



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 402 OF 2017

JUSTUS MULANDI MUNUVE .....1<sup>ST</sup> CLAIMANT  
SHADRACK MUUNDA MUSEMBI.....2<sup>ND</sup> CLAIMANT  
THOMAS KIOLI KIMWALU .....3<sup>RD</sup> CLAIMANT  
MAHAMUD MOHAMED CHARI.....4<sup>TH</sup> CLAIMANT  
CLEOPHAS MUTINDA MUTHAMA.....5<sup>TH</sup> CLAIMANT  
JONAH WATHOME MUTUA .....6<sup>TH</sup> CLAIMANT  
RAPHAEL WAMBUA MATILU.....7<sup>TH</sup> CLAIMANT  
FREDRICK MULANDI WAMBUA.....8<sup>TH</sup> CLAIMANT  
AMOS NG'ANG'A GITAU .....9<sup>TH</sup> CLAIMANT  
LAWI KIPTOO TARUS .....10<sup>TH</sup> CLAIMANT  
JACKSON KIMUYU PETER.....11<sup>TH</sup> CLAIMANT  
STEPHEN KYALO .....12<sup>TH</sup> CLAIMANT  
VICTOR VAATI NDUKU.....13<sup>TH</sup> CLAIMANT  
JOSEPH GITONGA MAINA.....14<sup>TH</sup> CLAIMANT  
JONES ODOLI TETE.....15<sup>TH</sup> CLAIMANT  
SHADRACK NGOLA NGAVA .....16<sup>TH</sup> CLAIMANT  
CHARLES KAVEVA KANUNA.....17<sup>TH</sup> CLAIMANT  
TITUS KILONZI KAWINZI.....18<sup>TH</sup> CLAIMANT  
DAVID MWANZA MUSEMBI.....19<sup>TH</sup> CLAIMANT  
PAUL KAMAU NG'ANG'A.....20<sup>TH</sup> CLAIMANT  
CHRISTINE STEPHEN OKICHA.....21<sup>ST</sup> CLAIMANT  
SOROKEY MUSDAF EDIN.....22<sup>ND</sup> CLAIMANT  
FATUMA ABDUL KOTOLA.....23<sup>RD</sup> CLAIMANT  
FATUMA GURACHA BISIKO.....24<sup>TH</sup> CLAIMANT  
QURESHO MOHAMED ALI..... 25<sup>TH</sup> CLAIMANT  
NJOLI ABDI..... 26<sup>TH</sup> CLAIMANT

ADAN ABDUL KOMBA.....	27 <sup>TH</sup> CLAIMANT
JOSEPH KIOKO NZAU.....	28 <sup>TH</sup> CLAIMANT
SAID MOHAMMED.....	29 <sup>TH</sup> CLAIMANT
NZAU KIUSYA .....	30 <sup>TH</sup> CLAIMANT
SAMUEL KING'ORI .....	31 <sup>ST</sup> CLAIMANT
FAITH MUNYAO.....	32 <sup>ND</sup> CLAIMANT
HAWA MOHAMMED .....	33 <sup>RD</sup> CLAIMANT
RODGERS MAMBO.....	34 <sup>TH</sup> CLAIMANT
DAUDI HASSAN.....	35 <sup>TH</sup> CLAIMANT
ISIKA KIEMA.....	36 <sup>TH</sup> CLAIMANT

**VERSUS**

**EASY PACK COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants filed this suit against the Respondent seeking relief against the Respondent for their unlawful, wrongful and unfair termination as well as non-payment of their terminal dues. The Claimants averred that they diligently served without any disciplinary issues until 26<sup>th</sup> August 2017 when a section of them were informed at 2.00pm after working the whole day from 7.30am that there was no more work for them. They were directed to go to the Respondent on 28<sup>th</sup> August 2017 and collect their dues. The Claimants averred that they reported to work as directed and had to wait till 10.00am when they were permitted into the premises. They requested to be informed what payments were to be made and were informed that only the dues for the days worked in the month of August 2017 and they thus sought to be paid their salary in lieu of notice, house allowance, payment in lieu of leave, overtime and service for the period they had worked for the Respondent but the director declined. They averred that the director intended to drive them out of the premises by use of force but they left without resistance. They thus sought the payments for the items due to them through the suit. They sought a declaration that the dismissal was unlawful, wrongful and unfair, Kshs. 747,347/- being payment in lieu of notice, Kshs. 19,141/- for underpayment, Kshs. 1,095,523.12 as severance pay, Kshs. 2,362,639.50 as house allowance, Kshs. 1,528,064.65 payment in lieu of leave, Kshs. 9,210,381.20 as compensation, costs of the suit plus interest. They also sought certificates of service.

