 1 of the contract. His salary was Kshs. 280,000. He was entitled to medical insurance and was provided the working tools such as the laptop by the Respondent. The 1st Claimant was available full-time, as required under Article 2 of the contract, beginning 1st December 2009. He worked up to early October 2010. He was unable to continue working due to non-payment of his salary.

15. He denied that he was engaged as a Consultant. There were Consultants in the business, such as Interior Designer Georgina. The 1st Claimant was answerable to Kibe Muigai. Mburu did not perform his role poorly, or involve himself in acts of gross misconduct. His role was to guide policy, a role he faithfully discharged. The Bundle of Documents filed by the 1st Claimant in the Further Supplementary Statement of Claim captures his work output. He gave directions and managed the process. He sourced material for his work from the Internet which was a common practice in the hotel industry. It was not a cut and paste job, and there was nothing wrong in sourcing from the Internet.

16. The 1st Claimant testified that it took him ten months to secure alternative employment after he left the Respondent. He stated that he suffered owing to the with-holding of his salary and constructive dismissal by the Respondent. His children were sent home from school due to non-payment of school fees; Mburu had to reside at his parents' home; and was unable to cater for his family's medical care. It is not true that the 1st Claimant misrepresented his credentials with the Respondent on engagement. He did not take away the Respondent's Cell Phone. He left this with the Accounts Assistant. He left with the laptop because he thought he would return to work. He later handed over the laptop to his lawyers. He has at all times been ready to return the laptop.

17. Mburu told the Court on cross-examination that he worked at Pesa Point Limited as Delivery Manager before being recruited by Kibe Muigai Holdings Limited. He worked for his previous employer between 2005 and 2009. He gave notice on leaving. He was paid by his former employer through electronic transfer. There were statutory deductions on his salary; there was a termination clause in the contract; and notice would be given in event of termination. He worked for another employer Pinnacle Limited at the time of testifying. His contract of employment had a termination clause, with other standard terms in a contract of employment.

18. The contract concluded with Kibe was dissimilar to a standard contract in certain aspects. It did not provide for statutory deductions and did not have a termination clause. It stated the relationship would not be deemed to be a partnership. There was a restraint on the 1st Claimant not to share information from the Respondent with third parties. Pinnacle Limited did not incorporate such clauses in the contract given to the 1st Claimant. Paragraph 6 of the contract between Mburu and Kibe referred to 'Other Consultants.' The Project Manager was a Consultant, based on the way he used to work. Article 2 and 4 contemplated two scenarios- full time employment or part-time employment of the 1st Claimant. Part time work was with regard to the period before 1st December 2009 when the 1st Claimant took full time work. When the 1st Claimant left, the Hotel had not opened. Article 3 did not intend that the 1st Claimant would only become full-time once the Hotel opened. He prepared sales and marketing plan. The Respondent confirmed Mburu delivered. The templates are available in the Internet, but the work done by the 1st Claimant was not downloaded from the Internet. The Strategy Document was available even before the Claim was filed. It was not downloaded and brought to Court. It was generated in February 2009 and was part of the marketing strategy. He sent Kibe staff establishment report. Page 184 of the 1st Claimant's Further Supplementary Statement of Claim is a list of UN Permanent Missions as of 24th August 2011. The 1st Claimant left work in 2010. It is annual directory of the UN, and it was not correct that the 1st Claimant downloaded this shortly after coming to Court. Hilary Ondato served as a Human Resources Consultant. Mburu worked with him, but it was incorrect to say the documents at page 65 to 80 of the Further Supplementary Statement of Claim, were entirely from Ondato. The Report on UN Missions was not aimed at misleading the Court that the Claimant was doing a lot of work. He worked six days a week. Consultancy work can be paid for periodically. The 1st Claimant wrote an email message to the Respondent, informing the Respondent he would not be able to continue working. He did not have the email in Court. He was not giving Kibe notice of termination; he was merely informing him he would not be able to travel to work. He presumed he was dismissed, and the employer should have issued him notice. It is not true that the 1st Claimant was a Consultant, or that he absconded. The Respondent's laptop was forwarded to the Claimant's Lawyers. It had software. The 1st Claimant acknowledged it was important for this to be verified.

