



**Kenya Hotels & Allied Workers Union v Sun Africa Hotels Limited & another; Kenya Union of Domestic Hotels, Educational Institutions and Hospital Workers (KUDHEIHA Workers) (Interested Party) (Cause 88 of 2023) [2025] KEELRC 974 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 974 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE 88 OF 2023**

**M MBARŪ, J**

**MARCH 27, 2025**

**[FORMERLY NAIROBI ELRC CAUSE NO.E592 OF 2023]**

**BETWEEN**

**KENYA HOTELS & ALLIED WORKERS UNION ..... CLAIMANT**

**AND**

**SUN AFRICA HOTELS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MGM MUTHU HOTELS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA WORKERS). INTERESTED PARTY**

**JUDGMENT**

1. The claimant is seeking the following orders against the 1<sup>st</sup> respondent and judgment be entered in the following terms;
  - a. An order or declaration declaring that the decision by the 1<sup>st</sup> respondent to terminate the services in respect of the grievants on account of redundancy was unfair and wrongful.
  - b. Ksh.100, 493,049.86.
  - c. Ksh.490, 000.
  - d. Issuance of Certificate of Service.
  - e. Exemplary damages.
  - f. Costs of the claim.



- g. Interests on (b) above;
- h. Any other relief this court may deem just to grant.

### **Claim**

2. The claimant is a registered trade union and has filed the claim on behalf of the grievants. The respondents are limited liability companies involved in hotel services. The interested party is a trade union.
3. The claim is that the grievants were employed by the first respondent and issued with written letters. It came to the grievants' attention that the second respondent had taken over the management of the first respondent. The takeover went to the claimant's attention following a Settlement Agreement dated 13 July 2023, which was entered into by the first respondent and the interested party.
4. The claimant, its members' representatives, and the shop steward were absent at the meeting, culminating in the Agreement. The Agreement related to the payment of full and final employment dues to the employees of the 1st respondent up to 28 February 2022.
5. The payment is related to the termination of employment on the grounds of retirement. A term of the Agreement was that upon payment of the final dues by 1 March 2022, the 1st respondent shall be discharged from all liability regarding dues owed to its employees as of 28 February 2022.
6. Under the Agreement, there was a term that upon payment by the 1st respondent, any dues owed thereafter should be solely borne by the 2nd respondent from 1 March 2022. Parties to the Agreement agreed not to have any further claims against the 1st respondent.
7. The Agreement required the full and final payment of all employees' dues by cheque to each employee before 31 July 2023.
8. The first respondent owes the claimant's members Ksh.100, 493,049.85. It also owes Ksh.490, 000 to the grievants in its welfare.
9. The 1st respondent's unfair redundancy of the grievants is unconstitutional and unlawful. Despite the grievants seeking the claimant's intervention for a joint meeting with the respondent following the takeover by the 2nd respondent, these have been ignored. The redundancy was unjustified, and the letters terminating employment were without notice to the claimant.
10. The claim is supported by the witness statement of Tsuma Nyamawi Mwajoto, the shop steward to the grievants, who avers that he was employed as a pool attendant by the 1st respondent and worked for 21 years from 26 November 2002. He was earning ksh.33, 100 per month. It came to his attention that the 2nd respondent had taken over the affairs of the 1st respondent and that through an Agreement dated 13 July 2023, the 1st respondent and the interested party made a settlement of employee dues, leading to a discharge without involving the claimant or its members who are owed Ksh.100, 493,049.86 plus welfare Ksh.490, 000.
11. Mwajoto testified that the employees, including the grievants, were issued redundancy notices without prior notice or consultations with the claimant, resulting in unfair termination of employment.
12. The claimant also submitted that the 114 grievants are unionized but were not issued notice to terminate employment through redundancy. The grievants learned that the 2nd respondent had taken over the management of the 1st respondent following a settlement agreement with the interested party dated 13 July 2023. The Agreement concerned the payment of final dues of employment to employees of the 1st respondent up to 28 February 2022. It was a term of the Agreement that any further payments



