



**Osumba v Living Walls Africa Limited & another (Cause E395 of 2023)  
[2025] KEELRC 1004 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1004 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E395 OF 2023  
SC RUTTO, J  
MARCH 28, 2025**

**BETWEEN**

**EDWINA OSUMBA ..... CLAIMANT**

**AND**

**LIVING WALLS AFRICA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**RMM BUILDS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through a Statement of Claim dated 8<sup>th</sup> May 2023, the Claimant avers that although she was issued with a contract of employment by the 2<sup>nd</sup> Respondent, she was working for both the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, both of which are companies partly owned by the same people. That she was not privy to the arrangement between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents in terms of dealing with employees. In the Claimant's view, the two companies were a joint venture. The Claimant has further averred that the 2<sup>nd</sup> Respondent currently operates under the 1<sup>st</sup> Respondent's name. According to the Claimant, she treats both Respondents as her employers for purposes of this suit and holds them severally and jointly liable.
2. It is the Claimant's case that she was employed by the Respondents as Assistant Quantity Surveyor with effect from 5<sup>th</sup> August 2020. That she performed her duties diligently and faithfully as assigned until 31<sup>st</sup> May 2020, when her services were terminated on account of redundancy.
3. In the Claimant's view, the termination of her contract was both procedurally and substantively unfair. The Claimant has further averred that sometimes in April 2021, the Respondents made a unilateral decision to reduce her salary from Kshs 60,000/= to Kshs 30,000/=.
4. It is against this background that the Claimant has asked the Court to award her the following reliefs:
  - a. Compensation for unfair termination Kshs.932,796



- b. Unpaid May 2022 salary Kshs.6,846
  - c. Deducted salaries during furlough leave Kshs.36,846
  - d. Notice pay Kshs.77,733
  - e. Severance pay Kshs.52,500
  - f. Service pay Kshs.52,500
  - g. Pending leave days Kshs.41,625
  - h. Compensation for violation of the Claimant's right to fair labour practice.
  - i. Costs of this suit
  - j. Interest on (a) to (i) above
  - k. Any other relief the court may deem fit and just to award.
5. In response to the Memorandum of Claim, the 1<sup>st</sup> Respondent denied all assertions by the Claimant. Putting the Claimant to strict proof, the 1<sup>st</sup> Respondent has averred that she (Claimant) is neither its employee nor has a valid contract of employment with her.
  6. While the 1<sup>st</sup> Respondent has admitted that they may share one director and one shareholder with the 2<sup>nd</sup> Respondent, it has contended that the same are two separate legal entities with very distinct areas of trade and have never traded in a manner or with the intention to create any assumptions that they were working as a joint venture.
  7. According to the 1<sup>st</sup> Respondent, the Claimant was an employee of the 2<sup>nd</sup> Respondent.
  8. Terming the Claimant's Claim as frivolous, vexatious, and an abuse of the court process, the 1<sup>st</sup> Respondent has asked the Court to dismiss the suit with costs.
  9. The 2<sup>nd</sup> Respondent did not enter appearance or file a response to the Memorandum of Claim. Be that as it may, on 14<sup>th</sup> November 2023 and 14<sup>th</sup> February 2024, Ms. Nyakanini, Advocate, appeared in Court on behalf of the 2<sup>nd</sup> Respondent and requested for time to file pleadings. This was notwithstanding the fact that there was no Notice of Appointment filed by the said Advocate. Oddly enough, the firm of Fraciah & Co. Advocates filed an application to cease acting for the 2<sup>nd</sup> Respondent. Seeing that there was no Notice of Appointment formally appointing the said firm of Advocates to come on record for the 2<sup>nd</sup> Respondent in the matter herein, it follows that the application to cease acting was of no consequence.
  10. In light of the foregoing, the 2<sup>nd</sup> Respondent did not participate in these proceedings.
  11. The matter proceeded for hearing on 16<sup>th</sup> May 2024 and 11<sup>th</sup> December 2024, during which both sides called oral evidence.

### **Claimant's Case**

12. The Claimant testified in support of her case as CW1. At the outset, the Claimant sought to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed alongside the Memorandum of Claim as exhibits before Court.
13. It was the Claimant's testimony before Court that she was initially employed by the 2<sup>nd</sup> Respondent and issued with an employment contract.



