Muthoni v Barium Capital Limited & another (Cause E199 of 2022)
[2024] KEELRC 2345 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2345 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E199 OF 2022

JK GAKERI, J

SEPTEMBER 30, 2024

BETWEEN

TERESIA MUTHONI ..... CLAIMANT

AND

BARIUM CAPITAL LIMITED ..... 1ST RESPONDENT

CENTUM INVESTMENT COMPANY PLC ..... 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 25th March, 2022 alleging unfair termination from employment by the Respondents.

2. It is the Claimant's case that she was initially employed by the 2nd Respondent from 2007 to 2012 and then between 2012 and 2018 worked with Nabo Capital (previously Centum Assets Managers Limited), a wholly owned subsidiary of the 2nd Respondent, working in various roles with the last being General Manager- Advisory.

3. The Claimant avers that owing to the restrictions imposed by the Capital Markets Authority on Nabo Capital's business in 2018, the 1st Respondent was incorporated as a wholly owned subsidiary of Nabo Capital to provide transaction advisory and capital raising business to the 2nd Respondent, its subsidiaries and other investors outside of the Centum Group.

4. The Claimant avers that shortly after incorporation, the 2nd respondent acquired Nabo Capital's 100% interest in the 1st Respondent and it became a wholly owned subsidiary of the 2nd Respondent.

5. The Claimant states that she was employed by the 1st Respondent as its managing director and was a member of the 1st Respondent's board of directors but was not provided with a contract of employment.

6. The Claimant states that within the Centum Group, the 1st Respondent was not treated or viewed as an independent entity as the 2nd Respondent completely dominated the finances, policy and business practice of the 1st Respondent such that it did not have separate legal existence in so far as;

    a. The 1st Respondent's human resource, payroll and administrative functions were centrally performed by the 2nd respondent.

    b. The 2nd Respondent was involved in the 1st Respondent's executive and management reviews, payments, leave applications, appraisals, recruitment, salary increments and other daily administrative tasks.

    c. The 1st Respondent also had no autonomy over its staff grading categories because its employee's salary bands, grading structures and reward policies were subsumed by the 2nd Respondent in its organogram.

    d. The 1st Respondent's financials were attributed to and aggregated by the 2nd Respondent with bonus payments being determined by the 2nd Respondent irrespective of the 1st Respondent's audited performance.

7. The Claimant avers as a result, the 2nd Respondent substantially controlled the activities and personnel of the 1st Respondent.

8. The Claimant avers that on 19th June, 2020, the 1st Respondent's board of directors approved the decision to wind up the 1st Respondent. However, the letters notifying the Claimant and other employees of the intended redundancy had been sent four days earlier on 15th June, 2020.

9. The Claimant avers that she was informed that she would receive a redundancy package in the sum of Kshs.10,735,694.25 and requested to regularize her employment records and to justify the payment that she was to receive in line with audit and tax purposes.

10. The Claimant avers that by a letter dated 20th July, 2020, her services were terminated on the purported redundancy.

11. The Claimant states that she was notified that the 1st Respondent would pay to her redundancy dues of Kshs.10,903,410.52, the amount which was enhanced after her notification of redundancy was extended to 20th July, 2020. She further states that the redundancy package did not include the Claimant's b*onus of 2019* which had accrued and was therefore entitled to.

12. The Claimant states that her terminal dues have not been paid to date on the basis that there are no assets within the 1st Respondent to make payment.

13. The Claimant avers that the purported reasons for redundancy were not substantively justified or genuine because;

    a. The decision to wind up the 1st Respondent's operations was not made by it's board;

    b. The 1st Respondent's board resolution to wind up its operations on 19th July 2020 was an afterthought as the communication was already issued to its employees; and

    c. The 1st Respondent's purported liquidity issues were contrived by the 2nd Respondent to illegally deprive the Claimant of her employment and terminal dues.

14. The Claimant avers that the procedure of redundancy did not comply with the provisions of Section 40(1)(a) of the *Employment Act*.