- to employees would accrue from the 2nd respondent. These payments were to be settled by 31 July 2023.
13. The claimant submitted that it filed Nairobi Cause No.E592 of 2023, which was transferred to this court under the current reference and placed before the conciliator. However, the 1st respondent refused to attend. The conciliator met the claimant and interested party and recommended that the Settlement agreement be binding on all employees, including the grievants.
  14. The claimant filed suit apprehensive that the grievants would have their employment terminated on the grounds of retirement without participation in the Settlement Agreement.
  15. The 2nd respondent took over management on various conditions. The position that the interested party is the proper party to engage is incorrect since the grievants have opted to join the claimant as the union of their choice. There is no evidence to confirm that the grievants have been paid their dues upon the handover between the respondents. The Settlement Agreement did not address the grievants' claims; hence, this suit for payment of Ksh.100 493,049.86 and Ksh.490 000. The respondents and interested parties did not call witnesses to challenge the grievants' claims. They are bound by their pleadings as held in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others HCCC No.1243 of 2001*.
  16. The claimant was not involved in the discussions leading to the Settlement Agreement of 13 July 2023 and hence cannot be bound by its terms. The interested party did not have the authority to transact on behalf of the grievants, which denied the claimant and the grievants their constitutional rights.
  17. Through the evidence of Tsuma Nyamawi Mwajoto, the grievants confirmed that they are still employed and that the second respondent pays wages. The grievants left the interested party's membership and are entitled to be notified of any changes through their union of choice, the claimant.

## Responses

18. In response, the 1st respondent filed the Reply and Counterclaim. The response is that there exist several suits, including;  
Mombasa ELRC Cause No.960 of 2016;  
Mombasa ELRC Cause No.49 of 2020; and  
Mombasa ELRC Cause No.924 of 2017.
19. The grievants in this case are listed in the other ongoing suits, and hence, the suit herein is sub judice. Other cases have been concluded over the same matter, rendering this suit res judicata. The suit is an abuse of the court process and should be dismissed.
20. The response is that the 1st respondent should be removed as a party in these proceedings on the basis that the grievants are aware and ought to know that successive companies, including Nyali International Beach Hotel, Nyali Sun Africa Beach Hotel and Spa Limited, and MGM Muthu Hotels took over its business. There is evidence that the grievants were aware of the takeover of the company where Tsuma Nyamawi Mwajoto, the 7th grievant, is the claimant No.20 in Mombasa Cause No.49 of 2020 and grievant No.92 in Mombasa Cause No.960 of 2016. By filing the current suit, the matter is sub judice and pending before the Court of Appeal.
21. It serves no purpose for the 1st respondent to attend these proceedings. Most grievants are parties in several other cases pending in the court over the same subject matter.



22. The response is that the claimant is not entitled to the orders sought. The alleged sum of Ksh. 100, 493,049.86 or any part thereof is not owed as alleged. The Ksh.490 000 claim is not due, nor are the alleged exemplary damages and Certificate of Service.
23. In the counterclaim, the 1<sup>st</sup> respondent's case is that the claim should be dismissed and the following orders issued;
- a. Dismiss the claim as against the 1<sup>st</sup> respondent with costs and interest on the higher scale;
  - b. In the alternative and without prejudice, to remove the 1<sup>st</sup> respondent as a party to the claimants' case and/or punitive and/or exemplary damages to be assessed, proved and granted by the court to the 1<sup>st</sup> respondent.
  - c. To award general and/or punitive and/or exemplary damages to be assessed, proved and granted by the court to the 1<sup>st</sup> respondent.
  - d. To make orders and directions that this suit should be first consolidated with;  
Mombasa ELRC Cause No.40 of 2020;  
Mombasa ELRC Cause No.924 of 2017;  
Mombasa ELRC Cause No.960 of 2016 and any other suit pending in court and affecting or concerning the grievants as cited herein.
  - e. Interests on damages awarded;
  - f. Such further reliefs as the court may deem fit in favour of the 1<sup>st</sup> respondent.
24. In evidence, the 1<sup>st</sup> respondent filed the witness statement for Abhimanyu Garhwal, the director of Sun Africa Hotels Limited. He avers that the claimant's claim is without merit and should be dismissed. Several other suits filed by the grievants sought to be represented by the claimant, which matters are pending determination or have since been determined, exist; the claim herein is sub judice and is res judicata.
25. The 1st respondent also submitted and reiterated the Notice of Preliminary Objections, stating that the claim herein is sub judice and res judicata. The grievants have filed other suits, which are pending or have been determined.
26. The 1st respondent also submitted that the attendance and representation of the interested party in these proceedings is irregular as held in Nakuru Cause No.E011 of 2022 Kenya Engineering Workers Union v Rift Valley Engineering Limited that the provisions of Section 22 of the Employment and Labour Relations Court Act and the Advocates Act read with Order 9 of the Civil Procedure Rules is not obscure in terms of representation in court.
27. In response, the 2nd respondent denied the allegations made by the claimant, save that the grievants were employees of the 1st respondent. Any claim before 1 March 2022, the takeover date, is denied. The 2nd respondent took over management from the 1st respondent on 1 March 2022 with set conditions regarding handling liabilities and expenses as owed by the 1st respondent.
28. The interested party, the union concerned with employee affairs, bargained and agreed with staff representatives and the 1st respondent to ensure members were fairly catered for in the transition. The interested party has not filed any case in court to challenge the agreement or breach of contract.
29. All the employees were represented through the interested party as the recognized union. The interested party filed Mombasa ELRC Cause No.49 of 2022 as the employee's representative.