2. The Respondent filed a defence in which it denied that the Claimants were its employees or that they were underpaid or that they had no record of indiscipline and sought that the Claimants strictly prove their averments. The Respondent averred that Gazette Notice No. 2356 dated 28<sup>th</sup> February 2017 banned the manufacture and importation of all plastic bags used in commercial and housing packaging and that the ban took effect on 28<sup>th</sup> August 2017 entirely frustrating the Respondent's main business. The Respondent averred that if the Claimants were its employees then the payments made to them were at all times in compliance with the law. The Respondent denied dismissing the Claimants unlawfully or failing to pay them their terminal dues comprising of their full pay, leave or issuing them with certificates of service. The Respondent denied paying them anything other than a consolidated salary plus any dues for the extra hours worked. The Respondent denied the jurisdiction of the court asserting that the suit ought to have been filed in Nairobi. The Respondent urged the dismissal of the suit.

3. The 1<sup>st</sup> Claimant testified on behalf of all the Claimants having been given the authority to plead. He stated that the plastic ban related to plastic bags for domestic use and that the plastic bags used in packing medicines, garbage or bread were still produced. He stated that no notice was given to the Ministry of Labour as required by law and no house allowance was paid contrary to their expectation. He produced payslips and the NSSF statements as evidence of their employment and underpayment. In cross-examination he testified that he had worked in the manufacture of plastics and was operating a machine that produced both the domestic and industrial packaging including those for Mini Bakers. He testified that the production staff sued and he was not aware if the security staff sued. He stated that in their NSSF statements there some gaps. He admitted that the payslips bore the overtime paid each month. He stated that there was no need to close shop as there was capacity to continue production of the non-banned plastic. In re-exam he stated that he did not need a certificate to differentiate between the single use plastic for domestic use and the packaging used for industrial packaging.

4. The Respondent called Abdukadir Mohamad Said who testified that he was the general manager of the Respondent at the time. He stated that the Respondent used to make the soft bags used by *mama mboga* and that the Respondent did not make the packaging used for bread or cartons. He denied knowing the Claimants no. 21 Christine and 32 Faith Munyao. He stated that the Claimants 1-19, 26, 28, 36 were machine operators while no. 22-25 and 33 were cleaners while no. 4, 20, 27, 29-31, 34 and 35 were general labourers. He stated that the Claimants were notified of the closure of the company due to the ban. In cross-exam he testified that the salary was consolidated. He admitted that the Respondent had not produced evidence that the Respondent did not manufacture the other forms of plastic as alleged by the Claimants. He agreed that the staff were notified but the labour office was not. He denied that Christine Okicha and Faith Munyao were the Respondent's employees.