15. The Claimant further avers that her right to fair labour practices under Article 41 of *the Constitution* of Kenya was breached in that the Respondents;

    a. caused the Claimant to suffer unemployment during the pandemic for disingenuous reasons;

    b. disregarded due process in terminating the Claimant's employment;

    c. failed to engage in meaningful discussions with the Claimant on alternative measures to mitigate the effects of the purported redundancy; and

    d. unlawfully withheld the Claimant's terminal dues and caused her to suffer undue financial hardship during the pandemic.

16. As a result of the purported redundancy, the Respondents have illegally withheld the Claimant's terminal dues and caused her to suffer loss.

17. The Claimant prays for judgment against the respondents for;

    a. A declaration that the termination of the Claimant's employment was unconstitutional, unprocedural, unfair and unlawful.

    b. Damages for breach of the Claimant's right to fair labour practices under Article 41 of *the Constitution* of Kenya.

    c. Compensation equivalent to 12 months' remuneration for unfair, wrongful and unlawful termination of employment on account of the purported redundancy equivalent to Kshs.11,760,000/=.

    d. Payment of the Claimant's redundancy dues of Kshs.10,903,410.52.

    e. The pro-rated amount due to the Claimant arising from the Kshs.11,775,753/= approved by the Respondent to be paid to the 1st Respondent's employees as bonus.

    f. Interest on (c), (d) and (e) at court rates from the date of filing this suit.

    g. Costs of the suit.

Respondent's case

18. By a Memorandum of Reply dated 6th June, 2022, the 2nd Respondent filed a Memorandum of Reply in which it admitted having employed the Claimant for the position of a Risk Analyst effective 2nd April, 2007 but denies the Claimant's allegations contained in the Claimant's Memorandum of Claim.

19. The 2nd Respondent avers that the Claimant was then promoted to the position of Risk Officer reporting to the Chief Executive Officer.

20. It further avers that the claimant was appointed the Operations Manager on 1st April, 2013.

21. The 2nd Respondent denies that the Claimant was not provided with a contract of employment and contends that the 1st Respondent company (Barium Capital) was run independently from the 2nd Respondent (Centum).

22. It avers that its role (if any) was limited to having a representative in the Board of Barium Capital as a shareholder and all decisions were made in the best interest of the Company and on the basis of information recommended by the Managing Director and management team of Barium Capital.

23. The Claimant's job description was to manage the overall operations of Barium Capital including recruitment of staff and was only answerable to the Board of Directors of Barium Capital in which she was a member.

24. The 2nd Respondent reiterates that companies and employers have the prerogative to decide how best to run their business.

25. It avers that the Claimant and the Labour Officer were notified of the imminent redundancy as prescribed by law.

26. It further states that requirements of both procedural and substantive fairness were met during the termination of the Claimant's employment process, with deliberations and further consultations taking place with the aim of absorbing affected employees in other affiliate companies.

27. The 2nd Respondent states that due to the dynamic and volatile nature of the business environment during the COVID-19 Pandemic and the failure by the 1st Respondent to raise capital, its board of management re-assessed its operations and decided to cease operations and carry out the redundancies.

28. The 2nd Respondent urges the court to dismiss the Claimant's claim with costs on a full indemnity basis.

Claimant's evidence

29. The Claimant testified as CW1. On cross examination, she admitted that she had a contract of employment with the 1st Respondent effective 2018 and employment was terminated in July 2020 on account of redundancy. CWI stated that she received a new contract with Nabo Capital.

30. The Claimant testified that her contract with the 2nd Respondent came to an end and she was employed by the 1st Respondent as MD and was a member of the Board in charge of compliance issues.

31. She stated that services such as grievances, evaluation, human resource records and payroll were outsourced to the 2nd Respondent.

32. The Claimant alleges that she unprocedurally received a redundancy notice.

33. She states that she received an extension dated 15th July, 2020 which she signed on 17th July, 2020.

34. On re-examination, the witness stated that she worked in multiple organizations within the group and had no letter of appointment.

35. The witness, however confirmed that she signed the contract with Barium Ltd after she received the letter of redundancy.

36. She stated that there were emails between James Mworia, the Group MD and Fred Murimi dated 19th February, 2019 and 28th January, 2020 meeting on budget of the 1st Respondent, who raised issues on reputational risk to the group. She stated that she then received an email dated 23rd July, 2020 on the amount payable on redundancy.