19. Redirected, Mburu testified that the Respondent has not requested for verification of the laptop. Article 1 defined his duties. He coordinated and oversaw other individuals. Article 1 mentions these duties and 'etc'. There were other tasks. Article 2 expressed the salary was 'net'. It was the responsibility of the Respondent to enforce statutory deductions. He was not referred to as 'Consultant' under Article 4. He worked full time from 1st December 2009. The 1st Claimant performed his role and forwarded the documents to Kibe Muigai via email.

Evidence by LILIAN DEBORA SITAWA for the two Claimants.

20. Lilian Debora Sitawa testified for both Claimants. She is an employee of PSI Kenya. In 2010, she worked for the Respondent. She was an Assistant Accountant at Emerald Hotel, which she testified, is the property of Kibe Muigai. She handled petty cash, wages and salaries. Wages were paid in cash by Kibe. Only two persons were paid by cheque- the two Claimants. Saidi Emmerich was the Food and Beverage Manager, while Ken Kimani was the General Manager. Emmerich was paid his June 2010 salary late, while the salary for July, August, September and part of October was not paid. Kibe Muigai did not explain to the employees why he did not pay their salaries. Sitawa left employment in December 2010, while Emmerich left 1st week of October 2010. She worked from 8.00 a.m. to 5.00 p.m. same time as the Claimants. She testified that Mburu was not paid salary for July, August, September and October. He left

around 8th October 2010. She sat in the same office with the two Claimants. Interior Designer and the Human Resource person came to work on specific days. There was a phone at the office, which the Witness used after Mburu left.

21. Cross –examined, Sitawa testified that Henry Ondato was the Human Resource Manager. She was employed after Ondato. He did not report on a daily basis. He left around May 2010. Sitawa was responsible for payment of salaries and wages. She worked on the instructions of Kibe Muigai. She did not know what relationship he had with the Claimants. She was told by Kibe that Emmerich was the Food and Beverage Manager. She did not know the nature of Emmerich’s contract. She worked daily and shared office with the Claimants. She worked for 12 months, January to December 2010. Mburu preceded her. It was Kibe who instructed her on payment of salaries and wages, not Mburu. She did not see Mburu’s contract of employment, but depended on what she was told by Kibe Muigai. She did not make statutory deductions with respect to the Claimants’ salaries. The laptop was used by Sitawa and Mburu. The phone was used by the office. She did not know if Mburu was given any other equipment. She would pay those who were irregular such as the Interior Designer, Environmentalist and the Human Resource Manager. The Claimants urge the Court to uphold their prayers.

Case for the Respondent KIBE MUIGAI HOLDINGS LIMITED

22. ON SAIDI EMMERICH, the Respondent’s position is that he was contracted to carry out consultancy services as Pre-opening Food and Beverage Manager. His role included preparation of food and beverage operating policies; standards manuals; and coordination of all processes and inputs by various Consultants to ensure timely and successful opening of the Hotel. He did not execute these duties in accordance with the contract. Any payment to him was subject to his performance. The agreement did not have the usual essential clauses that would constitute an intention to create employer-employee relationship. He was accountable to the client for policy direction and would liaise with the overall Project Manager and other Consultants. If he was not paid for August, September and October 2010, it was due to his misconduct and non-performance of his role. He was in breach of his contract.

23. The Respondent listed particulars of breach to include misrepresentation of the Claimant’s experience and competence; absconding from work; and failure to deliver certain outputs. He was not constructively dismissed, but left work of his own volition.

24. Kibe Muigai, a Consultant in Urban Management and one time Lecturer at Moi University, testified that he hired Saidi Emmerich to help him put certain standards in place. It was at a construction site, and the 2nd Claimant was to prepare specific outputs to be used when the Hotel opened. Kibe had more than 40 Construction Workers, Engineers, Architects and Advisors. A friend recommended the 2nd Claimant to Kibe. He was hired as a Consultant in 2010. Kibe and Emmerich prepared an agreement together, which is dated 10th October 2009. Nowhere is the term ‘employer’ or ‘employee’ mentioned in the agreement. Article 2 states ‘upon opening of the Hotel...’ The Hotel never opened as agreed. Kibe expected consultancy services with specific outputs. The Human Resources Manager was to determine the salary after doing comparative analysis. The Hotel was not opened by the time Emmerich left. The Hotel only opened in 2012, by offering conference facilities.