5. The parties were to file submissions and the Claimants submitted that the Respondent's witness was not candid as the payslips for the 2 staff that he denied were produced in evidence clearly demonstrating the 2 were employees of the Respondent. It was submitted that whereas it was the duty of the employee to register with NSSF, it was the duty of the employer to ensure remittances were made after deduction of NSSF dues. The Claimants submitted that it was not the absence of an NSSF statement that confirmed employment but the employment records maintained by the employer. The Claimants submitted that the Respondent had failed to show the records kept under Section 74(1) of the Employment Act to show who its employees were if it wished to controvert the Claimants allegations. The Claimants relied on the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited [2013] eKLR** and the case of **Joseph Omollo v Board of Management Kisumu Boys High School** which cited with approval the case of **Lawi Wekesa Wasike v Mattan Contractors Limited [2016] eKLR** on the issue of employee records. The case of **Josephine M. Akinyi v Farhiyo Mohamed [2016] eKLR** was cited for the proposition that where the employer fails to produce the contract of employment the employee's averment must be given more weight. The Claimants relied on the case of **Kenya Union of Domestic, Hotel and Educational Institutions, Hotels & Allied Workers Union v Muthaiga Golf Club [2012] eKLR** on the matter of the verifying affidavit which was stated by the Respondent to be defective. The Claimants submitted that the dismissal amounted to a redundancy which the Respondent did not effect legally. The Claimants submitted that on the authority of **Halsbury's Laws of England, Volume 16 – 4<sup>th</sup> Edition** at page 434, the term 'redundancy' is defined. The Claimants submitted that the Respondent did not adhere to the mandatory legal provisions for doing so and refused to pay their statutory entitlements. The Claimants submitted that only two categories of plastics were banned by the Gazette Notice and that the Respondent's business was therefore not entirely shut down by dint of the notice since there was other business it could engage in. The Claimants relied on the case of **Tsakiroglou & Co. Ltd v Noble & Thorl G.m.b.H [1961] 2 All ER 179** where the court held that there was no frustration of contract in that case where shipping of groundnuts via the Suez Canal was rendered impossible but the groundnuts could be shipped via the Cape of Good Hope, a much longer route. They relied also on the case of **Davis Contractors, Ltd v Fareham Urban District Council [1955] 1 All ER 275** on the issues regarding the banning of the two categories of plastic bags. The Claimants submitted that by employing the Claimants Christine Stephen Okicha in June 2017 and Sorokey Musdaf Edin in March 2017 the Respondent was estopped from alleging the contracts were frustrated as it had contemplated hiring even when it was aware of the ban. The Claimants submitted that they were not notified of the intention to shut down. They cited the cases of **Kenya Airways Limited v Kenya Aviation & Allied Workers Union & 3 Others [2014] eKLR**, **Gladys Agayo v Somak Travel Limited [2015] eKLR**, **Timothy Mabeta Kambuni v Bedson East Africa Limited [2013] eKLR** and **Kevin Ziro Pole v Elsek & Elsek Limited [2015] eKLR** on the law on redundancy. Regarding the records to be kept by the employer, the Claimants cited the case of **Lawi Wekesa Wasike v Mattan Contractors Limited [2016] eKLR** and submitted that the Respondent did not produce any records to controvert the averments and evidence of the Claimants regarding their employment. The Claimants relied on the case of **Chandler v Webster [1904] KB 493** for the proposition that they were entitled to the benefits accruing to them from the employment and that the law having taken effect the loss would lie where it fell and that the event would only affect the obligations falling due after the supervening event. The Claimants thus urged the grant of the prayers sought.

6. The Respondent on its part submitted that the undisputed facts were that the Respondent engaged in the manufacture of plastics which were banned by the Government. The Respondent submitted that after the ban the Kenya Association of Manufacturers instituted a Petition seeking orders to quash the Gazette Notice and stay its implementation and that the ban took effect on 28<sup>th</sup> August 2017 after the High Court dismissed the application for conservatory orders. The Respondent submitted that the ban took effect immediately and frustrated all of its operations. The Respondent submitted that the employees had the right to lodge a suit relating to their employment but submitted that the dismissal was fair. The Respondent submitted that the Claimants did not prove that the Respondent had the capacity to produce any of the exempted classes of plastic bags such as those for industrial use. The Respondent argued that a party is bound by their pleadings and that the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** bolstered their argument. It submitted that the attempt by the Claimants to shift the burden of proof upon the Respondent was therefore not tenable. The case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** citing with approval the Supreme Court of Nigeria in the case of **Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** on the issue of parties being bound by their pleadings. The Respondent submitted that the closure of the Respondent was inevitable following the ban and that it had no other way of sustaining the contracts or save its business due to loss of substratum by reason of illegality. The Respondent submitted that the issue of redundancy did not arise as the law contemplates it as occurring as a result of internal organizational processes none of which were the circumstances for termination in the case before the court. The Respondent submitted that the case related to frustration of contract and cited the case of **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** where the Court of Appeal dealt with the issue of frustration of contract and quoted **Halsbury's Laws of England 3<sup>rd</sup> Edition volume 8 pages 185 (ii) Para 320** on the doctrine of frustration. The Respondent also cited the case of **Joshua Nyagol Onyango & 4 Others v Relief & Missions Logistics Limited [2017] eKLR** on the doctrine of frustration. In that case there was a frustration of the contract at the airport between the Respondent (the employer) and KAA. The Respondent submitted that the Claimants were therefore not entitled to the prayers sought in the claim.

