

RADAR SCREEN WILLIAM MAEMA

LABOUR RELATIONS An employee may resign and claim damages for unfair termination by employer

Constructive dismissal a novel remedy for harassed workers

One thing that Kenya's turbulent labour market has over the years missed is counsel from the Kiswahili proverb *akufukuzaye hakuambii toka*.

Loosely translated, it means whoever wants you out of their house does not need to say so. You should read their conduct and get the message that you are no longer welcome.

This proverb seems to have found a pride of place in employment jurisprudence.

Apart from the traditional methods of terminating employment via notices of termination, payment in lieu of notice, summary dismissal and redundancy, courts have acknowledged that an employee may resign and still claim damages against the employer for unfair termination, also called constructive dismissal.

When an employee resigns, he is not entitled to claim damages against the employer. Indeed, if he resigns without giving the requisite contractual notice, the employer is entitled to recover the pay in lieu of notice through legal proceedings and there is usually no valid defence to such a claim.

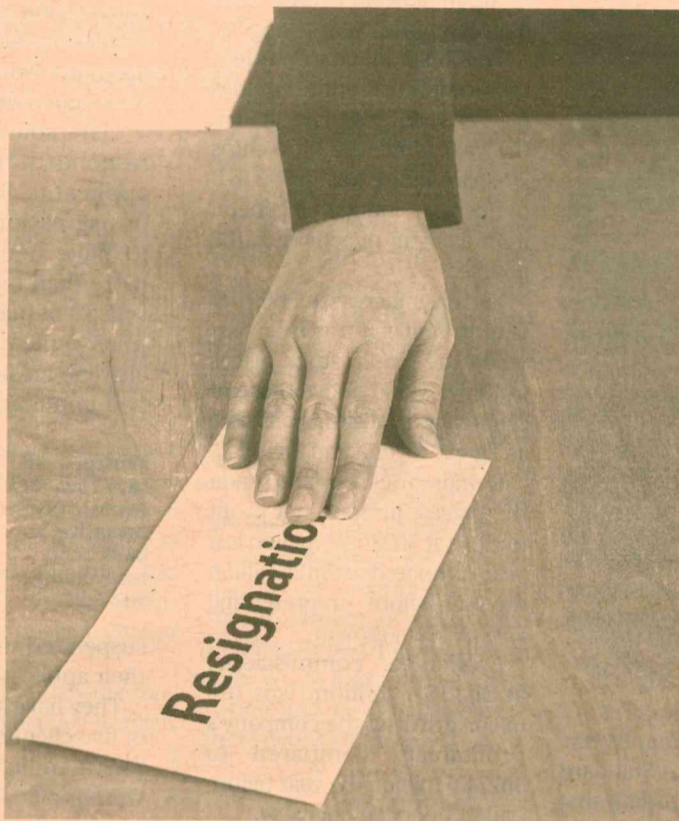
The doctrine is well established in the UK, South Africa and other developed jurisdictions

The doctrine of constructive dismissal stems from the fact that there is an implied term in every employment contract that the

employer will not, without a reasonable cause, conduct itself in a manner that fundamentally damages the relationship with the employee or makes the working environment unbearable for the employee.

The doctrine is well established in the UK, South Africa and other developed jurisdictions where it is codified in statute and entrenched in case-law. While the doctrine is not yet part of Kenyan statute law, it is rooted in Article 41 of the Constitution which guarantees the right to fair labour practices.

Constructive dismissal arises where an employer, without terminating the employee's contract, treats the employee in such an unreasonable manner that it becomes unbearable for the employee to continue in employment. Under such circumstances, the employee is forced to resign, not out of his free will, but due to the intolerable treatment of the employer.



Therefore, when an employer, by action or omission materially breaches the terms of the employment contract or otherwise makes it impossible for the employee to effectively perform his duties, such employee is entitled to resign and claim damages against the employer for constructive dismissal. The employer, by his conduct, is deemed to have dismissed the employee.

The Employment & Labour Relations Court appears to have embraced the doctrine of constructive dismissal with gusto. The leading case on the subject currently is *Coca-Cola East Central Africa Limited V. Maria Kagai Ligaga (2015) eKLR* where the court pronounced itself robustly on this doctrine.

The court held that an employee is entitled to leave when the employer's behaviour towards him is so unreasonable that the employee cannot be expected to stay. The employer's conduct must be so grave that it constitutes a repudiation of the contract of employment. The breach must go to the very root of the contract.

In other words, the employer must have breached the terms of the employment contract in such a manner that it is no longer possible for the employee to continue working effectively.

There are many scenarios that can lead to constructive dismissal and there

is no exhaustive list in that regard. A few examples will, however, suffice. Where an employee is subjected to persistent harassment, which continues unabated despite the employee's complaint, frequent and unexplained transfers, unpredictable changes in pre-agreed performance targets, demotion (including change of title even without reduction in pay), unilateral change in job description, among others, constitute valid grounds for constructive dismissal.

The employer's conduct does not have to be intentional or in bad faith in order for constructive dismissal to arise. Structural changes within the business could force the employee into a situation where he has no choice but to resign. There must, however, be a causal link between the employer's conduct and the reason for the resignation.

In constructive dismissal, the employee is entitled to leave employment with or without notice so long as the employer's conduct is the fundamental reason for the resignation. The burden of proof in this regard lies on the employee. There is no valid constructive dismissal if, for instance, the employee notifies the employer of the breach and the employer remedies it or reverses the decision complained of. It is also essential for the employee to demonstrate that he had exhausted all internal processes, including the grievance procedure, before resorting to resignation.

An employee might forfeit his right to rely on constructive dismissal through acquiescence. This occurs where the employee is shown to have accepted or waived the employer's breach. This can be deduced from the employee's agreement to continue working despite the breach of the employment contract by the employer. To avail himself of this remedy, the employee must act expeditiously and resign within a reasonable time after the breach has occurred otherwise he will be estopped from relying on a breach which, by his own conduct, he has condoned.

Constructive dismissal is treated as a dismissal by the employer and the employee is entitled to damages for unfair termination, notwithstanding that he was not actually fired by the employer.

Maema is a Senior Partner in the law firm of Iseme, Kamau & Maema Advocates. wmaema@ikm.co.ke



British Prince Philip admitted to hospital for hip surgery

The Duke of Edinburgh has been admitted to hospital in central London for planned surgery on his hip, Buckingham Palace has said.

The surgery will take place on Wednesday at the King Edward VII Hospital in Marylebone.

Prince Philip (pictured), 96, retired from royal duties last August. The duke was not at last Thursday's Royal Maundy Service at Windsor Castle, with his absence said to be because of a hip problem.

In a statement, Buckingham Palace said: "His Royal Highness The Duke of Edinburgh was admitted to King Edward VII Hospital in London this afternoon, for planned surgery on his hip which will take place tomorrow."

"Further updates will be issued when appropriate."

Royal health

The duke announced his retirement in May 2017, after decades of supporting the Queen, as well as attending events for his own charities and organisations. A

month later he was admitted to the King Edward VII hospital as "a precautionary measure" following an infection arising from a pre-existing condition.

His final solo engagement was on August 2 last year, when he reviewed a parade of Royal Marines outside Buckingham Palace in his capacity as Captain General of the corps.

But he has since appeared several times at engagements alongside the Queen.

The surgery comes ahead of a busy time for the royal family, with the Duchess of Cambridge due to give birth to her third child this month, and the wedding of Prince Harry and Meghan Markle in May.

BBC

"...An employee might forfeit his right to rely on constructive dismissal through acquiescence."