25. The parties agreed the 2nd Claimant would work from the site as he did not have an office. He used a makeshift office which was formerly a garage. The agreement was that Emmerich would be paid monthly, after he generated certain documents for the Respondent. It is common in the world of consultancy. It is wrong for the 2nd Claimant to imply he was employed by the Respondent. Kibe had borrowed funds from the Bank, and was expected to show output reports to the lending Bank. Emmerich failed to produce these reports.

26. The specific outputs were drafting of food and beverage management policies; produce standards and menus; prepare inventory of equipment; and oversee service contracts among other things. It was a one off engagement. If he was to go on working after the Hotel opened, he would have been given a contract of employment. He left in October 2010. Kibe had not paid him because he failed to deliver. Emmerich

had been warned many times by Kibe, and told he would not receive his pay if he failed to deliver the specific outputs. The 2nd Claimant filed the document referred to as '*The Food and Beverage Manager's Vision*,' after the Respondent had filed his Response. The Respondent had already mentioned in its Response, that certain outputs were not delivered. Payments made to him were not commensurate with his outputs. When Emmerich said he would not go on working, Kibe e-mailed him and asked they sit down and get an arbitrator to assess what had been delivered against what had been paid. Emmerich instead filed this Claim. Kibe was compelled to hire other Consultants such as Kioko Musyoki. Kibe did not have experience in hotel business and that was why he had to hire Consultants. Emmerich misrepresented his credentials to Kibe. Kibe formed this opinion after he put several questions to Emmerich. Consultants subsequently hired by Kibe have delivered.

27. ON KENNETH KIMANI MBURU, the Respondent's position is similar to that stated in the case of Emmerich. Mburu was contracted to carry out consultancy services as the Pre-opening General Manager. He was to oversee and coordinate all processes and inputs by the various Consultants to ensure timely and successful opening of the Hotel. He failed to execute these duties. Payments made to him depended on performance, and the health insurance would be availed to him upon discharge of his obligations under the contract. There was no intention to create an employer- employee relationship. The 1st Claimant similarly misrepresented his credentials; absconded from work; failed to procure licenses and statutory approvals for the Hotel; failed to procure equipment; and failed to return the Respondent's laptop worth Kshs. 150,000.

28. Kibe testified Mburu held a consultancy agreement, not a contract of employment. He was paid every 4 weeks. The Hotel was not operational by the time he left. It was a one-off engagement to generate deliverables. After opening, he would be engaged on another contract if need be. The Parties never got to the second phase. Mburu did not report from 8.00 a.m. to 5.00 p.m. There was no stipulated time. Ordinarily, he would meet Kibe in the afternoons. He worked from a makeshift office. He failed to deliver, and when the dispute on payment arose, Kibe asked him to submit to arbitration. The 1st Claimant instead opted for court action.

29. Kibe told the Court that Mburu misrepresented evidence. Kibe had already filed his Statement of Response when Mburu quickly went to other Consultants and the Internet and brought further documents to Court, purporting these to be evidence of his personal outputs. He brought a document on the UN Missions from the Internet. He compiled documents after the fact. No statutory deductions in both cases were made on their pay. Mburu left with the Respondent's laptop, which contained all the information on the project. Kibe would wish to have the laptop inventoried by an ICT expert before he takes it back. In both cases, the prayers are not merited. Kibe testified that a proper audit should be taken to determine what work was done by the two Claimants, what was paid, and what is owed.

30. Cross-examined, Mr. Kibe Muigai stated that the contracts set out what the Claimants were supposed to do. In the case of Mburu, the duties were not exhaustive. They were to remain accountable to the Respondent. The agreements were drafted by the Parties. The term used in the agreements on the nature of payments made to the Claimants was 'salary.' Kibe explained this is a generic term. Consultants are also paid a salary. The Hotel opened in December 2011, a year after the two Claimants left. Delay was caused by the two. Kibe conceded payments were not made for July, August, September and part of October. The agreements did not cover aspects of both the pre-opening and post-opening phases. Musyoki is an employee, but Kibe did not have his contract of employment in Court. There were no arbitration clauses in the agreements.

