Samasource EPZ Limited t/a Sama v Meta Platforms, Incorporated & 186 others; Kenya Human Rights Commission & 8 others (Interested Parties) (Civil Appeal E595 of 2023) [2024] KECA 1152 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1152 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E595 OF 2023

DK MUSINGA, MSA MAKHANDIA & JM MATIVO, JJA

SEPTEMBER 20, 2024

BETWEEN

SAMASOURCE EPZ LIMITED T/A SAMA ..... APPELLANT

AND

META PLATFORMS, INCORPORATED ..... 1ST RESPONDENT

META PLATFORMS IRELAND LIMITED ..... 2ND RESPONDENT

MAJOREL KENYA LIMITED ..... 3RD RESPONDENT

KIANA MONIQUE ARENDSE ..... 4TH RESPONDENT

JAMES AGADA MARK ..... 5TH RESPONDENT

MEAZA SHURA ..... 6TH RESPONDENT

MARK AGABA ..... 7TH RESPONDENT

FASICA BERHANE GEBREKIDAN ..... 8TH RESPONDENT

CAMERON ROWAN CORNER ..... 9TH RESPONDENT

ROBEL KHASAY GEBRU ..... 10TH RESPONDENT

ABEL ABRHA ASGEDOM ..... 11TH RESPONDENT

EPHREM KIRUBEL MIHRETEAB ..... 12TH RESPONDENT

DAWIT BIRHANE BERHE ..... 13TH RESPONDENT

TREVIN BROWINE ..... 14TH RESPONDENT

LUBEGA EDWARD ..... 15TH RESPONDENT

NAOD AMANUEL GEBREKIDAN ..... 16TH RESPONDENT

TEAMIR DELLELEGN ..... 17TH RESPONDENT

KAUNA IBRAHIM MALGWI ..... 18TH RESPONDENT

TSIDENA ABADI ZEMO ..... 19TH RESPONDENT

MESERET DINKU ABDO ..... 20TH RESPONDENT

AYANA EPHREM GELETA ..... 21ST RESPONDENT

ALEWIYA MOHAMMED MUSA ..... 22ND RESPONDENT

TIKKY OLANG'O ..... 23RD RESPONDENT

KHOTHAMANI MHOLONGO ..... 24TH RESPONDENT

YONA BEDASA ..... 25TH RESPONDENT

THRAS GIDEY ..... 26TH RESPONDENT

SAMRAWIT TEKESTE ..... 27TH RESPONDENT

ZEGEYE DAWIT GEBREMARIAM ..... 28TH RESPONDENT

JASON ILOVU ..... 29TH RESPONDENT

ROSEBELLAH WAKHU ..... 30TH RESPONDENT

CAROLINE NJERI MUCHANGI ..... 31ST RESPONDENT

EVELYN NALUWU ..... 32ND RESPONDENT

HASSAN ALKANO ..... 33RD RESPONDENT

EDINAH LUMUMBA ..... 34TH RESPONDENT

PALESA GLORIA KOMETSI ..... 35TH RESPONDENT

MAHAT ABDULLAHI SHEIKH ..... 36TH RESPONDENT

MAHLET YILMA ..... 37TH RESPONDENT

CIELLA IRAMBONA ..... 38TH RESPONDENT

MUSA ABUBAKAR ..... 39TH RESPONDENT

ABDIKADIR GUYO ..... 40TH RESPONDENT

JAMES IRUNGU ..... 41ST RESPONDENT

HABEN HAILE YOHANES ..... 42ND RESPONDENT

JUANITA JONES ..... 43RD RESPONDENT

ODIRILE MOLEBOGE ..... 44TH RESPONDENT

TESSLINE TONI KIEWIETS ..... 45TH RESPONDENT

ANTIAN JAY-DEAN MOOSA ..... 46TH RESPONDENT

SAMUEL EBENIRO ..... 47TH RESPONDENT

LIELINA ASSEFA ..... 48TH RESPONDENT

MARION IMUYA MUHANDA ..... 49TH RESPONDENT

ABDULLATEEF KEHINDE ..... 50TH RESPONDENT

BELLA NININAHAZWE ..... 51ST RESPONDENT

MAGDALENE SILA ..... 52ND RESPONDENT

SOPHIA DANIELS ..... 53RD RESPONDENT

EPHRATA MAMO ..... 54TH RESPONDENT

AMERTI BAYISA ..... 55TH RESPONDENT

DE DIEU UWIDUHAYE ..... 56TH RESPONDENT

TUYISHIMIRE MARIE IRENE ..... 57TH RESPONDENT

SIBUSISO DUMA ..... 58TH RESPONDENT

ARIANE HOGOZA ..... 59TH RESPONDENT

FAYO HUSSEIN KADIR ..... 60TH RESPONDENT

NGARAMBE CHRYSOLOGUE ..... 61ST RESPONDENT

UWAMAHORO STELLA CARINE ..... 62ND RESPONDENT

ABDIKHES DAAR ..... 63RD RESPONDENT

ESTHER MUKAMANA ..... 64TH RESPONDENT

CYLIA SKOSANA ..... 65TH RESPONDENT

MUGERWA HAMIDAH ..... 66TH RESPONDENT

ISMAIL ALIYU. ..... 67TH RESPONDENT

LAWAL MOHAMMAD SHUAIBU ..... 68TH RESPONDENT

SONIA MATETE KGOMO ..... 69TH RESPONDENT

JODA BASHIR SUNDAY ..... 70TH RESPONDENT

DAWIT BIRHANE BERHE ..... 71ST RESPONDENT

DAVID NKURUNZIZA ..... 72ND RESPONDENT

NATHAN NKUNZIMANA ..... 73RD RESPONDENT

JOHNSON TWAGIRIMANA ..... 74TH RESPONDENT

NASIRU AMINU MADAKI ..... 75TH RESPONDENT

STEPHAN VAN DEN BERG ..... 76TH RESPONDENT

NALEDI MKHIZE ..... 77TH RESPONDENT

ALINOOR MOHAMED ABDULLAHI ..... 78TH RESPONDENT

WILBERFORCE APUNGU ..... 79TH RESPONDENT

NAFTALI ANDATI WAMBALO ..... 80TH RESPONDENT

RAYWINE MUKONAMBI ..... 81ST RESPONDENT

IRANYIBUTSE KOFFI ..... 82ND RESPONDENT

MUSA ALIYU BAFFA ..... 83RD RESPONDENT

DANIEL ELIAS YADETA ..... 84TH RESPONDENT

MICHAEL MELAKU WALELIGN ..... 85TH RESPONDENT

NEO NKWE ..... 86TH RESPONDENT

BUSISIWE EGNECIOUS NKOSI ..... 87TH RESPONDENT

PHETHILE BRIDGET DLAMINI ..... 88TH RESPONDENT

KWENZEKILE NGIDI ..... 89TH RESPONDENT

PRINCESS NELISIWE MADLEBE ..... 90TH RESPONDENT

ANTONY AWUOR ..... 91ST RESPONDENT

KIDIST FANTU BUZUNEH ..... 92ND RESPONDENT

ASCHALEW SEIFU HUSEN ..... 93RD RESPONDENT

ABDIHAMID BULLE ..... 94TH RESPONDENT

NAKATE JANAT ..... 95TH RESPONDENT

KAME TUYE BADASA ..... 96TH RESPONDENT

NYANGARESI DANCAN ..... 97TH RESPONDENT

UMAR KABIR ..... 98TH RESPONDENT

HIJRA ABDALLAH ..... 99TH RESPONDENT

HANAN ABDI ..... 100TH RESPONDENT

BEATRICE ANI ..... 101ST RESPONDENT

INNOCENTIA NEO MABASO ..... 102ND RESPONDENT

SAMRAWIT MARKOS WELDESENEBET ..... 103RD RESPONDENT

MINASE SISAY ..... 104TH RESPONDENT

ESTHER EMOSHOGWE MICHAEL ..... 105TH RESPONDENT

LAWAL SUIDI MOHAMMAD ..... 106TH RESPONDENT

TUMWEBAZE PROSCOVIA ..... 107TH RESPONDENT