37. She stated that she received an email dated 18th May, 2020 from the group CEO yet the board had not sat on the question of redundancy. She further stated that the notification of redundancy is dated 15th June, 2020 and the Board sat on 19th June, 2020. By an internal memo dated 12th June, 2020, the Group Human Resource sought approval of redundancy.

Respondents Evidence

38. RW1, Mr. Thomas Omondi adopted his witness statement as evidence in chief.

39. On cross-examination, the witness stated that he was the Group Chief Operations Officer of the 2nd Respondent and that the Claimant's line manager was not Fred Murimi.

40. He stated that the Claimant reported to the Board of Directors (Fred Murimi).

41. He denied that he was the Claimant's line manager but controlled her performance as the service promoter of the 2nd Respondent.

42. He stated that the 2nd Respondent provided certain services to the 1st Respondent as per the CBS and was a supervisor of the 1st Respondent.

43. On re-examination, the witness stated that the Group was not an entity but a collection of companies owned by Centum and the 1st Respondent is one of companies owned by the 2nd Respondent. The CBS was the shared services of the company.

44. He confirmed that the 1st Respondent was a wholly owned subsidiary of the 2nd respondent.

45. He further stated that as an employee of the CBS, he was the MD and Group COO of the 2nd Respondent carrying out human resource services which include issue of notices and computation of dues.

46. He testified that the 2nd Respondent was responsible for full oversight of the 1st Respondent as a member of the Board. He confirmed that the Claimant sat in the board together with Fred Murimi and were both aware of the deliberations of the board.

47. He confirmed that the Claimant was an employee of the 1st Respondent.

Claimants Submissions

48. The Claimant's counsel highlighted the following issues for determination, namely;

    i. Are both respondents to be held liable for the Claimants employers?

    ii. Were the reasons for declaring the Claimants employment redundant substantively justified and fair?

    iii. Was the termination of the Claimants employment on account of redundancy procedurally fair?

    iv. Did the Respondents breach the Claimants right to fair labour practices?

    v. Is the Claimant entitled to the reliefs sought?

    vi. Who should bear the costs of the suit?

49. On the first issue both the Claimant and the 2nd Respondent are in agreement that the 1st Respondent was the Claimant's employer. The Claimant further asserts that the 2nd Respondent was also her employer.

50. Counsel highlighted the provision of Section 2 of the *employment act* that defines an employer as

> " 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"

51. Counsel relied on the holding in Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited (2019) eKLR where the court explained the effect of the above provision is that employment of an individual entails the selection and engagement of the employee, the power to control the employees conduct and the power of dismissal.

52. It is the Claimant's submission that despite the roles between the Respondents being clearly delineated in the chart of authority, the 2nd Respondent directly managed and controlled the claimant's employment including overseeing invoice payments, managing performance and termination of employment.

53. The Claimant submits that the court should find that the Respondents as well as CBS operated as one economic unit sharing various responsibilities as employers over the Claimant's employment.

54. Counsel relied on the holding in Philip Ateng Oguk & 27 Others v Westmont Power (Kenya) Limited & another (2015) where the court found companies in a group sharing human resource functions to be liable as employers and held;

> " The Court therefore agrees with the claimants that the presence of various legal entities at the workplace claiming to be part of a 'group of companies' should not result in the obfuscation or defeat of their employment rights. The E.A power management Company was merely a façade company joined at the hip with western. The court reviews these companies as economic units rather than legally separate. The Respondent was not the traditional outsourcing company but a business arm entrusted management of human resources within the same group of companies. It did not independently employ and could not independently employ the claimants without westmount . . . The first conclusion the court reaches, is that E.A power management limited and westmont, were the same economic unit which employed the claimants."

55. The Claimant also relied on the holding in Stephen Njoroge Kigochi v Martin Njoroge Wanyoike & Another (2014) where the court observed that;

> " Employees are recruited by known human persons and will hardly know the insulating multiple legal personalities at the bottom of their employer's business. Employees should therefore be given the greatest latitude in bringing all entities described under Section 2 of the laws above to account for employment wrongs . . . it is sufficient that Dr. Wanyoike who recruited the Claimant, instructed, controlled and remunerated the Claimant at work is the principal Respondent shouldering the burden of righting the perceived employment wrong"

56. The Claimant further submits that the 2nd Respondent assumed the power of dismissal of an employer by initiating, internally discussing and managing the purported redundancy of the claimant.