30. The claims sought relating to the period before 28 February 2022 do not apply to the 2nd respondent, who only took over management on 1 March 2022 on the condition that the 1st respondent would take up all liabilities. The 1st respondent has entered the agreement and been discharged upon payment and settlement of all terminal dues owed to the employee and represented by the interested party.
31. The final payments were not made following a meeting held on 19 January 2023 between the 1st respondent and the interested party. This does not create liability for the 2nd respondent to pay what the 2nd respondent agreed to pay in settlement of terminal dues.
32. The claimant has admitted that several meetings were held during the transition to negotiate with the 1st respondent to make payments. The pending payments relate to ongoing cases in Cause No.960 of 2016, Cause No.49 of 2020, and Cause No.924 of 2017. These matters do not involve the 2nd respondent but the first respondent.
33. The redundancy claim against the 2nd respondent does not arise since the grievants were not its employees, as alleged.
34. Upon the takeover, the second respondent engaged several persons, including James Madaga, Harrison Mbiuku Muthoka, James Kioko Kyumu, Ainea Shivachi Kalira, and Fredrick Ndungu, who were grievants and who, at the time, were ripe for retirement per the CBA with the interested party.
35. The grievants were to proceed on retirement but did not as the 2nd respondent was still in transit. On this basis, oral contracts like those issued by the 1st respondent, commencing on 1 March 2023, issued retirement notices, and the claims against the 2nd respondent should be dismissed with costs.
36. The 2nd respondent filed the witness statement of Evelyn Irungu, who reiterated the response.
37. The 2nd respondent submitted that the claimant had sought declaratory orders against the 1st respondent on the basis that there was the termination of employment of the grievants due to redundancy. No orders are sought against the 2nd respondent. The claimant is bound by its pleadings as held in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others [2014] eKLR. The only issue the claimant has stated is that the 2nd respondent is the current management and, hence, should pay the terminal dues. However, redundancy dues should be paid by the responsible employer at the time such notice is issued. In this case, the claimant has not filed any redundancy notice from the 2nd respondent to justify any payment claims.
38. Save for four (4) grievants who retired and were issued with notices, the 2nd respondent has not interfered with employment. The 4 grievants have since refused to vacate the premises on the basis that they have not been paid their terminal dues.
39. The 2nd respondent submitted that the claimant's case is that there was redundancy, yet, during his evidence, Tsuma Nyawawi Mwajito testified that he is still in employment. Redundancy only arises when employment is terminated due to operational reasons. Whatever dues are owed by former employers should be notarized by the 2nd respondent. The conciliation meetings held on 19 January 2023 resulted in a settlement agreement, and the 2nd respondent was not a party.
40. Under the Recognition Agreement, the 1st respondent and interested party had the right to enter into a settlement agreement on behalf of the employees. The claimant has no recognition agreement or CBA with the respondents.
41. There is no proof of the claims for Ksh.100, 493,049.86 or Ksh payment.490, 000 as alleged. No liability attaches to the 2nd respondent.