KAME BADASA ..... 108TH RESPONDENT

NAHOM TEKEST ..... 109TH RESPONDENT

ABDIAZIZI HUSSEIN ADAN ..... 110TH RESPONDENT

FREDRICK AMOS OKUMU ..... 111TH RESPONDENT

ABDULLAHI GULIYA ADAN ..... 112TH RESPONDENT

SHEWIT MULUGETA ..... 113TH RESPONDENT

MOHAMED DAUD ABDI ..... 114TH RESPONDENT

RIYAN ISMAEL IBRAHIM ..... 115TH RESPONDENT

HALIMA JILLO ..... 116TH RESPONDENT

NAJMA ILYAS HAJI ..... 117TH RESPONDENT

GLADYS ATYANG ..... 118TH RESPONDENT

TEDDY ODHIAMBO ..... 119TH RESPONDENT

SAUSEPETER OJIAMBO ..... 120TH RESPONDENT

LESEGO MOTLANTHE ..... 121ST RESPONDENT

PASSY NAMYALO ..... 122ND RESPONDENT

ADIAM GEBREZGABHER BEYIN ..... 123RD RESPONDENT

TIRHAS HAILEKIROS HAILESILASSE ..... 124TH RESPONDENT

BOTLHOKWA NONDALI DITSHEPO RANTA ..... 125TH RESPONDENT

MOSANDILE MKHABELAHAMUD AHMED HAJI ..... 126TH RESPONDENT

HENRY NTEGE ..... 127TH RESPONDENT

MOIPONE MMUSI ..... 128TH RESPONDENT

ABDIAZIZ OSMAN ADAN ..... 129TH RESPONDENT

SANDILE MKHABELA ..... 130TH RESPONDENT

KELVIN MAGU NGILA ..... 131ST RESPONDENT

HELLEN NAMUYANJA ..... 132ND RESPONDENT

MERCY CHIMWANI ..... 133RD RESPONDENT

ROSS KOGOSHE ..... 134TH RESPONDENT

AMIR AHMEDMUZ ADEM ..... 135TH RESPONDENT

SINIDU YOHANNES JOBA ..... 136TH RESPONDENT

YASMIL DAUD ALI ..... 137TH RESPONDENT

ADDNA HAJI ..... 138TH RESPONDENT

LONWABO MTSHENGU ..... 139TH RESPONDENT

HAMZA DIBA TUBI ..... 140TH RESPONDENT

FELIX OTIENO MURUKA ..... 141ST RESPONDENT

IBRAHIM ALIO GALGALLO ..... 142ND RESPONDENT

LARSON ABEL DOMJUL ..... 143RD RESPONDENT

BORU HUSSEIN JATTANI ..... 144TH RESPONDENT

MOHAMED ABDIKADIR IBRAHIM ..... 145TH RESPONDENT

HUSSEIN KORE WAKO ..... 146TH RESPONDENT

MOHAMED GURACHA ..... 147TH RESPONDENT

JATANI HUSSEIN JATANI ..... 148TH RESPONDENT

MOLU ADAN GOLICHA ..... 149TH RESPONDENT

FELIX MUNDE ONDIGO ..... 150TH RESPONDENT

BONGIWE LAMANI ..... 151ST RESPONDENT

BERISA TESFAYE ..... 152ND RESPONDENT

SHARMAKE SAID ..... 153RD RESPONDENT

CARYN PIETERSE ..... 154TH RESPONDENT

SHUKRIA ALI TIFOW ..... 155TH RESPONDENT

ASHA ABDULLAHI ABDIRAHIM ..... 156TH RESPONDENT

OBSITU ALIYI OMER ..... 157TH RESPONDENT

GEORGE KIPSANG ..... 158TH RESPONDENT

KEANAN LESLEY JOUSTEN ..... 159TH RESPONDENT

ELMI OSMAN ..... 160TH RESPONDENT

ABDIRIZAK MUKTAR AHMED ..... 161ST RESPONDENT

IBRAHIM ROBA QAMPARE ..... 162ND RESPONDENT

MARIAM ADHAN HASSAN ..... 163RD RESPONDENT

BIGOMBA LASTO ..... 164TH RESPONDENT

KIBIRIGE IVAN GAAYI ..... 165TH RESPONDENT

MAWERERE ERIC ..... 166TH RESPONDENT

FRANK MUGISHA ..... 167TH RESPONDENT

ENDALEW SHIBABAWE ..... 168TH RESPONDENT

RETINA ASFAW TEGEGN ..... 169TH RESPONDENT

EUNICE WANJIRU MWAURA ..... 170TH RESPONDENT

AHMEDNOOR SALAT OSMAN ..... 171ST RESPONDENT

MUSTAPHA MUKHTAR ..... 172ND RESPONDENT

SANI MUHAMMAD FAISAL ..... 173RD RESPONDENT

STEPHEN KOOME ..... 174TH RESPONDENT

JOSHUA OTIENO OOKO ..... 175TH RESPONDENT

SSENGOOBA ALLAN OSWALD. ..... 176TH RESPONDENT

ESTHER MAINGI ..... 177TH RESPONDENT

MARVIN NKOJO ..... 178TH RESPONDENT

ILIYASU ABBA AHMED ..... 179TH RESPONDENT

MUHAMMAD ALIYU ..... 180TH RESPONDENT

EMMANUEL SAMBO ..... 181ST RESPONDENT

FIYORE NUGUS ..... 182ND RESPONDENT

ABDI MOHAMED ALI ..... 183RD RESPONDENT

ROBA DEREJE AMANTE ..... 184TH RESPONDENT

MICHAEL NKOKO ..... 185TH RESPONDENT

AYUB HUSSEIN GISHO ..... 186TH RESPONDENT

AYANDA MASHABA ..... 187TH RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

MINISTRY OF FOREIGN AFFAIRS ..... INTERESTED PARTY

KITUO CHA SHERIA ..... INTERESTED PARTY

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION ..... INTERESTED PARTY

CENTRAL ORGANIZATION OF TRADE UNIONS KENYA .... INTERESTED PARTY

THE ATTORNEY GENERAL ..... INTERESTED PARTY

MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES ... INTERESTED PARTY

MINISTRY OF HEALTH ..... INTERESTED PARTY

(Being Appeals from the Ruling and Order of the Employment and Labour Relations Court of Kenya, Nairobi (Ongaya, J.) dated 2nd day of June, 2023 in ELRC Petition No. E052 of 2023)

JUDGMENT

1. This judgment determines three consolidated appeals, namely, Civil Appeal Nos. 595 of 2023, 602 of 2023 and 615 of 2023, all of which arise from a ruling delivered by the Employment and Labour Relations Court (ELRC) on 2nd day of June 2024 (Ongaya, J.) in Nairobi ELRC Constitutional Petition No. E052 of 2023, Kiana Monique Arendse and 42 Others vs Meta Platforms, INC & 3 Others, Kenya Human Rights Commission & 8 Others (Interested Parties). For the sake of brevity, the 4th to the 46th respondents herein were the petitioners in the said suit. Samasource EPZ Limited, (the appellant herein), was the 3rd respondent in the said proceedings. Lastly, Meta Platforms Incorporated, Meta

Platforms Ireland Limited, and Majorel Kenya Limited, (the 1st, 2nd and 3rd respondents) were the 1st, 2nd and 4th respondents respectively in the said suit.