31. Mburu had a salary of Kshs. 280,000. Employer pays statutory deductions. His salary was described as 'net.' The Respondent did not deduct with-holding tax. The Claimants were supposed to pay their own taxes. The phone was returned and is not in issue. Kibe did not suggest an ICT expert when offered his laptop back by the Claimants' Advocates. Debora was also a Consultant. There were about 15 Consultants, some with their own laptops. They did not work from 8.00 a.m. to 5.00 p.m. He did not agree that the two Claimants had open-ended contracts of employment. The Respondent stated in its Statement of Response that the two Claimants absconded, were not performing and were also involved in acts of gross misconduct. Kibe does not have expertise in the hotel industry, but did not agree that this

would mean his evidence on the subject could not stand. The two were not employees, and cannot claim they were constructively dismissed.

32. Redirected, Kibe testified that Parties consulted before they drafted the agreements. They did not involve a Lawyer. Use of 'salary' was understood to mean payments for outputs. The term 'net' was used in its ordinary meaning. The agreements should be understood as prepared by non-experts. Kibe had no reason to doubt the Claimants' credentials at the time he engaged them. He gave them credit where they delivered. He did not need to be an expert in the hotel business for his evidence to stand. He had suggested to the Claimant's Lawyers that his laptop be handed back after ICT expert verification.

33. Shadrack Karabilo is a Consultant in the hospitality industry. He trained at the Utalii College in Nairobi for 2 years, and spent another 2 years training at an Institution in Germany. He worked for Hotel Intercontinental Nairobi for 10 years, African Hotels for 7 years, and Serena Hotel for 20 years before he retired. He was requested to look at the CVs of the two Claimants by Kibe Muigai. Emmerich was hired as a Consultant to ensure the kitchen was properly organized. It was a high standard Hotel. The menu he prepared did not conform to the standard. He was incompetent. Karabilo explained that a consultant could be paid at once, or could be paid monthly on retainer. He was on retainer at a Hotel in Meru. The Client provides the working tools. Karabilo carried his own laptop, and generated his own documents. There were instances when the Client could provide working tools and working space. Cross-examined, the Witness stated he carried his own laptop. He had space, not an office, from where he would do his work. Taxes were payable from the consultancy fees. Pay was agreed to between the Consultant and the Client. Karabilo never worked with the Claimants; he merely examined their CVs. He did not consult their former employers or workmates. Kibe told him the Claimants were Consultants. He stated on redirection that the Claimants' documents were cut and paste from the internet.

34. Kioko Musyoki testified he has been an Hotelier from 1985. He trained at Utalii and Overseas. He consulted for the Respondent, and was later employed as the General Manager. He was tasked with putting in place standard procedures for operating the hotel. Measurement was pegged on his output. He would be paid Kshs. 1.4 million which was paid staggeringly, depending on outcome. He accomplished his task, and parted ways with the Respondent at the end of the consultancy. He was rehired by another Management Company who took over the Hotel, and employed as the General Manager. He was now given a letter of employment, and began to pay N.S.S.F, N.H.I.F and PAYE deductions. His current employment letter has a termination clause. He told the Court on cross-examination that the Management Company which employed him is called West house Company. He did not carry his employment contract to Court. He was offered health insurance cover while on consultancy. This did not happen in previous consultancies. The consultancy agreement stated he would earn Kshs. 280,000, not Kshs. 1.4 million staggered. He was paid 'net' and would not tell if the Respondent paid taxes. The Respondent holds that the prayers sought by the Claimants are without merit, and the respective Claims should be rejected.

35. The Court understands the issues raised by this dispute to be these-

[a] Whether the Claimants were contracted as Employees or Consultants;

[b] Whether they were unfairly constructively dismissed; and

[c] Whether they are entitled to the arrears of salary, notice pay and damages.

Another issue which was raised *ex tempore* by the Respondent relates to its laptop which is in the custody of the Claimants' Advocates. How should the Respondent receive back its laptop?