42. The interested party in response avers that it is a registered trade union, while the 1st respondent, as a member of the Union of Kenya Association of Hotelkeepers and Caterers, has signed a Recognition Agreement and has a CBA. The 1st respondent manages different units in the country, including Keekorok Lodge, Sovereign Suits, Lake Naivasha County Club, and Nyalı Sun Africa Beach Hotel and Spa Limited. These units are covered under the Recognition Agreement and CBA.
43. The interested party admitted ongoing proceedings in Mombasa ELRC Cause NO.924 of 2017 and Cause No.49 of 2020.
44. As noted in the minutes of 19 January 2023, the Settlement Agreement does not relate to or affect the claimant's employees or members.
45. The interested party submitted that following a meeting of the parties on 19 January 2023, it was agreed that all employees would be absorbed or paid by Sun Africa Hotels by 28 February 2022. All transitioning employees will be under MGM management from 1 March 2022. When the 1st respondent took over management of the various hotels from Nyalı International Beach Hotel Limited, there was no proper handing over, which resulted in the filing of multiple cases, including Mombasa Cause No.924 of 2017, Cause No.49 of 2020 and Cause No.960 of 2016.
46. When the interested party learnt that the 1st respondent was handing over to the 2nd respondent, it moved and engaged and obtained a Settlement Agreement dated 13 July 2023. The agreement related to the payment of final dues to the employees of the 1st respondent up to 28 February 2022. Upon the agreement, any further payment of terminal dues from 1st March 2022 would not be settled by the 1st respondent, and the dues would be settled on or before 31 July 2023.
47. The parties held various meetings to reach the Settlement Agreement, including one on 19 January 2023. It was acknowledged that some employees who had worked for over 30 years had not been paid, and there is litigation over the same. The 2nd respondent was keen to take over management without liabilities.
48. The interested party submitted that the 2nd respondent is not bound under the Settlement Agreement as it relates to the 1st respondent and the interested party. A CBA was binding the parties leading to the agreement. There was a takeover by the 2nd respondent without carrying forward any liability from 1 March 2022. For claims not settled by the 1st respondent, the interested party filed Cause No.924 of 2017 and 49 of 2020.
49. The claim is filed in abuse of court process and meant to create disharmony between the parties to the Recognition Agreement. Despite attending conciliation and making recommendations, the claimant has remained adamant on its claim. The interested party members are still employed, save for grievants under Cause No.49 of 2020.

### **Determination**

50. On the pleadings, statements and submissions, the issues which emerge for determination can be summarized as follows;
  - Whether the suit is sub judice and res judicata;
  - Whether the representation by the interested party is proper;
  - Whether the orders sought by the claimant should be issued;
  - Who should pay the costs?



51. The 1st respondent reiterated the challenge of the interested party's attendance in this case and Mombasa ELRC Cause No.924 of 2017.
52. On 9 May 2024, the court delivered a ruling on the legal issues raised by the 1st respondent challenging the attendance and representation of the interested party in these proceedings. The ruling further addressed that the interested party is the claimant in Mombasa ELRC No.924 of 2017, and the matters herein are closely related.

**Is the claim herein sub judice and res judicata?**

53. The claimant filed the instant suit on 24 July 2023 under Nairobi Cause No.E592 of 2023, seeking interim orders to stay the implementation of the Settlement Agreement dated 13 July 2023 between the 1st respondent and the interested party.
54. The claimant filed the Memorandum of Claim with the application, seeking payment of Ksh.100, 493,094.86, dues owed to the 114 grievants due to redundancy, and Ksh.490, 000, welfare owed to the grievants.
55. The issue in dispute in this case is the alleged redundancy and non-payment of terminal dues to the 114 grievants. The issue arose following what the claimant asserts to be the Settlement Agreement dated 13 July 2023 regarding the payment of full and final dues on or before 31 July 2023.
56. The court at Nairobi transferred the matter to this court and directed parties to attend before the conciliator. Only the claimant and the interested party attended.
57. The conciliator recommended that the settlement agreement cover all the employees, including the grievants.
58. A matter is sub judice where it is filed contrary to the principles outlined under Section 6 of the [Civil Procedure Act](#) provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
59. The purpose of this legal principle is as expressed in the case of Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] KECA 305 (KLR). It is meant to avoid multiple suits by the same parties over the same issues. See Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others [2019] KECA 76 (KLR)
60. In this case, the 1st respondent has highlighted several other suits: Mombasa ELRC Cause No.960 of 2016, Mombasa ELRC Cause No.49 of 2020, and Mombasa ELRC Cause No.924 of 2021. These suits relate to the 1st respondent, the interested party, and various employees; the claimant is not a party. The issue in dispute herein arose from the claimant's learning of the Settlement Agreement dated 13 July 2023 and the payment of terminal dues to the interested party without being involved.
61. As explained above in the pleadings, the claims herein are not identical while some issues are similar. It is apparent that from the said impugned settlement agreement, different causes of action could arise as the agreement affected parties differently. The invocation of the impugned agreement in different cases does not render the matter sub judice. In any event, the challenge subject to the present claim



is the payment of terminal dues. In contrast, the claimant alleges that its members were not paid Ksh.100,493,049.86 and welfare dues of Ksh. 490,000 together with Certificates of Service.