2. A concise account of the dispute that birthed the litigation before the ELRC is necessary to contextualize the issues arising in these appeals respectively. Briefly, by a petition dated 17th March 2023 filed at the ELRC, the 4th to the 46th respondents sued the appellant herein and the 1st to the 3rd respondents alleging, inter alia, violation of their constitutional rights, unfair labour practices and unhealthy work environment. They accused the 1st, 2nd and 3rd respondents of embarking on a sham redundancy as a retaliation after the 4th to 187th respondents filed before the ELRC Petition No. E071 of 2022, Daniel Motaong vs Samsasource & Meta, citing, inter alia, gross violation of their rights as Facebook content moderators. They prayed for: (a) a declaration that their constitutional rights had been violated; (b) a declaration that the redundancy undertaken by the 1st, 2nd and 3rd respondents against them was unjustified and amounted to unfair discrimination; (c) that the termination letters issued to them were invalid; (d) that they were unfairly remunerated; (e) that the non- disclosure and non-disparage agreements signed by the moderators are invalid; (f) that they be reinstated and compensated for unfair termination; (g) award damages under various heads particularized in their petition; and, (h) costs of the suit.

3. In opposition to the petition, the 2nd respondent filed grounds of opposition dated 16th May 2022 contending that the 1st respondent herein lacked locus standi to institute the petition because it is a foreign national not domiciled in Kenya; the petition is an abuse of court process; the 1st respondent's termination of employment was lawful; the 1st respondent cannot bring a claim on behalf of undisclosed persons; the petition does not meet the threshold of a representative suit under rule 9 of the Employment and Labour Relations Court Rules; and the ELRC lacks jurisdiction to entertain the matter because the 1st respondent is a foreign corporation that is neither resident, domiciled nor trading in Kenya.

4. The 4th to 186 respondents filed an application dated 17th March 2023 in the said case claiming, inter-alia, that the appellant and the 1st and 2nd respondents were in the process of terminating their contracts through an unlawful redundancy, and no genuine or justifiable reason was proffered. They also alleged that they were never consulted, and that the criteria used to terminate their services did not take into account issues such as seniority in time, skill, ability and reliability of individual moderators. Lastly, they alleged that the 3rd respondent had been engaged by the 1st and 2nd respondents to recruit new content moderators to replace them and not consider them.

5. The grounds in support of the application are explicated in the supporting affidavit sworn on 17th March 2023 and supplementary affidavits sworn on 23rd May 2023 by the 3rd respondent and the 7th respondents. In a nut shell, the 4th to 187th respondents prayed for a raft of reliefs pending the hearing and determination of the petition, among them: (a) an interim injunction restraining the appellants from implementing the redundancy notices issued by the 1st respondent on 18th January 2023; (b) an interim injunction restraining the appellants and the 1st respondent from varying the contractual terms of the Facebook Content Moderators in a manner unfavorable to the moderators;

    (c) an order that any contracts that were due to lapse before the determination of the petition be extended until after the determination of the petition; (d) an order compelling the appellants and the 1st respondent to provide proper medical, psychiatric and psychological care for Facebook content moderators in place of wellness counselling; and, (e) the appellants and the 1st respondent be compelled to regularize the immigration status for all Facebook content moderators who are immigrants and at all costs protect them from deportation.

6. In opposition to the application, the 1st and 2nd respondents filed a replying affidavit on 9th May 2023 sworn by Joanne Redmond "under protest of the Court's jurisdiction." Briefly, he averred inter alia, that: (i) the 1st and 2nd respondents are foreign corporates not resident or trading within the jurisdiction of the Court; (ii) that they had appealed against a ruling dismissing their application dated 24th March 2023 challenging the trial Court's jurisdiction;

   (iii) the application dated 17th March 2023 was incompetent, bad in law and devoid of merits because it sought prayers at variance with those in the petition; that the appellants were not the 4rd to 187th respondents' employers; (iv) the disputed redundancy process was being undertaken by the appellant who is the 4th to 187th respondents' employer; (v) the mandatory orders sought ought not be granted at an interlocutory stage; (vi) the appellants have no say in the redundancy process by the 1st respondent because they are not privy to their employment contracts; and,

   (vii) there was no basis for the appellant to regularize the immigration status of the Facebook content Moderators.

7. In opposition to the application, the appellant filed grounds of opposition and a replying affidavit sworn by one Annpeace Alwala on 11th May 2023 and a supplementary affidavit sworn on 11th April 2023. The salient averments are: (i) the 4th to 186th respondents' work was tracked by managers of the 1st respondent and not the appellants; (ii) the 1st respondent is not a partner of the appellants, their relationship is purely a service provider and service recipient; (iii) the 4th to 187th respondents were invited to a meeting on 10th January 2023 vide e-mail sent by the appellant on 9th January 2023 to notify them of the intended redundancy process; (vi) another redundancy notice was issued on 18thJanuary 2023 and consultative meetings held on 18th January 2023, 2nd February 2021, 23rd February 2023 and 28th February 2023; (v) all positions of content moderators were being abolished and therefore the question of criteria did not arise; (vi) and that the toxicity and adverse health impacts of the work of content moderators are sub-judice as they are directly in issue in ELRC Constitutional Petition *No. E071 of 2022*.

8. In opposition to the application, the 3rd respondent filed a replying affidavit sworn by Sven Alfons A De Cauter on 27th March 2023 and a further affidavit sworn on 24th May 2023. The key averments are: (a) the 3rd respondent knows the job requirements and therefore sets the recruitment criteria and has the sole discretion to assess the suitability of any applicant for the positions; (b) the 4th to 187th respondents are not the only qualified persons to conduct content moderation work in the region; (c) the 3rd respondent had completed a recruitment exercise in East and Southern Africa and had started training the hired staff in anticipation to take up the content moderation work; (d) the 3rd respondent has heavily invested in preparation to undertake content moderation projects by leasing office space, therefore, if the orders are granted, it will incur loss of income and investments and its staff will be rendered redundant, and on-going contracts will be frustrated; (e) It urged that the 4th to 187th respondents' remedy lies in damages.

9. In the impugned ruling dated 2nd June 2023, Ongaya, J. determined 5 issues : (a) whether the 1st and 2nd respondents' replying affidavit sworn by Joanne Redmond should be struck out;

   (b) whether the 3rd respondent's various affidavits sworn by Annpeace Alwala on 27th March 2023, 11th April 2023, and 11th May 2023 should be struck out; (b) whether the affidavits sworn by Sven A De Cauter on 27th March 2023 and 12th April 2023 should be struck out; (c) whether the 1st and 2nd respondents are employers of the applicants or the 3rd respondent was the sole

and only employer of the applicants; (d) whether the applicants have met the threshold for grant of the interim orders as prayed; and,

(e) whether the petition was sub judice.