The Court Finds and Awards:-

36. The Respondent is a registered Limited Liability Company running a Hotel in Nairobi. The Hotel initially operated in the name and style of Hotel Ravine, which has since changed to the Emerald Hotel. The Respondent engaged Saidi Emmerich as the Hotel Pre-opening Food and Beverage Manager, in an agreement concluded on 10th October 2009, while a similar agreement was concluded with Kenneth

Kimani Mburu on 4th November 2009.

37. The agreement concluded between Emmerich and the Respondent has 5 Articles [Clauses], which are:-

- a. Emmerich shall be the Hotel Pre-opening Food and Beverage Manager, preparing food and beverage standards manuals, and coordinating processes and inputs by various consultants;
- b. Prior to the opening of the Hotel Kibe Muigai would, on behalf of Kibe Muigai Holding Limited, pay to Emmerich Kshs. 100,000 every month. After opening of the Hotel, Emmerich would be paid a salary recommended by the Human Resources Manager based on comparative salary surveys and approved by the Board;
- c. Emmerich would remain accountable to the client for policy direction, and liaise with the overall Project Manager and other Consultants;
- d. The Food and Beverage Manager and the Respondent did not have a partnership, nor a joint venture under the agreement;
- e. All information obtained in the course of executing the agreement would not be shared with third parties, without the written consent of both parties.

38. The agreement between Mburu and the Respondent has 8 Clauses, summarized as follows:-

- a. Mburu would be the Hotel Pre-opening General Manager, overseeing and coordinating all processes and inputs by the various consultants to ensure timely and successful opening of the Hotel, and especially putting in place and executing pre-opening plans, marketing plan and pre-opening budgets;
- b. If available to perform this role beginning 1st December 2009, Mburu would be paid by Kibe Muigai on behalf of Kibe Muigai Holdings Limited, Kshs. 280,000 [net], and have a full insurance cover [in-patient and out-patient] for himself and his family of three members, for every month preceding the opening of the Hotel;
- c. If available to perform this function on full-time basis before 1st December 2009, Mburu would be paid Kshs. 100,000 [net] every month before 1st December 2009;
- d. If not available full time before 1st December 2009, but continued to give inputs and attending all relevant working meetings, Mburu would be paid Kshs. 50,000 [net] for every month before 1st December 2009, with effect from 1st October 2009;
- e. After the opening of the Hotel, Mburu would be the General Manager and would receive a net salary of Kshs. 350,000 per month. He would have health insurance for himself and three other members of his family;
- f. The General Manager would remain accountable to the Client for policy direction and liaise with the overall Project Manager and other Consultants;
- g. The parties did not enter into a partnership of joint venture by concluding the agreement;
- h. Information exchanged between the Parties relating to project Hotel Ravine, would not be passed onto third Parties without the written consent of the Parties.

39. In answering the first question, the Court must attempt to evaluate these two agreements, and make a finding whether they are employment contracts, or consultancy contracts. The Respondent testified that the agreements were drawn by the Parties, without the involvement of their Lawyers. This is apparent from the wording of the two documents, which adopts the language common to employment contracts as well as language that is characteristic of consultancy/independent contracts. They for instance adopt the word 'salary' which is a feature of the employment contract, while the Respondent is referred to as 'the Client' which is a terminology relating to consultancy/independent contracts.

40. A closer look into both agreements leads the Court to find these were not intended to be consultancy/independent contracts, but employment contracts. A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another's control, except to the extent admitted under the contract. The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties'

intention.

41. Even with the hybrid wording in the contracts, the intention of the Parties, and the wording in large portions of the two agreements persuade the Court these were employer-employee relationships. A Consultant is paid a fee as confirmed by the Respondent's Witness Mr. Karabilo, not a salary. A Consultant is not eligible for Company benefits such as health insurance, which was extended by the Respondent to Mburu and three other members of his family. A Consultant would not normally be provided with the tools of work. The Respondent provided Mburu with the laptop, office facilities, and a phone. The Respondent provided the tools of work, and directed the Claimants in the performance of work. There were frequent meetings between the Parties during which Kibe Muigai kept demanding for specific outputs. He was emphatic the Claimants remained accountable to him. A Consultant would have the latitude to discharge his obligation according to his own processes and methods, which would include the ability to subcontract or hire own assistants. The evidence on record suggests all the persons working at the Hotel were engaged by the Respondent, and were paid by the Respondent largely through Debora. He remained in control of the undertaking. There was no evidence that the Claimants paid with-holding tax. Instead, the Respondent paid Mburu a 'net salary.' It is the obligation of an employer to enforce statutory deductions such as P.A.Y.E, N.S.S.F and N.H.I.F contributions. By paying 'net salary' the presumption would be that the Respondent had factored in this obligation. The fact that no evidence was presented showing payment of these employee deductions is not an indication that there was no employer-employee relationship.