### **Is the suit res judicata?**

62. The doctrine of res judicata is anchored on Section 7 of the *Civil Procedure Act*. It is in these terms;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

63. This doctrine is summed up by the court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] KECA 472 (KLR): Simply put, res judicata is essentially a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

64. As with the sub judice addressed above, the cause of action in this case is distinct and separate from previous suits outlined by the 1st respondent. Following the Settlement Agreement dated 13 July 2023, aggrieved, the claimant moved the court and registered the issue in dispute as unlawful and unfair redundancy.

The doctrine of res judicata does not apply in this case.

65. The counterclaim, as couched by the 1st respondent, is without a foundation. It is dismissed.

66. The claimant's claim concerns the Settlement Agreement dated 13 July 2023 between the 1st respondent and the interested party. Under the agreement, the claimant asserts that the grievants were declared redundant and should be paid their terminal dues.

67. The orders sought by the claimant speak to facts of a redundancy. Order (a) seeks;

An Order of declaration declaring that the decision by the 1st respondent to terminate the services in respect of the grievants on account of redundancy was unfair and unlawful.

The subject notice declaring a redundancy has not been filed.

A termination notice for the grievants has not been filed.

68. Tsuma Nyamawi Mwajoto testified at length that the 2nd respondent still employs him and that his salary is paid monthly.

Mwajoto testified that;

I have been working with the 1st respondent for 21 years from 26 November 2002, and as at the time of my termination, I was earning a basic salary of Ksh.33, 100. ... It came to my attention as the shop steward, and which attention I brought to the claimant, that the 2nd respondent has taken over the management and affairs of the 1st respondent. The same was known to me vide a Settlement agreement dated 13 July 2023, which agreement was entered into by the 1st respondent on the one part, the KUDHEIHA on the second part and the staff representative of the individual hotels on the third part.



69. The claimant has filed the Settlement Agreement of 13 July 2023. Part of the terms of the agreement were that;

The employer and the parties present have mutually agreed, under the meeting held on 13 July 2023 with all the Union representatives and all the Hotel Shop Stewards, to settle all full and final dues as per CBA retirement Clause 27A that have arisen in respect to Sun Africa Hotel Limited up to 28 February 2022.

The 1st respondent recognizes the interested party.

70. The reference point for the Settlement Agreement was clause 27A of the CBA.

71. Whereas a CBA, once negotiated by the recognized trade union, should not apply differently to other unionisable employees on the shop floor, the context of the settlement agreement between the 1st respondent and the interested party is the settlement of full and final dues of all employees up to 28 February 2022 as per the CBA retirement Clause 27A.

72. Did the interested party members in the service of the 1st respondent take retirement to earn terminal dues payment? Such is a matter not before the court in this case.

73. Having learnt of the Settlement Agreement,, the claimant has opted to lodge a claim seeking redundancy terminal dues.

74. A redundancy is well defined under Section 2 of the *Employment Act* and *Labour Relations Act*. It only arises where a position is rendered superfluous, as defined in the case of Longhorn Publishers Kenya, also known as Longhorn Kenya Limited v Njuguna [2023] KECA 316 (KLR). Where a position is no longer tenable, the employer is allowed to remove it and declare a redundancy, which may affect the employment of some employees. This position is reiterated in the case of Kambo v Sagemcom Kenya Limited [2022] KEELRC 14643 (KLR), where the court held that an employer can terminate employment when given positions become superfluous.

75. In this case, without the redundancy notice, any termination of employment of any grievant to claim under a dispute over alleged wrongful, unlawful, and unfair redundancy is without merit. In the settlement agreement between the first respondent and the interested party, no redundancy was declared given the context.

76. The handover between the respondents from 1 March 2022 is not denied. Indeed, this is a matter addressed by the settlement agreement that all liabilities between Sun Africa Hotels Limited as the employer would cease from 28 February 2022 and thereafter, the 2nd respondent MGM Muthu Hotels and its affiliates under whom the employees shall fall from 1 March 2022 would take over. This agreement is between the parties to it. As the party recognized by the 1st respondent, the interested party had the legal standing under the *Labour Relations Act* to enter into such an agreement.

77. Section 12(6) of the *Employment Act* should be read carefully when a claimant invokes the provisions of Section 40 of the Act over alleged redundancy. Section 12(6) of the Act requires that;

(6) Where, after an employer has given to an employee a statement under section 10 either—

(a) the name of the employer is changed without any change in the identity of the employer or

(b) the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken, and subsection (7) applies in relation to the change,



The person who is the employer immediately after the change is not required to give the employee a statement under section 12, but the change shall be treated as a change within subsection (1).