10. In allowing the application dated 17th March 2023, Ongaya, J. issued the following orders against the appellant and the 1st, 2nd and 3rd respondents:

a. That pending the hearing and determination of the petition, an interim injunction order is hereby issued restraining the 1st, 2nd and 3rd respondents from implementing in any manner whatsoever anything incidental to or related to the redundancy notice issued to Facebook Content Moderators (GPL 8 CO) on 10.01.2023 as read together with the redundancy notice issued on 18.01.2023; in particular, and for greater certainty, the 1st, 2nd and 3rd respondents are hereby restrained from terminating the contracts of the Facebook Content Moderators pending the hearing of the petition.

b. That pending the hearing and determination of the petition, an interim injunction order is hereby issued restraining the 1st, 2nd, and 3rd respondents from varying the contractual terms of the Facebook Content Moderators (GPL 8 CO) in a manner unfavourable to the moderators.

c. That pending the hearing and determination of the petition, an interim order is hereby issued that any contracts that were to lapse before the determination of the petition be extended such that the termination date will be after the determination of the petition.

d. That pending the hearing and determination of the petition, an interim injunction order is hereby issued restraining the 1st and 2nd respondents from engaging content moderators to serve the Eastern and Southern African region through the 4th respondent or through any other agent, partner or representative or in any manner whatsoever engaging moderators to do the work currently being done by the moderators engaged through the 3rd respondent, and unless the content moderators herein are otherwise retained in employment upon the prevailing or better terms and conditions of service as the respondents may jointly or severally arrange.

e. That pending the hearing and determination of the petition, a prohibitory order is hereby issued restraining the 1st, 2nd and 4th respondents from refusing to recruit qualified content moderators on grounds that they were previously engaged through the 3rd respondent.

f. That pending the hearing and determination of the petition, a prohibitory order is hereby issued restraining the respondents either by themselves, their servants, agents, employees, or any one acting under their authority, direction, control, or instruction from, whether by words or actions, making any threat to or in any way whatsoever retaliating against any moderators as a result of the institution of the petition.

g. That pending the hearing and determination of the petition, an order is hereby issued compelling the 1s, 2ndand 3rd respondents to provide proper medical, psychiatric and psychological care for the petitioners and other Facebook Content Moderators in place of 'wellness counselling'.

h. That pending the hearing and determination of the petition, an order is hereby issues for the 1st, 2nd, and 3rd respondents to regularize the immigration status for all Facebook Content Moderators herein who are immigrants and at all costs protect them from deportation.

i. That pending the hearing of the petition and in view of the lamentations by the content moderators herein, the 4th, 5th, 6th , 7th, and 8th interested parties shall review the status of the law

and policy for protection of employees' occupational safety and health in the sector of virtual digital work, digital workspaces, and digital work place and measures for improvement of the applicable policy and law and report to the Court in that regard including extent of protection of the applicants in the instant case.

j. That pending the hearing and determination of the petition, the 4th, 5th, 6th, 7th, and 8th interested parties shall review the status of the employment policy and law and steps being taken to sufficiently provide for the rights and obligations of employers and employees with respect to the sector of virtual or digital work, digital workplace and digital workspaces.

k. That pending the hearing and determination of the petition, the parties are encouraged to consider alternative dispute resolution including negotiation, conciliation or mediation with a view of arriving at amicable compromise and recording a consent in court as may be just or appropriate.

l. That the 1st, 2nd and 3rd respondents will jointly or severally pay the costs of the application.

m. As the file was before this Court while Nduma, J. handling the file was on leave and case having been certified urgent and, Nduma, J. will shortly resume from leave, parties to agree on a convenient date for mention before Nduma, J. for further steps in the matter.

11. Aggrieved by the ruling, the appellant and the 1st, 2nd and 3rd respondents lodged their respective notices of appeal dated 6th June 2023, 1st August 2023, and 9th June 2023. They also filed their respective records of appeal. Upon being served, the 4th to 187th respondents promptly filed Notice of Grounds Affirming Decision dated 17th January 2024.

12. In Civil Appeal No. 595 of 2023, the appellant prays that its appeal be allowed and the application dated 17thMarch 2023 be dismissed, and it be awarded the costs of the application and the appeal. Its appeal is premised on 11 grounds which we have summed up as follows: (i) the learned Judge made conclusive findings of fact at an interlocutory stage among them, extending the 4th- 187 respondents' expiring or expired contracts, interpreting contracts, determining that the 1st and 2nd respondents were the principal employers of the petitioners, finding that the appellant was merely an agent of the principal employers, finding that the intended redundancy was not justified, and finding that the alleged sicknesses of the content moderators had been proved; (ii) the learned Judge in failing to find that the claims relating to the safety and working conditions at the appellant's premises were sub judice and in failing to find that prayers c, d, e, f, g, h, q and r of the application were not merited; and, (iii) failed to find that the tests for granting injunction were not met.

13. In Civil Appeal No. 615 of 2023, the appellant (Majorel Kenya Limited) faults the learned judge for striking out its 3 affidavits sworn by Sven Alfons A De Cauter as detailed earlier, and in failing to consider the affidavits which were filed. The other grounds and the prayers sought are substantially similar to those cited in Civil Appeal No. 595 of 2024, hence it will add no value to rehash them here.

14. In Civil Appeal No. 602 of 2023, the appellants (Meta Platforms Inc & Meta Platforms Ireland Ltd) cited a whopping 24 grounds of appeal which we have summarized as follows; that- (i) the learned judge erred in striking out the replying affidavit dated 9th May 2023 sworn by Johanne Redmond; (ii) misconstruing Order 19 rule 7 of the Civil Procedure Rules, section 88 of the *Evidence Act*, and the High Court decision in Pastificio Lucio Garofaio SPA vs Security & Fire Equipment Co & Another [2001] eKLR regarding the admissibility of the said affidavit; (ii) considering extraneous matters and misconstruing precedents. The remaining grounds are essentially similar to those cited in Civil Appeal No.595 of 2023, while a few relate to merits of the main dispute, hence our reason not to mention them here.

15. In support of Civil Appeal No. 595 of 2023, learned counsel Mr. Omino submitted on 9 grounds, principally faulting the learned judge for making conclusive findings of fact at an interlocutory such: (a) Meta was the real employer of the Content Moderators and not Sama; (b) the content moderators had a legitimate expectation that their expired contracts were renewable; (c) the work environment was unsafe and that the content moderators suffered psychological harm as a result of the work environment. Counsel cited this Court's decision in Lucy Wangui Gachara vs Minudi Okwemba Lore [2015] eKLR in support of his assertion that a Court should not make conclusive findings of fact at the interlocutory stage.

16. Mr. Omino also faulted the Judge for extending expired or expiring employment contracts, yet the appellant had withdrawn from the content moderation business with effect from 31st March 2023, necessitating the redundancy exercise. Counsel contended that the unilateral extension of the content moderators' contracts at an interlocutory stage effectively reinstated the employees before merit hearing and determination. Further, the threshold for a mandatory injunction was not met.

17. Counsel maintained that the alleged safety and working conditions of the employees was sub–judice because the same issues were alive in ELRC Constitutional Petition No. E071 of 2023 ELR, Daniel Motaong vs Samsasource & Others involving the parties herein. He faulted the trial judge for dismissing the issue, reasoning that filing a petition on behalf of the content moderators cannot prevent them from pursuing their own case. Counsel also contended that some of the prayers sought in the application had not been sought in the petition, therefore they were not available at the interlocutory stage.

18. On the question of irreparable harm in the event the redundancy proceeds, Mr. Omino submitted that only one medical report was produced by the content moderators which was a case of insomnia, therefore, no medical evidence was provided by the content moderators to demonstrate the alleged healthcare needs. Counsel added that the content moderators need not be in employment or remain in Kenya for them to pursue their claims, therefore dismissing the application could not have caused them irreparable harm, in any event, they were also seeking reinstatement orders in the petition.

19. In support of Civil Appeal No. 602 of 2023, the 1st and 2nd respondents' counsel, Ms. Onyango, submitted that they disputed the existence of an employment relationship between the 1st and 2nd respondents and the content moderators because the contract between the appellant and the content moderators were explicit that the appellant was their employer. Therefore, she faulted the learned judge for granting final orders, including a declaration that the 1st and 2nd respondents were principal or primary employers of the content moderators. She also argued that there were no special circumstances to merit such drastic orders and relied on the Supreme Court of India decision in Ashock Kumar Bajpai vs Dr. (Smt) Ranjama Baipai AIR2004, ALL 107, 2004(1) AWC 88 to buttress her aforesaid assertion.