57. Counsel submits that no evidence was tendered in court to demonstrate the basis on which the 2nd Respondent's head of Human Resources purported to act for the 1st Respondent or her alleged relations to CBS.

58. The Claimant submits that Section 45(2)(b)(ii) of the *Employment Act* requires the respondents to prove that the reasons for the termination of employment were fair based on the 1st Respondent's operational requirements.

59. Counsel submits that the ground of redundancy was unfair, and disingenuous as the circumstances that led to the redundancy were fabricated by the 2nd Respondent. That in 2018 and 2019, the 1st Respondent's business was profitable and the board declared bonuses.

60. Counsel further submits that through the email exchange between the 1st and the 2nd Respondent, the 1st Respondent was required to change business focus as the subsidies were adversely impacting on the 2nd Respondent's cashflow which was exacerbated by the COVID-19 Pandemic that led to artificial liquidity.

61. Counsel urges the court to find that the redundancy was unfair in that the 2nd Respondent usurped the dismissal authority of the 1st Respondent by orchestrating the redundancy process.

62. Reliance was made on the holding in Kenya Airways Limited v Aviation & Allied Workers union Kenya & 3 others (2014) eKLR;

> " There are two broad aspects of this definition. First one is that the loss of employment in a redundancy case has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment".

63. Counsel further submits that the Respondent is required under Section 45(2)(c) of the *Employment Act* to demonstrate that the termination of the claimants contract of employment was conducted in accordance with a fair procedure.

64. Counsel submits that the notices and the meetings were illegal as only the 1st Respondent had authority to initiate the process of redundancy.

65. Counsel further submits that the provisions of Section 40(1)(e) (f) and (g) of the *Employment Act* were not complied with as the Claimant was not paid, encashed leave, notice pay or severance pay following the termination of employment despite the 2nd Respondent's officials confirming the Claimant's redundancy package.

66. According to counsel, the Respondent infringed on the Claimants rights to fair labour practices by imposing a redundancy process devoid of substantive justification and fair procedure.

67. Reliance was made on the holding in *Mbage v Hillcrest Investment Limited (ELRC Cause 2007 of 2016* KEELRC 2096 (KLR) where the court held that termination of employment on account of redundancy for disingenuous reasons constituted unfair labour practices and stated that;

> " To terminate employees employment on an account of redundancy yet the reason is, not anchored on genuine and proper operational requirement but camouflaged will meet no better description than an affront on the principal of fair labour practices . . . In the upshot I find that the Respondent violated the Claimants right to fair labour practices".

68. Counsel urges that the Claimant has proved her case on a balance of probabilities and seeks a declaration that the termination of employment was unfair, unprocedural and unconstitutional and urges the court to award the reliefs as sought.

2nd Respondent's submissions

69. The 2nd Respondent's counsel addressed the following issues for determination namely;

    i. Who the Claimant's employer was.

    ii. Whether the Claimant's termination on account of redundancy was in accordance with the law.

    iii. Whether the Claimant is entitled to any of the reliefs sought.

    iv. Whether Centum, the 2nd Respondent, is liable.

70. On the first issue, counsel submits that there existed an employment relationship between the Claimant and the 1st Respondent.

71. Reliance was made on the holding in *Kaiga v Das (Employment and Labour Relations Claim 2 of 2023*) [2023] KEELRC 2194 (KLR) (22 September 2023) (Judgment) where the court held that the existence of employer-employee relations is primal to any employment claim.

72. Reliance was also made on the holding in Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited [2019] eKLR which determined the necessary elements for establishment of an employment relationship. The case establishes that in order for a positive determination of the existence of an employer-employee relationship, there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally the power to control the employee's conduct.

73. On the second issue, counsel submits that termination of the Claimant's employment on account of redundancy was lawful, procedural and fair.