42. Consultancies are limited in their duration. The contracts concluded between the Parties were open-ended. The opening of the Hotel would not result in the termination of the contracts. In the case of Emmerich, he would remain the Food and Beverage Manager, the only change being in his salary, which would be fixed by the Human Resources Manager relying on marketplace benchmarks. In the case of Mburu, Article 5 strongly states '*shall be the Hotel's General Manager, and shall be paid Kshs. 350,000 [net] per month.*' It is not suggested anywhere in the agreements that these were consultancies which were for a specific duration, or which would translate into contracts of employment upon the opening of the Hotel. Instead, the contracts are open-ended, promising the Claimants improved terms of service after the opening of the Hotel. The Claimants became employees on accepting these contracts, and the fact that they were not there by the time the Hotel opened its doors to customers, would not affect their status as employees of the Respondent. It was not necessary that the words 'employer' and 'employee' be expressed on the face of the agreements, for them to be deemed to be valid employment contracts. Mburu reported to work on 1st December 2009 under Article 2 of his agreement. He was paid Kshs. 280,000 as agreed under this Article. He was full-time, otherwise he would not have merited Kshs. 280,000 under the Article, but would probably have been paid Kshs. 50,000 per month under Article 4 which provided for part-time service. In terms of the duration, the two agreements fit the tag of employment contracts rather than characterization of consultancies.

43. Consultancies/ independent contracts are based on the periphery of the employer's business. They are not integral to the business. The roles played by the Claimants were integral to the business. One was designated as the General Manager; the other as the Food and Beverage Manager. They would continue in their respective roles once the business opened. This indicates that the Respondent considered their roles integral to the business. They were not in the periphery, as to fit the nature of consultancy.

44. The absence of a termination clause and leave clause in the agreements does not invalidate or make them any less binding employment contracts. Section 10 of the Employment Act 2007 provides some of the characteristics of an employment contract such as pay; basic job description; personal details of the employer and the employee; date of commencement; terms and duration of the contract; place of work; hours of work; remuneration interval; rate of remuneration; and methods of calculation. Most of these are captured in the agreements made between the Claimants and the Respondent, and the leaving out of some item would not invalidate the contracts. The items mentioned by the Respondent as lacking in the agreements are not the *essentialia negotii* of an employment contract. Furthermore the basic minimum conditions of employment are given under Part 5 and 6 of the Employment Act 2007, which must be read as part of every contract of employment. The agreements are not made invalid by not expressing terms and conditions which are implied by the law.

45. An 'employee' is defined in Section 2 of the Employment Act 2007 as " a person employed for wages or salary and includes an apprentice and indentured learner." An employer means " any person, public body, firm, or corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company." These definitions are repeated in the other Labour Legislations. The Claimants fit this description of an 'employee,' while Mr. Kibe Muigai in person or through his business vehicle Kibe Muigai Holdings Limited, fit the term 'employer.' It is notable that Mr. Kibe paid the salaries to the Claimant, on behalf of the Respondent under the agreements. The Court agrees with the Claimants that they were employed by the Respondent.