20. She urged that the striking out of Joanne Redmond's affidavit for being dated 8th June 2023 though it was filed on 9th May 2023 was improper because under Order 9 rule 17 of the Civil Procedure Rules, a court is permitted to accept an affidavit irrespective of an irregularity in form in line with the edict in Article 159(2) (d) of *the Constitution*.

21. Regarding the tests for grant of an injunction, Ms. Onyango submitted that some of the orders were ineffectual because the 1st and 2nd respondents could not comply with them. For example, the 1st and 2nd respondents were incapable of varying the terms and/or stopping the appellant from terminating the contracts because they were not parties to the employment contract between the appellant and the content moderators, nor were they involved in their recruitment. Regarding the regularization of the content moderators' immigration status and protecting them from deportation, counsel maintained

that issuance of work permits is the sole preserve of the Immigration department. Lastly, Ms. Onyango urged this Court to be guided by the principles that costs follow the event and award costs to the 1st and 2nd respondents.

22. In support of Civil Appeal No. 615 of 2023, learned counsel for the appellant, Mr. Mbatia, fully associated himself with Mr. Omino's submissions. Regarding the striking out of Mr. Sven Alfons De Cauter's affidavit for want of the advocates practicing certificate, he submitted that they were condemned unheard, yet no prejudice would have been suffered by the 4th to 187th respondents if their recommissioned affidavit could have been admitted.

23. Regarding the finding on employment relationship at the interlocutory stage, Mr. Mbatia submitted that the respondents in the petition before the E LRC are yet to file their responses to the petition in order to counter the allegations made by the petitioners. Therefore, there was inadequate material to assist the Court in making such a determination. He faulted the trial judge for conducting a mini-trial and determining findings of facts based on disputed affidavit evidence, thereby usurping the jurisdiction of the court that will hear the main petition. He cited Esso Kenya Limited vs Mark Makwata Okiya, Civil Appeal No. 69 of 1991 in support of the proposition that courts should avoid determining issues in the suit before the actual hearing.

24. Counsel faulted the trial Court for re-writing the contracts between the parties by finding that there was no justification for the redundancy. Counsel also submitted that the superior court misapplied the finding in Cables & Wires PLC vs Muscat [2006] EWCA Civ 220; [2006] ICR 975 since in the present case there was no need to imply an employment relationship when the appellant had accepted that it is the employer. He also faulted the trial Court for issuing extra-territorial orders which prevented the 3rd respondent from undertaking its business not just in Kenya but also in 25 other countries in East and Southern Africa. Further, the said orders were anti-competition since they limited the market to only the 4th to 187th respondents because it barred others from performing content moderation for the 1st and 2nd respondents, unless and until its competitor resolved its dispute with its employees.

25. Regarding the tests for granting injunction orders, Mr. Mbatia submitted that the superior court failed to apply the settled test in Giella vs Cassman Brown [1973] E.A 358. On the requirement for irreparable loss, Mr. Mbatia maintained that the 4th to 187th respondents sought damages of Kshs.1,000,000/= per moderator. Therefore, their remedy lies in damages should their suit succeed. He contended that the foregoing notwithstanding, no reliefs were sought in the petition against the 3rd respondent on account of the alleged discrimination.

26. On the requirement for balance of convenience, Mr. Mbatia maintained that as a result of the impugned orders, the 3rd respondent has been unable to conduct content moderation work, thereby placing it under severe financial pressure, forcing it to declare over 200 members of its staff redundant and terminated their employment in December, 2023. Therefore, the balance of convenience tilts in favour of the 3rd respondent.

27. Ms. Akuno, learned counsel for the 6th-9th Interested Parties, supported the appeals. She maintained that extending lapsed contracts of the content moderators amounted to unjust enrichment because some content moderators whose contracts were due to expire by lapse of time did not contemplate extension of their contracts.

28. Learned counsel for the 4th to 187th respondents, Ms. Mutemi, relied on the grounds raised in the Notice of Grounds Affirming Decision dated 17th January 2024. Responding to submissions made in support of Civil Appeal No. E595 of 2023, she submitted that the 1st and 2nd respondents having contracted the 3rd respondent to undertake content moderation work, it was required to prove that

the job had become superfluous, thus necessitating redundancy. Consequently, the trial judge did not err by inquiring whether the redundancy was being carried out in compliance with section 40 of the *Employment Act*. Ms. Mutemi cited this Court's holding in Barclays Bank of Kenya Ltd & Another vs Gladys Muthoni & 20 Others [2018] eKLR, that the first port of call is to identify who the employer is so as to answer the question whether the employer has issued the required statutory notices.

29. Ms. Mutemi maintained that the 4th to 187th respondents met the threshold for granting an interim injunction, having demonstrated that: their rights to fair labour practices had been infringed for being subjected to a redundancy that did not comply with section 40 of the *Employment Act*. Further, their right to the highest attainable standard of physical and mental health under Article 43 and the right to dignity under Article 28 were violated. She also submitted that the 4th to 187th respondents also proved irreparable harm which could not be adequately compensated by an award of damages. She contended that the irreparable harm includes sudden job loss; risk of loss of life by suicide as a result of mental disorders and violation of the right to fair labour practices. She relied on Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR which defined irreparable injury as a loss that cannot be adequately compensated by way of damages, and contended that loss of life and mental health cannot be adequately compensated by an award of damages.

30. On whether the extension of the content moderators' contracts until the determination of the petition amounted to reinstatement, Ms Mutemi cited the Supreme Court decision in *Mitu-bell Welfare Society vs Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018)* [2021] KESC 34 (KLR), holding that Article 23 (3) of *the Constitution* empowers the High Court to fashion appropriate reliefs, even of an interim nature in specific cases, so as to redress the violation of fundamental rights.

31. Answering the contention that the orders were issued in vacuo, she submitted that the appellant does not state which orders were in vacuo. In distinguishing the case of David Waruiru Ngotho vs Betty Abonyo Oyugi & 10 Others cited by the appellant, Ms. Mutemi contended that the prayer sought in the chamber summons was inconsistent with the prayers sought in the plaint. As a matter of fact, the two were contradictory to each other, and noted that the said case was based on the Civil Procedure Rules as opposed to a constitutional petition.

32. Answering the submission that the 4th to 187th respondents' claim on inadequate psychosocial support are live disputes in ELRC Petition *E071 of 2023*, rendering the instant suit sub judicde, Ms. Mutemi submitted that circumstances have changed drastically since the filing of the said case, the most important being the redundancy, therefore, the two suits are different.

33. She contended that this Court lacks jurisdiction to adjudicate on the finding that the 1st and 2nd respondents are the principal employers of the content moderators, because the said finding was not among the orders issued in the impugned ruling. She insisted that an appeal only lies from orders of the superior court and relied on Attorney General vs George Bala [2023] KECA 117 (KLR) where this Court held that the right of appeal is a creature of statute and unless it is clearly and expressly given by statute, it does not exist.

34. In opposing Civil Appeal No. E602 of 2023, Ms Mutemi contended that out of the 24 grounds cited, 13 are grounds against the court's views and findings as found at paragraphs 29, 30, 31, 32, 38 and 39 of the ruling, as opposed to the final orders since they were basically the learned judge's views. Counsel relied on Attorney General vs George Bala [Supra] in support of the holding that an appeal only lies against a final judgment/decree or an order and not against observations by the court in the course of its determination.

35. Addressing Civil Appeal No. 595 of 2023, Ms. Mutemi maintained that the injunction orders were justified, and the trial Court properly struck out the affidavits because section 88 of the *Evidence Act* requires affidavits attested outside the Commonwealth to be authenticated and notarized, therefore Joanne Redmond's affidavit was incurably defective for want of proper attestation and for containing a future date.