14. She averred that the Respondents had an arrangement in which they were trading under the same name, and the employees of the 2<sup>nd</sup> Respondent were essentially working for both companies. According to the Claimant, the companies share the same office.
15. It was the Claimant's view that the two companies were in a joint venture and that her tax returns were filed by the 1<sup>st</sup> Respondent.
16. The Claimant further averred that the 2<sup>nd</sup> Respondent no longer operates in its name and its assets, employees and businesses have been taken over by the 1<sup>st</sup> Respondent.
17. The Claimant further stated that she decided to sue both companies because of the confusion created by their arrangement and to enable the court properly decide whether both Respondents are liable.
18. It was the Claimant's contention that the termination of her contract was both procedurally and substantively unfair. That she was informed of the decision to do away with her office on the very same day she was issued with the termination letter.
19. The Claimant further averred that the Respondents did not give her the statutory redundancy notice of 30 days as the termination took effect immediately.
20. According to the Claimant, there was no valid reason for doing away with her office which was playing a critical role in the business of the Respondents.
21. The Claimant further stated that the Respondents did not tabulate and pay her severance pay as required by law.
22. The Claimant has further averred that she was issued with a letter requiring her to proceed on furlough leave and communicating the reduction of her salary.
23. According to the Claimant, sending her on furlough leave and deducting her salary on account of the unlawful furlough leave was a breach of her right to fair labour practice.

### **1<sup>st</sup> Respondent's Case**

24. The 1<sup>st</sup> Respondent called oral evidence through Mr. Nicholas Kariuki Mwai who testified as RW1. Similarly, he adopted his witness statement to constitute his evidence in chief. He introduced himself as a director and shareholder of the 1<sup>st</sup> Respondent.
25. It was the testimony of RW1 that the Claimant is neither an employee of the 1<sup>st</sup> Respondent nor has she ever received a contract of employment or salary from the Company.
26. RW1 further averred that whilst he may be a common director and shareholder in both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent Companies, they are two separate legal entities with very distinct areas of trade and never have they traded in a way to create assumptions that they were a joint venture.
27. RW1 further denied the Claimant's assertions that the 2<sup>nd</sup> Respondent is operating under the 1<sup>st</sup> Respondent's name. That further, the 1<sup>st</sup> Respondent has not taken over the assets, employees and business operations of the 2<sup>nd</sup> Respondent.
28. RW1 further averred that the 1<sup>st</sup> Respondent has never filed the Claimant's returns. According to RW1, the P9 form presented by the Claimant had a typographical error on the Employer's Name.
29. According to the RW1, it is evident from the Memorandum of Claim and evidence presented through the bundle of documents that the Claimant is an employee of the 2<sup>nd</sup> Respondent.



30. In RW1’s view, the Claimant is on a witch-hunt, seeking to force a settlement package from the 1<sup>st</sup> Respondent when it has nothing to do with her employment situation with the 2<sup>nd</sup> Respondent.

### **Submissions**

31. It was submitted on behalf of the Claimant that there was no explanation given on what calibre of a technical officer the Respondents needed. To this end, the Claimant submitted that the Respondents did not discharge the evidential burden of the reasons for the termination.
32. The Claimant further submitted that she was working for both Respondents. In this regard, the Claimant posited that RW1, who is also a director of the 2<sup>nd</sup> Respondent, did not explain why the 2<sup>nd</sup> Respondent did not file a defence. According to the Claimant, this shows that the directors were using the two companies to evade justice to trade with one where necessary and switch to the other when convenient.
33. On its part, the 1<sup>st</sup> Respondent submitted that the fact that the two Respondents share directors and shareholders does not mean that they are in a joint venture unless there is a mutual understanding or a formal agreement between the companies about sharing of profits, risks and responsibilities. In support of this argument, reliance was placed on *Kenya Breweries Ltd v EABL Limited (2007) eKLR* and *Animsisninc v Foreign Compensation Commission (1969) 2 AC 147*.
34. The 1<sup>st</sup> Respondent further submitted that it is possible for errors to be made on the P9 form and that is why Section 28 of the *Tax Procedures Act* outlines the procedures for making amendments to a return filed with KRA, including the rectification of errors. In this regard, the 1<sup>st</sup> Respondent invited the Court to consider the determination in *Kenya Revenue Authority v Jommu & Co. Advocates (2013) eKLR* and *Kenya Revenue Authority v Okiya Omtatah (2020) eKLR*.
35. In further submission, the 1<sup>st</sup> Respondent stated that the burden of proof was on the Claimant to prove that she was its employee. On this score, the 1<sup>st</sup> Respondent posited that the Claimant failed to produce any documentation other than the P9 form that has a typographical error to claim that she was its employee.

### **Analysis and Determination**

36. Flowing from the pleadings on record, the evidentiary material before Court and the rival submissions, the following issues stand out for determination: -
- a. Who was the Claimant’s employer?
  - b. Whether the Claimant was unfairly and unlawfully terminated from employment.
  - c. Is the Claimant entitled to the reliefs sought?

### **Who was the Claimant’s employer**

37. Whereas the Claimant has averred that both Respondents were her employers, the 1<sup>st</sup> Respondent holds otherwise and is categorical that the Claimant has never been its employee and has never received a contract of employment from the said company.
38. The *Employment Act* defines an employer to mean “any person, public body, firm, 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” while



an employee is defined to mean “a person employed for wages or a salary and includes an apprentice and indentured learner”.

