



Mutua & 9 others v Steel Makers Limited; Real Max HR International Limited (Third party) (Cause 1906 of 2017) [2025] KEELRC 1542 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1542 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1906 OF 2017**

**L NDOLO, J
MAY 29, 2025**

BETWEEN

**SIMON IVITA MUTUA 1ST CLAIMANT
KALUKU MULI 2ND CLAIMANT
JOSEPH KYALO NDAMBUKI 3RD CLAIMANT
HILLARY KIBET KIRUI 4TH CLAIMANT
NASHON MANDELA MBETA 5TH CLAIMANT
PETER KASIMU MUTHIANI 6TH CLAIMANT
JONES KENNEDY KALUNGU 7TH CLAIMANT
ALEX MUTINDA KALUNGU 8TH CLAIMANT
ALEXANDER MULI 9TH CLAIMANT
CHARLES KIBET CHEPKWONY 10TH CLAIMANT**

AND

STEEL MAKERS LIMITED RESPONDENT

AND

REAL MAX HR INTERNATIONAL LIMITED THIRD PARTY

JUDGMENT

1. In their claim dated 25th September 2017, the Claimants cite the issues in dispute as; unlawful summary dismissal, and non-payment of terminal dues and compensatory damages.



2. The Respondent's Reply is contained in a Statement of Response dated 14th November 2017 and amended on 13th August 2021. The Claimants filed a Reply to the amended Response on 3rd November 2021.
3. Pursuant to a 3rd Party Notice issued by the Respondent on 7th October 2021, Realmax HR International Limited was joined as a 3rd Party in these proceedings. The 3rd Party filed a Statement of Defence dated 10th October 2022.
4. The 3rd Party's plea to be released from the proceedings at the interlocutory stage, was rejected by the Court, in a ruling delivered on 2nd February 2023.
5. The matter proceeded to full hearing with the 6th Claimant, Peter Kasimu Mithiani testifying on his own behalf and on behalf of his co-claimants. The Respondent called two witnesses; James Murigi, the General Manager and Lydia Odongo, the Office Administrator. The 3rd Party called its Director, Fredrick Juma Ondiega. The parties also filed written submissions.

The Claimants' Case

6. In their claim dated 25th September 2017, the Claimants state that they were all employees of the Respondent, having been employed on diverse dates between March 2000 and May 2015.
7. Save for the 5th and 6th Claimants, who claim to have been employed as Crane Operator and Mechanic respectively, all the other Claimants state that they were employed as General Labourers.
8. The Claimants plead that on 3rd January 2017, they reported to work as usual but were informed by their supervisor, one James Mureki that their services were no longer required. They add that their inquiries regarding the turn of events did not elicit any explanation from the Respondent; instead, they were directed to vacate the Respondent's premises.
9. The Claimants lay a claim of wrongful dismissal and therefore seek the following remedies:

1st Claimant: Simon Ivita Mutua:

- a. One month's salary in lieu of notice.....Kshs. 15,810
- b. Unpaid leave for the entire period of service.....25,033
- c. House allowance for the entire period of service.....45,059
- d. 12 months' salary in compensation.....189,720

2nd Claimant: Kaluku Muli

- a. One month's salary in lieu of notice.....Kshs. 15,810
- b. Unpaid leave for the entire period of service.....79,050
- c. House allowance for the entire period of service.....142,296
- d. 12 months' salary in compensation.....189,720

3rd Claimant: Joseph Kyalo Ndambuki

- a. One month's salary in lieu of notice.....Kshs. 15,810
- b. Unpaid leave for the entire period of service.....88,273
- c. House allowance for the entire period of service.....158,892