74. Reliance was made on the decision in Walter Ogal Anuro vs Teachers Service commission (2013) eKLR where the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

75. On the third issue, counsel submits that termination of the Claimant's employment on account of redundancy was constitutional, procedural, lawful and fair and is thus not entitled to the prayers sought save for her redundancy dues from the 1st Respondent as calculated in her severance package. The Claimant having not been an employee of the 2nd Respondent and her employment with the 1st Respondent having been terminated by the 1st Respondent on account of redundancy, the 2nd Respondent cannot be liable in any way.

76. Reliance was made on *Yamao vs Nestle Equitorial African Region Limited (Cause 328 of 2015*) [2024] KEELRC 65 (KLR) (25 January 2024) (Judgment), to reinforce the submission.

77. On the fourth issue, counsel submits that there was no relationship between the Claimant and the 2nd Respondent but there existed an employment relationship between the Claimant and the 1st Respondent at the time of termination of her employment.

78. Reliance was made on the sentiments of the court in *Kimemia v East African Breweries Limited & 2 others (Cause 212 of 2020*) [2023] KEELRC 1837 (KLR) (27 July 2023) where the court noted

that the averment by the Respondent that the Claimant was an employee of the 1st Respondent and not the 2nd and 3rd Respondents may as well find support in the documentary evidence on record. The letter of appointment dated 27th March, 2018 indicates that it is the 1st Respondent who hired the Claimant's services. This case establishes that a holding company is a distinct legal entity from its subsidiary and cannot therefore be sued for any breach of contract by its subsidiary. Mosi v National Bank of Kenya Limited [2001] eKLR- the law is clear that a holding company is a distinct legal entity from its subsidiary and it cannot be sued for any breach of contract by its subsidiary.

79. Counsel submits that there is overwhelming and incontrovertible evidence that supports the existence of an employment relationship between the Claimant and the 1st Respondent and not between the Claimant and the 2nd Respondent.

80. It is the 2nd Respondent's submission that the reliefs sought by the Claimant cannot be borne by Centum. Counsel further submits that the claim is devoid of merit as against the 2nd Respondent and as such urge the Court to dismiss the claim with costs.

81. The 2nd Respondent underscores the reasoning of the Court in Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike [2017] eKLR where it was held that much as courts are right to be solicitous of the interests of the employee, they must remain where all, irrespective of status can be assured of justice. Employers are Kenyans too and have rights which courts are duty-bound to respect and uphold. This case establishes that justice is a two-way highway.

Determination

82. The issues that commend themselves for determination are:-

    i. Who the Claimant's employer was.

    ii. Whether the Claimants redundancy was bonafide.

    iii. Whether the Claimant is entitled to the reliefs sought.

83. The 2nd Respondent maintained that it operated as a distinct legal entity separate from 1st Respondent.

84. It is clear that the claimant signed an employment contract with the 1st Respondent, Barium Capital Limited on the 19th January, 2018 to the position of a managing partner.

85. Section 2 of the *Employment Act* defines an employer as a

> " 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".

86. The Employment Contract Clause No. 6 "The Company is a member of the centum group and accordingly, you may be required to offer their services to any other affiliate or subsidiary of centum group. In the event of any such change, this contract shall stand terminated when a new contract of employment is entered into between you and the relevant centum group subsidiary or affiliate"

87. In the Court's view, there was significant control of the Claimant by the 2nd Respondent which is discernible from the payslips adduced as evidence by the Claimant which were issued by the 2nd Respondent.

88. The employment contract between the Claimant and the 1st Respondent also expressly stated that the Claimant could be required to offer services to any other affiliate or subsidiary of the Centum Group of Companies.

89. The evidence on record reveals that there was no clear operational dichotomy between the Respondent companies.

90. Although a subsidiary company is a legal entity in its own right, corporate law qualifies the rule in Salomon V Salomon & Co. Ltd (1897) AC. 22 in such cases for purposes of accounting or financial status of the group.

91. The holding company is required to prepare group accounts every financial year.

92. From the foregoing, the court is persuaded by the Claimant's argument that the 1st and the 2nd Respondent operated as a single entity as expressly provided for by the contract of employment.

93. Section 2 of the *Employment Act*, 2007 enacts that "redundancy" means; 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;

94. Section 40 of the *Employment Act* decrees that:–

    1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

        i. 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;

        ii. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

        iii. 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;

        iv. 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;

        v. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

        vi. 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

        vii. 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.