36. In opposition to Civil Appeal No. E615 of 2023, Ms Mutemi contended that out of the 9 grounds of appeal, 6 grounds challenge the court's observations. Only grounds Nos. 1, 5 and 6 challenge the orders of the court. Counsel relied on Attorney General vs Bala [Supra] and adopted her arguments in Civil Appeal No. E595 of 2023 on the same issue.

37. As to whether the trial court was justified in striking out the replying affidavits sworn by Sven A De Cauter, Ms. Mutemi submitted that the replying affidavit offended sections 5 and 8 of *Oaths and Statutory Declarations Act* that require a commissioner of oaths to be a practicing advocate, an irregularity which remains uncontested. In fact, the 3rd respondent sought to cure the defect by filing a further replying affidavit sworn by the same deponent. She also submitted that the 3rd respondent's further affidavit was not only filed out of time, but it was also filed one day before the hearing of the application. Consequently, he who seeks equity must do equity, therefore, the learned judge rightfully struck out both affidavits.

38. Mr. Nyawa appearing together with Mr. Ochiel for Katiba Institute, opposed the consolidated appeals. Mr. Nyawa submitted that the ELRC has a duty under Article 23 of *the Constitution* to fashion an appropriate relief such as a conservatory order preserving the petition for hearing on merit, and an applicant only needs to demonstrate that the petition is arguable, that unless conservatory orders are granted, the petition would be rendered nugatory, and that it is in public interest for the conservatory orders to be granted. To buttress his submissions, Mr. Nyawa cited the Supreme Court decision in Gatirau Peter Munya vs Dickson Mwenda Kithinji & Two Others [2014] eKLR in which the Court set out the tests for granting conservatory orders.

39. On the question whether the learned judge was justified in issuing the interlocutory reliefs, including the mandatory injunction, Mr. Nyawa submitted that without the orders, some of the content moderators could have been deported during the pendency of the case. Therefore, there were compelling circumstances meriting the mandatory injunction to preserve the status quo as opposed to establishing a new state of things as was held in Lucy Wangui Gachazra vs Minudi Okemba [2015] eKLR. In conclusion, Mr. Nyawa urged this Court not to interfere with the trial Court's exercise of discretion just because this Court could have arrived at a different conclusion, and added that the appellants have not proved any grounds to merit this Court's intervention.

40. We have considered the entire record, the grounds of appeal, the parties' diametrically opposed submissions, the authorities cited by the parties and the law. We are conscious that these appeals arise from an interlocutory ruling. The main dispute is still pending determination before the trial Court. Therefore, we shall refrain from making definitive findings on matters of fact or law which are still pending resolution before the trial Court. However, it does not escape our attention that some of the grounds of appeal as alluded to earlier relate to the merits of the pending dispute.

    Also, some submissions made before us by both the appellants and respondents digressed into the merits. For example, Ms Mutemi submitted that the 1st and 2nd respondents were required to prove that the jobs in question had become superfluous, necessitating redundancy, therefore, the trial judge did not err by inquiring whether the redundancy was being carried out in compliance with section 40 of the *Employment Act*. Whether or not the redundancy was lawful is a matter for determination during the hearing. We say no more.

41. It was also her submission that the first port of call was to identify who the employer was so as to answer the question whether the employer had issued the required statutory notices. Again, this is a matter of evidence during the trial. It was her submission that the employer did not comply with section 40 of the *Employment Act*, and that there were violations of Articles 43 and 28 rights. These matters can only be determined after a full hearing. Accordingly, we will omit any grounds that invite this Court to venture into the merits of the pending dispute.

42. The appellants contend that the learned judge made conclusive findings of fact and issued final orders at an interlocutory stage. For example, they urged that the question whether the 1st and 2nd respondents were the principal or primary employers of the content moderators was disputed. However, the learned judge made a conclusive finding that the 1st and 2nd respondents were the principle employers of the content moderators. They also complained that the trial judge made a conclusive finding of fact that the 4th to 187 respondents' alleged mental trauma was occasioned by their content working environment. Learned counsel Ms Mutemi maintained that the factual findings were mere observations made by the learned judge, which never found their way into the final orders issued in the impugned ruling.

43. Granted, the observations complained of did not find their way in the final orders. However, the fundamental question is, what are the permissible limits within which a Court should confine itself in determining an interlocutory application? To answer this question, we have read the contents of paragraphs 27 to 43 of the impugned ruling, the learned judge framed and determined issues of fact and law which are essentially matters for determination in the full hearing.

44. For example, at paragraph 27 of the ruling, the learned judge addressed the issue whether the 1st and 2nd respondents are employers of the applicants or the 3rd respondent was the sole and only employer of the applicants. The learned judge relied on statutory provisions and the decided cases on principles guiding determination of existence of the contract of service and then employer or employee status. He cited the definition of an employer and employee at section 2 of the *Employment Act*, 2007 and addressed his mind to the essentials of a contract of employment. At paragraph 29 of the ruling the learned judge proceeded to find as follows: -

> 29. The Court returns that the 1st and 2nd respondents were the primary or principal employers of the applicants and the 3rd respondent was merely the agent, foreman, manager or factor of the 1st and 2nd respondents as per the definition in the Employment Act, 2007 – and there being no dispute that the Kenya's employment law applied to the contracts of service...." (Emphasis added).

45. The learned judge did not stop at the above finding. He proceeded at paragraph 30 of the ruling to consider details of the contracts of service given the employees and what they entailed. After a lengthy analysis, he stated:-

> "...The employer is not identified. The tenure is not stated but by implication it is indefinite for several years in view of the promise for annual return air ticket. There is no mention of pertinent terms and conditions of service. The emphasis is on the work namely Content Moderation and then the payments. The letter dated 06.04.2022 confirms extension of contract from 06.04.2022 ending 05.04.2023 as a Content Moderator with Samasource Delivery Center. Fasica Berhane Gebrekidan accepted the extension of her employment under the terms and conditions outlined in her previous contract. She signed on 06.04.2022. Caroline Wanjiru Mwangi signed as Senior Director – People Operations, Samasource EPZ Kenya Ltd. The Court returns that looking at the letter, the 3rd respondent was acting as an

agent of the owner of the work of Content Moderation, the 1st and 2nd respondents. There is nothing in the arrangements to absolve the 1st and the 2nd respondents as the primary and principal employers of the Content Moderators." (Emphassis added).

46. At paragraph *31*, the learned judge stated:-

> 31. While making that finding, the Court has reflected upon the relationship between the 1st and 2nd respondent on the one hand and the 3rd or 4th respondent on the other. Little, no or scanty evidence has been provided by the respondents to explain their relationships. The Court is left to take into account the disclosed relational conduct. And it appears to the Court that the 1st and 2nd respondents are the owners of the digital work known as content moderation. That work is undertaken by the applicants in a digital workspace provided by the 1st and 2nd respondents. The operational requirements and policies in undertaking that digital work in the digital space is determined and imposed upon the applicants by the 1st and 2nd respondents. The 1st and 2nd respondents use digital tools to supervise the performance of the work by the applicants. Based on digital performance measurements, the 1st and 2nd respondents compute, determine and provide the due pay for each of the content moderators, such as the applicants. The role of the 3rd respondent or the 4th respondent as appears to have been identified to replace the 3rd respondent) then was, to recruit the content moderators, train and induct them in the job, provide a physical workplace and associated facilities (for the interface to the digital or virtual workplace and workspace), and, to generally perform the work of a human resource manager especially the classical roles of personnel management. There is nothing on record to suggest or show that the 3rd or 4th respondents work for themselves as consultants hired by the 1st and 2nd respondents to provide workforce as it would happen in a typical outsourcing contract. Even if such outsourcing arrangements existed, they appear to be limited to provision of human resource management services and physical workspace leaving the provision of the digital work of content moderation, the digital workspace or platform for performing the work, the digital operational requirements and, the provision of the money to pay the content moderators in the sole prerogative and obligation of the 1st and 3rd respondents. In absence of the outsourcing contract allocating obligations and roles between the 1st and 2nd respondents on the one hand, and, the 3rd respondent or 4th respondents on the other, the Court returns that the 1st and 2nd respondents are the principal employers of the applicants, the content moderators, and the 3rd or 4th respondents are the agents of the 1st and 2nd respondents and therefore as well the employers of the applicants for the purposes of the definitions of employment, employee and employer in the *Employment Act* as well as the decided cases."