d. 12 months' salary in compensation.....189,720

4th Claimant: Hillary Kibet Kirui

a. One month's salary in lieu of notice.....Kshs. 15,810

b. Unpaid leave for the entire period of service.....44,795

c. Service gratuity for the entire period of service.....22,398

d. House allowance for the entire period of service.....80,640

e. 12 months' salary in compensation.....189,720

5th Claimant: Nashon Mandela Mbete

a. One month's salary in lieu of notice.....Kshs. 21,330

b. Unpaid leave for the entire period of service.....359,055

c. House allowance for the entire period of service.....646,299

d. 12 months' salary in compensation.....255,960

6th Claimant: Peter Kasimu Muthiani

a. One month's salary in lieu of notice.....Kshs. 26,850

b. Unpaid leave for the entire period of service.....120,825

c. House allowance for the entire period of service.....217,485

d. 12 months' salary in compensation.....322,200

7th Claimant: Jones Kennedy Kalungu

a. One month's salary in lieu of notice.....Kshs. 15,810

b. Unpaid leave for the entire period of service.....69,828

c. House allowance for the entire period of service.....125,690

d. 12 months' salary in compensation.....189,720

8th Claimant: Alex Mutinda Kalungu

a. One month's salary in lieu of notice.....Kshs. 15,810

b. Unpaid leave for the entire period of service.....47,430

c. House allowance for the entire period of service.....21,345

d. 12 months' salary in compensation.....189,720

9th Claimant: Alexander Muli

a. One month's salary in lieu of notice.....Kshs. 15,810

b. Unpaid leave for the entire period of service.....94,860

c. House allowance for the entire period of service.....170,748



d. 12 months' salary in compensation.....189,720

10th Claimant: Charles Kibet Chepkwony

a. One month's salary in lieu of notice.....Kshs. 15,810

b. Unpaid leave for the entire period of service.....39,525

c. House allowance for the entire period of service.....71,148

d. 12 months' salary in compensation.....189,720

10. The Claimants also ask for costs of the case.

The Respondent's Case

11. In its Statement of Response as amended on 13th August 2021, the Respondent denies the Claimants' claims and states that at all material times, the Claimants were under the direct control and supervision of an outsourcing firm, Realmax HR International.

12. In response to the claims for leave pay, the Respondent avers that the Claimants were compensated when they did not go on leave.

13. The Respondent adds that during their tenure of employment, the Claimants were paid at the level of minimum wage, which was inclusive of a housing component.

14. The Respondent claims that the Claimants were part of a larger group of workers who participated in an unsanctioned stoppage of work, beginning 5th December 2016, and lasting for several weeks. The Respondent adds that in response to the work stoppage, it informed the Claimant's Contractor, Realmax HR International, in addition to making a report to the County Labour Office.

15. The Respondent maintains that it cannot be held liable for the action/inaction of the Contractor. The Respondent states that all outstanding wages and emoluments as billed by the Contractor for the month of December 2016 were remitted to the Contractor as per the agreement dated 1st October 2016, between the Respondent and the Contractor.

The 3rd Party's Case

16. In its Statement of Defence dated 10th October 2021, the 3rd Party states that it is not a proper party in these proceedings, asserting that it was not involved in either the hiring of the Claimants or the termination of their employment.

17. The 3rd Party states that it is a limited liability company, which was contracted by the Respondent on 1st October 2016, to provide human resource services.

18. The 3rd Party maintains that it was not privy to the contracts between the Claimants and Respondent, and the Respondent cannot therefore seek indemnity from it on the basis of the said contracts.

19. According to the 3rd Party, the contract between it and the Respondent required that the 3rd Party would provide its own employees to carry out general labour duties in the premises, and was therefore not involved with the Claimants at any point.

20. The 3rd Party avers that the person said to have terminated the Claimants' employment was an employee of the Respondent, who was not in any way affiliated to the 3rd Party.



Findings and Determination

21. There are three (3) issues for determination in this case:
 - a. Whether the 3rd Party is a proper party in these proceedings;
 - b. Whether the Claimants have proved a case of unlawful termination of employment;
 - c. Whether the Claimants are entitled to the remedies sought.

The 3rd Party's Joinder

22. In seeking joinder of the 3rd Party in these proceedings, the Respondent relied on a document titled 'Contract of Service Agreement' dated 1st October 2016.
23. The Agreement, which describes the 3rd Party as 'Contractor' and the Respondent as 'Client' sets out the scope of services to be provided by the 3rd Party as follows:
 - a. Employees will be provided to carry out general labor duties in the premises.
 - b. Staff will be provided to carry out machine attendant and machine operator services in the production block.
 - c. Drivers will be provided to pick and deliver goods to clients. This also includes any other service as instructions may be given from time to time.
 - d. The normal working hours will be 45 hrs a week and overtime will be paid at the rate of 1.5 times the normal hourly rate for excess hours worked and at 2 times the normal hourly rate for excess hours worked on public holidays. The normal working hours will be from 8.00 am to 5.00 pm with one hour lunch break.
24. The Respondent refers to Clause 6 of the Agreement on indemnity, which states as follows:

"The Contractor hereby agrees to indemnify or where applicable may compensate the client for any damage or loss caused by the contractor, its employees or agents where such a loss or damage is occasioned through negligence or wilful misconduct provided that the client or his agents shall not have directly or indirectly contributed to the occasioning of such a loss or damage through negligence or wilful misconduct."
25. While acknowledging that the Agreement came into effect after all the Claimants had been employed, the Respondent attempted to pursue a case of outsourcing. According to the Respondent, although the Claimants had initially been employed directly by it, their employment was transferred to the 3rd Party, from 1st October 2016, being the effective date of the Agreement between the 3rd Party and the Respondent.
26. While outsourcing is recognised as a legitimate mode of organising labour, case law has set standards to be observed in such an arrangement. In its submissions dated 28th February 2025, the 3rd Party cited the decision in *Wrigley Company (East Africa) Limited v Attorney General & 2 others and Sheer Logic Management Consultants Ltd* [2013] eKLR where a three judge bench of this Court (Nduma, Ndolo and Nzioki wa Makau JJ) established the following parameters for a credible outsourcing program:
 - a. Ordinarily, employers are not expected to outsource their core functions;