39. In the case of *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & another* [2012] KEELRC 4 (KLR), the Court (Rika J) observed that the statutory definitions in the *Employment Act* are based on the traditional employment relationships. The learned Judge however, appreciated that the nature of work is shifting away from physical production towards a service sector and that there are changes taking place in the structure of the Industry, and in the Workforce, changes that affect how work is performed. To this end, the learned Judge formulated three tests in evaluating who the employer and the employee are, beyond the statutory definitions. These tests are: Four-fold test; Economic reality test; and Multi-factor test.
40. The Court proceeded to analyse the three tests as follows:

“ The Four-fold test looks at the right to hire and fire the employee; who pays the salaries and the wages; who retains the power of dismissal and power to impose disciplinary sanctions; and who controls the employee with respect to the means and methods by which the work is to be accomplished. The test on control is the most important under the Four-fold test. In applying this test, the existence of the right and not its exercise thereof, is important. The Economic Reality test looks at the economic dependence of the employee. This concept seeks to fill the gap created under the control test, taking into account the nature of the modern highly specialized workforce. The Multi-factor test combines aspects of the first two tests: it considers the power of control of the employee with regard to the means and methods of work; and the underlying economic realities of the activity or relationship.”
41. Applying the three tests to the case herein, this Court is of the view that the evidence on record supports the position that the Claimant was an employee of the 2<sup>nd</sup> Respondent and not the 1<sup>st</sup> Respondent. Why do I say so?
42. The 2<sup>nd</sup> Respondent issued the Claimant with a contract of employment and, retained control over her salary and continued employment. Case in point, vide a letter dated 1<sup>st</sup> April 2022, the 2<sup>nd</sup> Respondent sent the Claimant on what it termed as “furlough leave” and notified her that her salary would be reduced by 50%. It was also the 2<sup>nd</sup> Respondent as opposed to the 1<sup>st</sup> Respondent, that issued the Claimant with a letter terminating her employment.
43. It is also apparent that the statutory definitions of employer and employee under the *Employment Act* fit the relationship that existed between the 2<sup>nd</sup> Respondent and the Claimant.
44. What’s more, the pattern of communication and correspondence between the Claimant and the 2<sup>nd</sup> Respondent confirm that the relationship that existed between the two parties was that of employer and employee. In this regard, the email correspondence exchanged between the Claimant and the 2<sup>nd</sup> Respondent’s management were work-related, and the email domain used was associated with the 2<sup>nd</sup> Respondent.
45. With respect to the Claimant’s P9 form, which bears the 1<sup>st</sup> Respondent’s name as the employer, it is notable that the Claimant has not produced evidence, for instance payslips or work directives, creating a nexus between her and the 1<sup>st</sup> Respondent. As it is, the P9 form alone is insufficient to confer an employment relationship between the Claimant and the 1<sup>st</sup> Respondent.



46. In view of the foregoing reasons, the Court finds that there is overwhelming evidence to conclude that the Claimant was an employee of the 2<sup>nd</sup> Respondent and not the 1<sup>st</sup> Respondent. Having determined as such, the Claimant's case against the 1<sup>st</sup> Respondent collapses at this point.

### **Unfair and unlawful termination**

47. From the record, the Claimant was terminated from employment on grounds of redundancy. As was held by the Court of Appeal in *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR, termination of employment through redundancy ought to be both substantially justified and procedurally fair.

48. Substantive justification refers to the reasons for which the redundancy was effected, while procedural fairness has to do with the procedure applied in effecting the redundancy.

49. With respect to substantive justification, it is imperative to consider the statutory definition of the term redundancy under the *Employment Act*. In this regard, Section 2 of the *Employment Act* defines redundancy to mean: -

“ the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.

50. In essence, the circumstances or reasons leading to an employee being declared redundant must fall within the statutory definition of the term redundancy.

51. In addition, an employer is required to prove that the reason for the termination of employment on grounds of redundancy is valid, fair and based on its operational requirements. In default, the termination is unfair in light of the provisions of Section 45(2) (b) (ii) of the *Employment Act*.

52. Coming back to the case herein, the reason advanced for the termination of the Claimant on the basis of redundancy was that the 2<sup>nd</sup> Respondent did not require an Assistant Technical Officer of her calibre at the time hence they had to let her go.

53. As stated herein, the 2<sup>nd</sup> Respondent neither entered appearance nor filed a Response to the Memorandum of Claim. As such, there was no evidence in whatever form or manner to prove that the 2<sup>nd</sup> Respondent did not require an Assistant Technical Officer of the Claimant's calibre, thus justifying the termination of her employment on grounds of redundancy.