95. In Kenya Airways Limited v Aviation and Allied Workers Union and 3 others as read with Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 others, the Court of Appeal held that

termination of a contract of employment on account of redundancy is a legitimate process based on the operational requirements of the employer. There must, however, be notices as contemplated by Section 40(1)(a) or (b) and (f) of the *Employment Act*, 2007. Further, the reasons and the extent of the redundancy must be provided to the employee or the union. The reasons also ought to be bonafide, in the sense of being justifiable and the employee must be involved in the process.

96. In *Mary Nyawira Karimi v Pure Circles Limited Cause No. 403 of 2016*, Mbaru J. observed that even where an employer intends to pay for the notice period, the notice of the intended redundancy must issue to the employee stating the extent and the reasons for the redundancy.

97. In the instant case the Claimant was issued with a Notification of redundancy dated 15th June 2020 which is reproduced as below;

> RE: Notification of Redundacy
>
> In accordance with section 40(1) of the *employment Act* 2007 and further to our meeting held with the Barium Capital team on 28th May 2020, we write to notify you of the imminent redundancy at Barium Capital.
>
> The redundancy has been occasioned by a business decision to cease barium capital operations which will effectively result to the discontinuation of Barium Capital as a subsidiary of the group.
>
> This letter serves to notify you that your position as the managing Director at Barium Capital will be declared redundant effective 15th July 2020. A confirmation of redundancy terminating your contract of employment will be issued to you in due course

98. In Thomas De La Rue Limited v David Opondo Omutelema, the Court held that there must be notification of intended redundancy of at least one month to both the employee and the Labour Officer where the employee is not a member of a trade union.

99. The provisions of Section 40(1) of the *Employment Act* are couched in mandatory terms, that the employer shall not declare an employee redundant until it had complied with the provisions listed under Section 40(1)(a) to (g). In the instant case, all that the Respondent did was issue the letter of redundancy without any prior notification or discussion with the Claimant, no explanation was given as to how the selection of employee being declared redundant was made and reasons for the redundancy and extent were not disclosed.

100. In Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, the Court of Appeal stated as follows;

> " The purpose of the notice under Section 40(1)(a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees."

101. The Respondent adduced no evidence to prove that the Labour Officer was notified of the intended redundancy as provided by Section 40(1)(b) of the *Employment Act*. In a nutshell, it is the finding of the Court that the Respondent's notice of redundancy was ineffectual.

102. The 2nd Respondent has not controverted the averments of the Claimant that the redundancy was a strategy orchestrated by the 2nd Respondent to close down the 1st Respondent.

103. From the foregoing, it is the finding of the court that the Respondent did not justify the redundancy and no evidence was provided on how it arrived at the decision of declaring the Claimant redundant. Consequently, the purported redundancy transitioned to an unfair termination of employment in terms of Section 45(2) of the *Employment Act* for want of a substantive justification and procedural fairness.

(i) Declaration

104. Having found that the termination of the Claimant's employment on account of redundancy was unfair, a declaration is made that the termination of employment was illegal and unlawful.

(ii) Damages for breach of Claimant's rights

105. The Claimant availed no evidence to prove this claim. It is declined.

(iii) Redundancy pay

106. Through an email dated 23rd June, 2020 by Pauline Malala on record, the Claimant's redundancy package was Kshs.10,903,410.52 and the same is awarded as tabulated.

(iv) Compensation

107. The Claimant having worked for the 2nd Respondent from 2007 to 2012 and 1st Respondent from 2012 to 2018, a total of 11 years at the Centum Group and having further found that the redundancy was not bonafide, the court is satisfied that the equivalent of 2 months' gross salary as compensation is fair, Kshs.1,960,000/=.

(v) Bonus

108. The Claimant availed no evidence to establish this claim.

It is declined.

109. In the end, judgment is entered in favour of the Claimant against the Respondent as follows;

a. Declaration that termination of the Claimant's employment on account of redundancy was unfair.

b. Redundancy dues

The Respondent owes the Claimant her redundancy dues and the same are awarded as admitted, Kshs.10,903,410.52.

c. Equivalent of 2 months' salary, Kshs.1,960,000.00.

d. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024.

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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.

DR. JACOB GAKERI

JUDGE