47. At paragraph 32 of the ruling, the learned judge stated:-

> 32. ..., the Court returns that in the instant case, upon material on record, the 1st and 2nd respondents are indeed the principal employers of the applicants as already found and the case appears to fall outside the well-known systems

of outsourcing in which the owner of the job or work and the outsourced contractor for provision of the workforce clearly share the obligations owed to employees. The Court observes that some of such obligations would be statutory and impose strict liability upon such owner of work and workplace and, also, upon the outsourced contractor as an employer....”

48. Regarding the claims that the respondents rights had been violated, the learned judge considered the said allegations at paragraph *33* and at paragraph *34*, he concluded as follows:-

> “ 34. In the instant case, the Court has found that there are two manifestations of fair labour practices that are in issue. First is about the obligations of an employer to an employee in a contract of employment. Second, are the obligations of the owner of work and more so an owner of a workplace or workspace. In Kenya’s employment law regime, the first one is largely governed by the *Employment Act*, 2007 and the 2nd one by the *Occupational Safety and Health Act*, 2007.”

49. Regarding the working environment the learned judge at paragraphs 35, 36 and 37 of the ruling extensively cited the provisions of the *Occupational Safety and Health Act*, 2007 and at paragraph *38* concluded as follows:-

> 38. While making that finding the Court has examined the evidence and returns that the applicants and the 3rd respondent are in agreement that the content of the work of content moderators is inherently hazardous with likely serous and adverse mental health impact as urged and demonstrated by the applicants in the supporting affidavits. There is no doubt that applicants have established that by reason of undertaking the content moderation work, some of them have thereby acquired mental illness like in the exhibited letter by Dr. Kigamwa Consultant Psychiatrist confirming that one of the applicants had acquired insomnia associated with her work. The same fact of the inherent hazard of the work of content moderation was acknowledged by the 3rd respondent who suggested to have provided numerous professional counsellors at the disposal of the applicants. Further in the redundancy process, the 3rd respondent acknowledges the same by providing a one-year post separation support in that regard. It is that in a constitutional petition, once a violation or threat of violation is established, the Court goes into inquiry to provide for appropriate relief and as urged for the applicants in their submissions.” (Emphasis added.

50. At paragraph 32 of the ruling, the court made the following:-

> “42. The Court has deeply reflected upon the sector of virtual or digital work, digital workplace and digital workspaces and the need to address the involved employees’ occupational safety and health. Such are the serious matters raised in the instant case besides the associated concerns about the ensuing complex employment relationships in which same actors appear to remain anonymous like the alleged contractor the 3rd respondent alleged was contracted by the 1st and 2nd respondents and who allegedly subcontracted the 3rd respondent. ...” (Emphasis added)

51. At paragraph *43* the learned judge made the following conclusion:-

> " 43. It is at this interim stage established for the applicants that the work of content moderation exposed them to hazardous work potentially predisposing them to mental ill-health or diseases and related adverse psychological impacts. ..."

52. To our mind, when determining an interlocutory application, courts are not required to give a detailed answer to every argument on issues of fact and law. This is because the decision whether or not to grant an interlocutory injunction or a conservatory order has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. All that a trial Court is required to do in its analysis is to demonstrate a certain margin of appreciation of the applicable tests for allowing or declining the interlocutory orders sought. In his analysis, all that the trial judge was required to do was to satisfy himself that the applicants before him demonstrated the tests for grant of the injunction or the conservatory orders sought. These tests are in any event settled. But the Court must always bear in mind that the nature of the application before it is such that it is premised on contested facts which will be proved or may not be proved during the hearing. Lord Diplock explained the nature of a hearing on a motion for an interlocutory injunction as follows:

> "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction."
>
> (American Cyanamid Co. v. Ethicon Ltd.) Emphasis added)

53. The above reasoning finds support in the fact that at the stage of an interlocutory injunction or plea for conservatory orders, the evidence is incomplete and untested by cross-examination, and because an interlocutory injunction or a conservatory order is merely a means of mitigating the risk of injustice pending trial, it is extremely crucial that the trial Court only confines itself to the tests for granting or refusing the orders and leave the determination of the contested issues of fact to the Court which will hear and determine the main dispute on merits.

54. Lord Diplock in the above case, in the context of interlocutory injunctions was of the opinion that a much lower threshold test should be adopted pursuant to which "the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried," or the applicant must show a "real prospect of succeeding in his claim for a permanent injunction at the trial." Once this has been demonstrated, "the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. Lord Diplock did not entirely eliminate an appraisal of the relative strength of each party's case from the purview of the court's discretion. However, he stated that such an appraisal should only be made "if the extent of the uncompensable disadvantage to each party would not differ widely," and then only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute.

55. In in considering an application for interlocutory injunction orders, a trial Court is only required to satisfy itself that the tests for grant of interim injunction have been demonstrated as laid down in Giella vs Cassman Brown and Co. Ltd [1973] E A 358. These are: (a) The Plaintiff must establish that he

has a prima facie case with high chances of success; (b) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages; and, (c) If the court is in doubt, it will decide on a balance of convenience.

56. Although the petition before the trial Court alleged violation of fundamental rights and freedoms and breach of *the Constitution* which involved balancing fundamental rights and freedoms, the threshold to be applied in all cases, whether the remedy sought is an injunction or a stay, and whether it is sought in a constitutional or a private-law setting is that a very limited analysis of the facts of the case at the interlocutory stage must be applied but carefully avoiding definitive findings on any contested issue of fact or law.

57. A reading of the above excerpt extracted from the impugned judgment leaves no doubt that the learned judge was actually writing a final judgment effectively determining the litigants' final rights on the issues he was considering as opposed to an interlocutory ruling. The learned judge impermissibly and dangerously delved into contested issues of fact and the law and purported to determine the parties' rights at the interim stage. It matters not that some of those findings never found their way into the final orders. What matters is the real danger of prejudicing or embarrassing a fair trial during the merit hearing of the case. Therefore, the learned judge fell into a grave error by going beyond the scope of his remit at the interlocutory stage and arriving at conclusive findings of fact and the law in his analysis, which are reserved for determination after a full trial.

58. Closely tied to the digression by the learned judge into matters reserved for determination in a full hearing is the contestation that the learned judge issued final orders at the interlocutory stage. The key issue here is whether the orders issued by the learned judge have the three attributes of a final order as set out by the Supreme Court of South Africa, Appellate Division in Zweni vs Minister of Law-and-Order 1993 (1) SA 523 (AD), namely: - (i) the decision must be final in effect and not susceptible to alteration by the court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion (if not all) of the relief claimed in the main proceedings.