54. Needless to say, the 2<sup>nd</sup> Respondent did not discharge its evidential burden under Section 45(2) (a) & (b) (ii) of the *Employment Act* that it had a valid and fair reason to terminate the Claimant's employment on account of redundancy. To this end, the Court arrives at the inescapable conclusion that the Claimant's termination from employment on account of redundancy was substantively unfair.

55. Turning to the question of procedural fairness in cases of termination on account of redundancy, Section 40(1) of the *Employment Act* stipulates the following conditions which must precede a redundancy: -

- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;



- b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
  - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
  - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
  - f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
  - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
56. From the record, the 2<sup>nd</sup> Respondent notified the Claimant of her redundancy through a letter dated 31<sup>st</sup> May 2022, which was to take effect on the same day. It is thus evident that the Claimant was notified of the redundancy after the fact. As it is, she had already been declared redundant. By all means, the said letter of termination was not a Notice of an intention to declare a redundancy as envisaged under Section 40 (1) (b) aforesaid.
57. Coupled with the foregoing, there is no evidence that the Ministry of Labour was notified of the Claimant's redundancy.
58. In light of the foregoing, it is evident that the 2<sup>nd</sup> Respondent did not comply with the statutory requirement under Section 40 (1) (b) of the Employment Act and, to that extent, is at fault.
59. The other requirement is in respect of the selection criteria stipulated under Section 40 (1) (c) of the Employment Act. In this regard, the employer is required to prove that in the selection of the employees to be declared redundant, it has paid due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.
60. In the case herein, there was no indication from the Claimant's end that there were other employees in her category who were in the service of the 2<sup>nd</sup> Respondent at the material time. In the circumstances, the Court is led to conclude that the requirement with respect to selection criteria was not applicable in this case.
61. As to the payments under Section 40(1) (e) (f) and (g) of the Employment Act, it is noteworthy that the Claimant was advised through the letter of termination dated 31<sup>st</sup> May 2022, that she would be paid one month's salary in lieu of notice, severance pay and unutilised leave days. Be that as it may, there is no evidence on record that the Claimant was paid her statutory dues as promised.
62. All things considered, there is no evidence that the 2<sup>nd</sup> Respondent made any effort to comply with the provisions of Section 40 (1) of the Employment Act hence the Claimant's termination from employment by way of redundancy was procedurally unfair.



## Reliefs?

63. As the Court has found that the 2<sup>nd</sup> Respondent did not prove that it had a valid and fair reason to terminate the Claimant's employment on account of redundancy, the Court awards her compensatory damages equivalent to five (5) months of her gross salary. This award takes into account the length of the employment relationship as well as the circumstances attendant to the termination.
64. The Claimant is further awarded unpaid salary for the month of May 2022, as there is no evidence that the same was paid in full.
65. The Claimant is awarded the salary that was withheld by the 2<sup>nd</sup> Respondent when she was sent on "furlough leave". Indeed, there is no evidence that the Claimant consented to the reduction of the said salary. As such, the salary reduction was contrary to Section 10(5) of the Employment Act.
66. Further, the Claimant is awarded one (1) month's salary in lieu of notice, severance pay for one (1) complete year of service, and unutilized leave days pursuant to Section 40(1) (e) (f) and (g) of the Employment Act.
67. The Claimant has further sought to be awarded service pay on the basis that she was not enrolled in any pension scheme. As the 2<sup>nd</sup> Respondent did not participate in these proceedings, this position was not controverted. Accordingly, this relief succeeds.

## Orders

68. In the final analysis, I allow the Claim and enter Judgment in favour of the Claimant against the 2<sup>nd</sup> Respondent and she is awarded: -
  - a. Compensatory damages in the sum of Kshs 381,665.00 being equivalent to five (5) months of her gross salary.
  - b. One (1) month's salary in lieu of notice being the sum of Notice pay of Kshs 76,333.00
  - c. Severance pay for one (1) complete year of service being the sum of Kshs 38,166.50
  - d. Service pay being the sum of Kshs 38,166.50
  - e. Unpaid leave days being the sum of Kshs 41,625.00
  - f. Salary withheld during "furlough leave" and in the month of May 2022, totaling the sum of Kshs 43,692.00.
  - g. Interest on the amount in (a) shall apply at court rates from the date of Judgement until payment in full.
  - h. Interest on the amount in (b) (c) (d) (e) and (f) shall apply at court rates from the date of filing the suit until payment in full.
  - i. The Claimant shall have the costs of the Claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2025.**

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**STELLA RUTTO**

**JUDGE**



In the presence of:

For the Claimant Mr. Odhiambo

For the 1<sup>st</sup> Respondent No appearance

For the 2<sup>nd</sup> Respondent No appearance

Court Assistant Milicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