- b. An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
 - c. An employer will not be permitted to transfer services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
 - d. Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
27. Wrigley remains good law and in the subsequent decision in *Superfoam Limited v Olwanda & 7 others* [2022] KEELRC 4028 (KLR) Mbaru J affirmed that an employer entering into an outsourcing arrangement has a duty to ensure that the existing employment relationship is brought to closure and the affected employees paid all accrued dues. The learned Judge further held that an outsourcing agreement entered into without notice to the affected employees amounts to an unfair labour practice.
28. In the present case, there is no telling as to the time when the Claimants' services were transferred from the Respondent to the 3rd Party. The Claimants themselves term the 3rd Party as a stranger and insist that they were employees of the Respondent.
29. Having taken evidence from the parties, I am persuaded that there was no credible outsourcing arrangement between the 3rd Party and the Respondent, in as far as the Claimants' employment was concerned. The Claimants were employees of the Respondent and there is no reason to drag the 3rd Party into the dispute. The result is that the claim as against the 3rd Party is dismissed.

Unlawful Termination?

30. In its defence to the claim for unlawful termination of employment, the Respondent accuses the Claimants of participating in an unprotected strike.
31. This accusation falls within the broad category of misconduct and the procedure for handling such cases is set out under Section 41 of the *Employment Act*, which provides that:
- 41.(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.
32. The foregoing requirements were summarised by Radido J in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR as follows:
- “The ingredients of procedural fairness...within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and present



a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

33. From the evidence on record, the Claimants were not subjected to any process within the definition of procedural fairness. The accusation of engaging in an unprotected strike was therefore unsubstantiated and unproved. The corollary is that there was no valid reason for the termination of their employment, as required under Section 43 of the *Employment Act*.

Remedies

34. Pursuant to the foregoing findings and conclusions, I find for the Claimants and taking into account their respective periods of service and the Respondent’s failure to avail them an opportunity to respond to the charges against them, I make award in favour of the Claimants as shown below.
35. I further award each Claimant one (1) month’s salary in lieu of notice.
36. Regarding the claim for house allowance, the only thing to say is that the Claimants were paid a daily wage within the minimum range, which is ordinarily inclusive of house allowance.
37. With evidence of the Claimants having been compensated in lieu of leave for 2016, the Court did not find any basis for the claim for leave pay for the previous years, which claim would be statute barred, in any event.
38. Finally, I enter judgment in favour of the Claimants as follows:

1st Claimant: Simon Ivita Mutua

- a. 3 months’ salary in compensation.....Kshs. 47,430
- b. 1 month’s salary in lieu of notice.....15,810
- Total.....63,240

2nd Claimant: Kaluku Muli

- a. 6 months’ salary in compensation.....Kshs. 94,860
- b. 1 month’s salary in lieu of notice.....15,810
- Total.....110,670

3rd Claimant: Joseph Kyalo Ndambuki

- a. 6 months’ salary in compensation.....Kshs. 94,860
- b. 1 month’s salary in lieu of notice.....15,810
- Total.....110,670

4th Claimant: Hillay Kibet Kirui

- a. 3 months’ salary in compensation.....Kshs. 47,430
- b. 1 month’s salary in lieu of notice.....15,810
- Total.....63,240



5th Claimant: Nashon Mandela Mbeta

- a. 12 months' salary in compensation.....Kshs. 255,960
- b. 1 month's salary in lieu of notice.....21,330
- Total.....277,290

6th Claimant: Peter Kasimu Muthiani

- a. 5 months' salary in compensation.....Kshs. 134,250
- b. 1 month's salary in lieu of notice.....26,850
- Total.....161,100

7th Claimant: Jones Kennedy Kalungu

- a. 5 months' salary in compensation.....Kshs. 79,050
- b. 1 month's salary in lieu of notice.....15,810
- Total.....94,860

8th Claimant: Alex Mutinda Kalungu

- a. 4 months' salary in compensation.....Kshs. 63,240
- b. 1 month's salary in lieu of notice.....15,810
- Total.....79,050

9th Claimant: Alexander Muli

- a. 7 months' salary in compensation.....Kshs. 110,670
- b. 1 month's salary in lieu of notice.....15,810
- Total.....126,480

10th Claimant: Charles Kibet Chepkwony

- a. 3 months' salary in compensation.....Kshs. 47,430
- b. 1 month's salary in lieu of notice.....15,810
- Total.....63,240

- 39. These amounts will attract interest at court rates from the date of judgment until payment in full.
- 40. The Respondent will pay the Claimants' costs as well as those of the 3rd Party.
- 41. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY 2025.

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JUDGE.

Appearance:

Mr. Namada for the Claimants



Mr. Owino for the Respondent

Mr. Ombati for the 3rd Party