78. Mwajoto testified that there is continuity of employment. The 2nd respondent has paid the due wages, and no claim arises.
79. In this regard, section 12(7) of the Act is addressed as contemplated under Section 12(6) of the Act;
  - (7) Subsection (6) applies in relation to a change if it does not involve any change in any of the matters, other than the names of the parties, particulars of which are required by sections
80. The context of the terms and conditions of the Settlement Agreement of 13 July 2023 should be section 12(6) and (7) of the *Employment Act*, as above.
81. That addressed, where the claim is premised under Section 40, the employer must have declared a redundancy under which the aggrieved employee can claim payment of terminal dues.
82. The claim premised on redundancy is without merit. The context of claims for Ksh.100,493,049.86 and welfare at Ksh. 490,000 and Certificate of Service, dues only available at the end of employment.
83. In this context, the claim for exemplary damages should be explained by a claimant. The rationale is that the violations against the claimant by the listed parties, including the interested party, must be particularized to allow them to respond and allow the court to decide. This position is addressed at length in the case of *Benedict Munene Kariuki & 14 Others v The Attorney General* Petition Number 722 of 2009 [2011] eKLR and held that:

This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today's Kenya, and I am satisfied that no benefit was obtained by the Moi regime from its obviously unconstitutional actions. Kenya's government has learned from its past, and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable, noting the burden on the innocent taxpayer. Further, I note that the Petitioners were not labouring for the "Second Liberation" in order to get monetary compensation but for the attainment of a higher ideal: a just society. Society is slowly coming alive, and their contribution by this judgment has been recognized.

84. In the case of *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company* advocates [2013] KECA 252 (KLR), the court also held that;

Exemplary damages, on the other hand, had gone beyond compensation and were meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive, e.g. where it is attracted by malice, insistence on a flurry defence of justification, or failure to apologize. ...

85. From the claim, the claimant has not made a case in this regard at all. The claim for exemplary damages is without justification.
86. What is the claim against the 2nd respondent? It is admitted that the 2nd respondent took over management from the 1st respondent, effective 1 March 2022. The Settlement Agreement between the 1st respondent and the interested party removes liability from the 2nd respondent to the extent that



any claims before 28 February 2022 should be settled between the 1st respondent and the interested party.

87. The claimant's claim relates to redundancy and that the 2nd respondent, having taken over from the 1st respondent, should pay the terminal dues. However, no notice was filed by the claimant, which was issued by the 2nd respondent. Having taken over management effective 1 March 2022, the 2nd respondent is removed from taking over any form of employee liability. 4 grievants who attained retirement age have since been issued with notice but refused to vacate on the basis that they have not been paid their dues.
88. The claim herein by the claimant cannot tie the 2nd respondent to individual claims. Retirement is a lawful and legitimate mode of termination of employment. Whatever claims arise upon such cessation of employment due to retirement, the subject employee ought to address such matter without placing any undue burden on the employer by insisting they will not vacate the premises or allocated housing or hand over the properties of the employer until their terminal dues, if any, are paid in full. To do so is to invite serious sanctions bordering on criminal conduct against the subject employee(s).
89. In this regard, the 2nd respondent shall secure the assistance of the security agencies to remove the employees who have been served with termination notices from its property. The subject employee will meet any costs attached to such conduct. Any work tools, properties or items of the 2nd respondent in the hands of the employees are to be secured by the police. The claimant has the option to advise its members to exit voluntarily and address their claims accordingly.
90. On costs, the 1st respondent has since handed over to the 2nd respondent's management. The claimant and interested party are bound under their relationships with the employer(s). The interested party enjoys a Recognition Agreement and the CBA. The award of costs would not secure industrial peace. Each party is to bear its costs.

In the given circumstances, each party is to bear its costs.

Accordingly, the claim is without merit and is hereby dismissed.

- a. The counterclaim is without merit and is hereby dismissed;
- b. The claimant to ensure its members issued with a termination notice exit the 2<sup>nd</sup> respondent's premises and undertake a handing over immediately and within the next 7 days from the date hereof, failure to which the 2<sup>nd</sup> respondent shall secure its properties through the assistance of the police at the cost of the subject employees.
- c. Each party to bear its costs save for (b) above.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 MARCH 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant:

..... and .....