46. Were they constructively dismissed? The Respondent suggested in its Response that the Claimants performed their roles poorly and were dismissed for gross misconduct. There was no evidence that the Respondent dismissed the Claimants for poor performance. There were no appraisals carried out by the Respondent, and no reports of such appraisals were made available to the Court. There is no written record of the Respondent complaining about the failure by the Claimants to discharge their respective roles. There was no clause in the agreements, which made payment of the Claimants' salaries dependent upon specific outputs. If they did not perform, or performed poorly, the Respondent had the option of terminating their contracts following the regular termination procedure. There were no warning letters, and no formal charges, or disciplinary proceedings. Mr. Kibe Muigai went at length to testify that the Claimants failed to deliver specific outputs. There was no appraisal carried out and hearing given to the Claimants on their performance. It was even suggested by Muigai that the two Claimants misrepresented their credentials on recruitment. This again was not an allegation that the Respondent investigated and made any findings on in writing before the Claimants left employment. The Respondent did not even write to the Claimants terminating the agreements, but just with-held their salaries from July 2010. The assertion that the Claimants left employment on the ground of gross misconduct was not backed up by evidence.

47. Constructive dismissal is not defined in our Employment Act 2007. The concept was the subject of this ***Court's Award in Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported]***. The Court found 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.*

In the Ligaga Award, the Claimant was transferred from Kenya to Uganda, retransferred to Kenya then to Mozambique, all within a very short notice. She was never allowed to settle in any position or market and was finally repatriated to Kenya and moved from one town to the other at considerable disruption to her family life. She resigned, and the Court found resignation was involuntary and amounted to constructive dismissal. The Claimant was granted monetary compensation. The Award has since been appealed against at the Kenya Court of Appeal.

48. The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this

definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.

49. The Respondent failed to pay the Claimants their July, August, September and part of October 2010 salary. Mr. Kibe Muigai conceded the salaries for July, August, September and part of October 2010 were not paid. This was confirmed by Debora, who maintained the payroll. The Claimants allege they were not able to raise fare to work, as there was no income. They encountered family and social problems, and could not continue to discharge their obligations under the contract. The Respondent was in breach of the two contracts from July 2010 up to October 2010. This was a fundamental breach, which fits the description of a repudiatory breach. The Claimants resigned as a result of the breach. They did not wait too long to resign, but resigned within three months after the Respondent first failed to remit their salaries. Retention by an employer of an employee's 4 months' salary is a serious, fundamental breach that is properly to be viewed as a repudiation by the employer, of the contract of employment. The salary or wages of an employee are protected under Part 4 of the Employment Act 2007. An employer who willfully fails to pay an employee's salary or wages not only acts in repudiation of the contract of employment, but commits a wage offence under Section 17 and is liable to criminal prosecution. The non-payment of the Claimants' salaries amounted to repudiation of the contracts, and an offence under the Employment Act 2007. The Claimants were entitled to consider themselves as dismissed from employment. They were constructively dismissed, and are entitled to damages under Section 15 of the repealed Part 3 of the Labour Institutions Act Number 12 of 2007 and Section 49 of the Employment Act 2007, which are the relevant substantive laws in force at the time of the constructive dismissal.

50. Having reached these findings, the Court grants the respective Claims in the following terms:-

[a] The Claimants were employees of the Respondent and were constructively dismissed;

[b] Kenneth Kimani Mburu [1st Claimant] shall be paid by the Respondent-

- i. One month salary in lieu of notice at Kshs. 280,000;***
- ii. Salary for July, August, September 2010 at Kshs. 840,000;***
- iii. Salary for 7 days' worked in October 2010 at Kshs.75,384; and***
- iv. 5 months' salary in damages for unfair constructive dismissal at Kshs. 1,400,000***

TOTAL.....Kshs.

2,595,384

[c] Saidi Emmerich [2nd Claimant] shall be paid by the Respondent-

- i. One month salary in lieu of notice at Kshs. 100,000;***
- ii. Salary for July, August, September 2010 at Kshs. 300,000;***
- iii. Salary for 7 days worked in October 2010 at Kshs. 26,923; and***
- iv. 5 months' salary in damages for unfair constructive dismissal at Kshs. 600,000***

TOTALKshs.

1,026,923

[d] The total amount of Kshs. 3,622,307 shall be paid by the Respondent to the Claimants within 40 days of the delivery of this Award;

[e] The Advocates to agree on an ICT professional to examine the Respondent's laptop with a view to handing the laptop over to the Respondent's Advocates, within the same period of 40 days; and,

[f] There shall be no order on the costs and interest

Dated and delivered at Nairobi this 29th day of January 2014

James Rika

Judge