



REPUBLIC OF KENYA



**KENYA LAW**  
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**Opembe & 18 others v Associated Construction Co Ltd (Cause 225 of 2016)  
[2022] KEELRC 13035 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13035 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 225 OF 2016  
S RADIDO, J  
NOVEMBER 2, 2022**

**BETWEEN**

**MAXWEL OPEMBE ..... 1<sup>ST</sup> CLAIMANT**  
**JOSEPH OBUCHERE ..... 2<sup>ND</sup> CLAIMANT**  
**JAMES MWEU ..... 3<sup>RD</sup> CLAIMANT**  
**PATRICK OBUCHERE ..... 4<sup>TH</sup> CLAIMANT**  
**BENSON ALIELI ..... 5<sup>TH</sup> CLAIMANT**  
**JOASH OPAMO ..... 6<sup>TH</sup> CLAIMANT**  
**EVANS LWANGU ..... 7<sup>TH</sup> CLAIMANT**  
**KAVUYE NELSON ..... 8<sup>TH</sup> CLAIMANT**  
**AMOS OKUTOYI ..... 9<sup>TH</sup> CLAIMANT**  
**FRANCIS NAMAYI ..... 10<sup>TH</sup> CLAIMANT**  
**JAMES ASHIOYA ..... 11<sup>TH</sup> CLAIMANT**  
**ISAYA ADEDE ..... 12<sup>TH</sup> CLAIMANT**  
**LABAN OUMA ..... 13<sup>TH</sup> CLAIMANT**  
**ENOS EKKUBE ..... 14<sup>TH</sup> CLAIMANT**  
**DOMINIC MUSEMBI ..... 15<sup>TH</sup> CLAIMANT**  
**SIMON OLUTEKHA ..... 16<sup>TH</sup> CLAIMANT**  
**CHARLES SHIKANDA ..... 17<sup>TH</sup> CLAIMANT**  
**GEOFFREY NYANGAU ..... 18<sup>TH</sup> CLAIMANT**  
**ISAYA OKINDA ..... 19<sup>TH</sup> CLAIMANT**



**AND**  
**ASSOCIATED CONSTRUCTION CO LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimants sued the Respondent on 2 August 2016, and they stated the Issue in Dispute as:  
Payment of final dues to the employees (Claimants) of the Respondent to Kshs 1,745,823/-.
2. The Respondent filed a Response on 3 June 2022, and the Cause was heard on 27 June 2022, when one of the Claimants testified.
3. The Respondent opted to close its case without leading any evidence.
4. Pursuant to Court directions, the Claimants filed their submissions on 18 August 2022. The Respondent filed its submissions on 5 July 2022.
5. The Claimants identified the Issues for determination as:
  - i. Whether the Claimants were declared redundant by the actions of the Respondent?
  - ii. What reliefs are the Claimants entitled?
  - iii. Whether the Claimants have proved to the satisfaction of the Court the claims as set out in the Claim Statement?
  - iv. Whether the Respondent's Defence should be struck out?
  - v. Who should pay the costs?
6. The Respondent outlined the Issues as follows:
  - i. What is the nature of the Claim by the Claimants?
  - ii. Who bears the burden of proof, and to what standard?
  - iii. Have the Claimants proved their claims to the required standard?
  - iv. Are the Claimants or any one of them entitled to the claims set out in the Memorandum of Claim?
  - v. Who bears the costs of this Cause?
7. The Court has considered the pleadings, evidence, and submissions.
8. The cause of action by the Claimants was a breach of contract/statute (failure to pay terminal dues upon declaration of redundancies).
9. The dues sought by the Claimants were 2 months' salary in lieu of notice, tool allowance, leave allowance, 56 days' pay during January, February and March 2016 and September 2013 salary arrears.
10. The Claimants also prayed for the Respondent to be ordered to issue them with Certificates of Service and PAYE (P9) forms.



### **Certificates of Service(s)**

11. A certificate of service is a statutory entitlement under section 31 of the *Employment Act*, 2007, and the Respondent should issue each of the Claimants with a Certificate of Service within 30-days.

### **PAYE (P9) forms**

12. An employer is under a legal obligation to issue its employees with P9 forms for purposes of making annual tax returns.
13. The Respondent should provide the Claimants with their copies of P9(s) as may be applicable or appropriate.

### **Salary in lieu of notice**

14. The Claimants did not place before the Court any evidential, contractual, or legal basis for the claim for the equivalent of 2 months' salary in lieu of notice and relief is declined (the Court notes that in the submissions, the Claimants made a pitch for 1-month salary in lieu of notice).

### **Tool allowance**

15. The Claimant, who testified on behalf of the other Claimants, conceded that the Respondent used to pay tool allowance, and nothing, therefore, turns on this head of the claim.

### **Leave allowance, salary arrears and other dues.**

16. The Claimants demanded Kshs 1,745,823/- but the exact particulars of how the sum was arrived at were not disclosed.
17. However, the correspondence between the parties produced in Court shows that the Respondent had admitted owing Kshs 917,767/- (see letters dated 14 May 2016 and 28 June 2016), and the Claimants admitted receiving a down payment of Kshs 365,000/- leaving a balance of Kshs 552,799/-.
18. The Court will allow this head of admitted balance.

### **Limitation**

19. The Respondent raised a plea of a time-bar in its defence but did not address the same in the submissions.
20. The Court considers the plea as having been abandoned.

### **Conclusion and Orders**

21. The Court enters judgment for the Claimants as follows:
  - i. Certificates of Service(s) to be issued within 30 days.
  - ii. PAYE (P9) forms to be provided within 30 days where applicable.
  - iii. The admitted sum of Kshs 552,799/- to be paid within 30 days.
22. The award in 21(iii) above to attract interest at court rates from the date of filing the Memorandum of Claim if not paid within 30 days.
23. The Claimants to have costs.



**DELIVERED VIRTUALLY FROM MOMBASA, DATED AND SIGNED ON THIS 2<sup>ND</sup> DAY OF NOVEMBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Claimants M. Kiveu Advocates

For Respondent Onsongo & co. Advocates

Court Assistant Chrispo Aura/Everylyne Nyaboke