59. In determining the nature and effect of a judicial pronouncement, we must bear in mind that it is not merely the form of the order that must be considered, but also, and predominantly, its effect. (See South African Motor Industry Employers' Association vs South African Bank of Athens Ltd 1980 (3) SA 91 (A) 96H)). In deciding the question whether an order is final or interim, a court is not called upon to speculate the ultimate effect of the order on the course of the litigation. Should it appear from the wording of the order that a ruling or an order may have had a material effect on the outcome of the suit, or predetermine the dispute before it is heard on merits, the Court of Appeal will be justified to set the orders aside. Determining whether the impugned orders meet the attributes of a final order and whether the effects of the order impacts on the yet to be heard suit between the parties requires interpreting the orders complained of. As to the applicable rules for interpreting a court order, we may refer to the Supreme Court of Appeal of South Africa in Firestone South Africa (Pty) Ltd vs Genticuro AG 1977 (4) SA 298 (A) in which Trollip, JA. made some general observations about the rules for interpreting a Court's judgment or order. He stated:

> "...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such

> a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it....
>
> It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

60. Earlier in this judgment, we reproduced the orders issued by the learned judge. For example, the learned judge granted an order to the effect that any contracts that were to lapse before the determination of the petition be extended such that the termination date will be after the determination of the petition. Like a guided missile, a Court order must be clear on its target. This is a blanket order that purports to extent any contract which may expire prior to the determination of the suit. The order is final in that it automatically extends any contract that may lapse during the pendency of the litigation. The validity of the contracts is one of the issues pending determination by the Court. Extending the contracts before interrogating the case on merits has the potential of prejudicing the case. Also, by issuing an order which effectively extends the contracts, when the existence of an employer/employee relationship is disputed has a potential of re- defining the parties' rights and obligations before hearing both parties on merit. We say no more lest we delve into the pending dispute.

61. Similarly, the learned judge issued an order compelling the appellant and the 1st, 2nd and 3rd respondents, pending the hearing of the petition, to provide proper medical, psychiatric and psychological care for the petitioners and other Facebook Content Moderators in place of wellness counselling. Again, this order was granted prior to hearing the evidence from both sides. The alleged sickness and its cause are key issues to be resolved during the hearing. There are allegations that only one medical report which disclosed a case on insomnia was provided. The issues in question are matters of fact which require evidence to prove, hence the need to hear both parties. The appellant was also ordered to in the interim to regularize the immigration status for all Facebook Content Moderators who are immigrants and at all costs protect them from deportation. Whether or not under the contract of employment (which is contested), the appellant was obligated to undertake the said function is essentially an issue of fact which requires determination by the trial Court, hence, the need to hear the parties on the merit of their respective positions.

62. The learned judge also issued orders directing the appellants to review the status of the law and policy for protection of employees' occupational safety and health in the sector of virtual or digital work, digital workspaces, and digital workplace and measures for improvement of the applicable policy and law and report to the Court in that regard, including the extent of protection of the applicants in the instant case. Much as this order starts with the wording pending the hearing of the petition, once the order is complied with, then nothing will remain for adjudication at the hearing on the said issue. A similar position pertains to the order requiring the appellants to review the status of the employment policy and law and steps being taken to sufficiently provide for the rights and obligations of employers and employees with respect to the sector of virtual or digital work and digital workplaces.

63. The other important point to note is that the injunction orders granted are mandatory in nature. Unlike a prohibitory injunction, which preserves the status quo, a mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavoured. A mandatory

injunction is seen as upsetting the status quo, and is subjected to a heightened preliminary standard. As was held in Locabail International Finance Ltd vs Agroexport and Others [1986] 1 ALL ER 901 thus: -

> "A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

64. The relief of interlocutory mandatory injunction is thus granted generally to preserve or restore the status quo of the last non- contested status which preceded the pending controversy, until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done, or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are: -

a. The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

b. It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

c. The balance of convenience is in favour of the one seeking such relief. (See Jagdish Prasad vs Shrawan Kumar & Anor (AIR 1914 Born 42).

65. We are not satisfied that the learned judge addressed his mind to the above considerations. For example, in the earlier cited excerpt, the learned judge deployed a lot of energy determining the existence of an employer/employee relationship, including citing the relevant statutory provisions and authorities. The learned judge also at this interlocutory stage interpreted the contracts as if he was writing a final judgment. The issues cited by the learned judge in granting the mandatory injunction orders do not in any manner support the existence of exceptional circumstances to merit a mandatory injunction at the interlocutory stage. Conversely, the issues highlighted by the learned judge as captured in the excerpt disclose contested issues of fact as opposed to exceptional circumstances. Clearly, a reading of the entire ruling leaves no doubt that the learned judge was writing a final judgment as opposed to an interlocutory ruling, and in so doing, he erred both in fact and in law in granting orders which though on their face are framed as interim orders, have an effect of final orders in that if allowed to stand, the orders can determine the main dispute, which they are meant to preserve even as they secure the petitioners rights pending hearing of the petition. The consequences of such an order is that it can prejudice the yet to be resolved dispute, and even place the dispute beyond the reach of the law because some consequences of a court order may be irreversible.

66. Ms Mutemi contended that before the trial Court was a constitutional petition which was accompanied by an application for conservatory orders and argued that under Article 23, a Court can fashion any remedy or appropriate relief as the justice of the case may demand so as to stop infringement of fundamental rights and freedoms or stop violation of *the Constitution*. This line of argument is attractive. However, that is how far the argument goes because the vast power conferred to the Court by

Article 23 is not an open licence for the court to exercise unlimited powers or discretion. The Court's power under *the Constitution* or any other law is invoked to effect substantive and procedural fairness between the parties. The inherent power under Article 23 is not merely one derived from the need to unleash orders any time a breach of right is alleged, but to ensure that appropriate and lawful orders are issued, adhering to the Court's procedures, and also to maintain the scales of justice to ensure fairness to both parties. In any event, by the time the drafters of *the Constitution* wrote Articles 48 and 50, they were not writing on a clean slate. They had before them cognate provisions of Articles 22 and 23 of *the Constitution*. The right to a fair trial guaranteed under Article 50, which is non-derogable, applies to both parties. Procedural fairness and the right to be heard and to have any dispute determined by a competent court includes the right not to have definitive findings of facts and law made at the interlocutory stage before hearing both parties on merits or granting orders which are final in nature before a merit hearing. A final order granted before merit hearing is an affront to substantive and procedural fairness.

67. The appellants in Civil Appeal Nos.595 of 2023 and 615 of 2023 fault the learned judge for striking out their affidavits as earlier detailed. Ms Mutemi maintained that no orders were issued emanating from the said finding, therefore, there is no right of appeal. We agree with Ms Mutemi. Section 66 of the *Civil Procedure Act* provides:

> " 66. Appeal from decree of High Court Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."

68. A decree is defined in section 2 of the *Civil Procedure Act* as follows:

> " decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; It includes the striking out of a plaint and the determination of any question within Section 34 or section 91, but shall not include—
>
> a. any adjudication from which an appeal lies as an appeal from an order, or
>
> b. any order of dismissal for default.
>
> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;
>
> Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

69. From the above provisions, the findings by the learned judge in the body of the ruling striking out the affidavits are not a decree or an order capable of being appealed from. The above section defines an order as the formal expression of any decision of a court which is not a decree, and includes a rule nisi. The Supreme Court of India in the matter of Smt. Ganga Bai vs Vijay Kumar and Others 1974 AIR 1126, 1974 SCR (3) 882 held that an appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order'.

70. In conclusion, flowing from the findings we have arrived at in our analysis of the facts, the law and authorities, and the issues we addressed, it is our finding that these three consolidated appeals are merited. Accordingly, we allow the three appeals and issue the following orders:

    a. The ruling delivered by Ongaya, J. on 2nd June 2023 is hereby set aside in its entirety together with all the consequential orders arising therefrom and substituted with an order dismissing the 4th – 187th respondents' application dated 17th March 2023.

    b. Each party shall bear its own costs for this appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MATIVO

.....

J. MATIVO

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.