7. The Claimants were all employees of the Respondent as the exhibits demonstrate. Despite denial of the two staff who the Respondent's witness Mr. Said said were not their employees, these two were employees and nothing to the contrary can be the truth. The contracts of all the Claimants were indeed frustrated by the Gazette Notice banning the use of single use plastics. **Halsbury's Laws of England 3<sup>rd</sup> Edition volume 8** para 320 on the Doctrine of Frustration makes provision as follows:-

*“...the doctrine of frustration operates to excuse further performance where – (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and (2) before breach, performance becomes impossible, or only possible in a very different way to that contemplated, without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration. The doctrine has been variously stated to depend on implied condition, disappearance of the foundation of the contract, and the intervention of the law.... The application of the doctrine of frustration does not depend on the intention of the parties, or of their opinions or even knowledge, as to the event which has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure”*

8. That however, did not absolve the Respondent from its obligations under the contracts. The Claimants were entitled to notice and payment of the terminal dues being leave earned, overtime worked, days worked in August 2017, the payment of housing which is a basic right in the employment sphere per Section 31 of the Employment Act. The Claimants were members of NSSF and were not entitled to the payment of severance pay. They are also not entitled to compensation as the Respondent was not responsible for the supervening event that led to the

termination. The Claimants will also have costs of the suit. The tabulation for each Claimant is as per the attachment contained in the decision. The Claimants will also have the certificate of service per Section 51 of the Employment Act.

No.	Name	Employ	Salary	Notice	Underpay	Housing	Leave	Total
1	Justus Mulandi Munuve	Dec-14	28,904	28,904	NIL	86,400	67,702	211,910
2	Shadrack Muunda Musembi	Nov-16	23,437	23,437	NIL	22,500	15,774.85	85,148.85
3	Thomas Kioli Kimwalu	Nov-15	27,298	27,298	NIL	66,300	40,422.09	161,318.09
4	Mahamud Mohamed Chari	Sep-16	15,000	15,000	NIL	29,250	12,115.38	71,365.38
5	Cleophas Mutinda Muthama	Nov-15	30,510	30,510	NIL	28,500	45,412.96	134,932.96
6	Jonah Wathome Mutua	Feb-16	30,510	30,510	NIL	47,250	39,310.91	147,580.91
7	Raphael Wambua Matilu	Jun-15	27,298	27,298	NIL	66,300	47,771.36	168,667.36
8	Fredrick Mulandi Wambua	Aug-13	32,207	32,207	NIL	151,200	104,053.38	319,667.38
9	Amos Ng'ang'a Gitau	Aug-13	25,490	25,490	NIL	158,400	82,352.31	291,732.31
10	Lawi Kiptoo Tarus	Aug-14	24,356	24,356	NIL	91,800	59,016.46	199,528.46
11	Jackson Kimuyu Peter	Nov-16	24,086	24,086	NIL	22,500	19,471.48	90,143.48
12	Stephen Kyalo	Sep-14	18,625	18,625	NIL	70,200	45,129.81	152,579.81
13	Victor Vaati Nduku	May-16	18,231	18,231	NIL	27,000	18,406.30	81,868.30
14	Joseph Gitonga Maina	Aug-13	27,298	27,298	NIL	122,400	87,230	264,226
15	Jones Odoli Tete	Aug-13	20,678	20,678	NIL	122,400	66,805.85	230,561.85
16	Shadrack Ngola Ngava	Mar-16	19,269	19,269	NIL	30,600	19,277.72	88,415.72
17	Charles Kaveva Kanuna	Mar-14	41,750	41,750	NIL	159,900	115,214	358,614.00
18	Titus Kilonzi Kawinzi	Aug-13	23,353	23,353	NIL	117,360	75,448.15	239,514.15
19	David Mwanza Musembi	Jan-16	22,139	22,139	NIL	42,750	29,802.50	116,830.50
20	Paul Kamau Ng'ang'a	Apr-15	14,000	14,000	NIL	58,800	23,476.88	110,276.88
21	Christine Stephen Okicha	June-17	14,760	14,760	NIL	5,366.88	2,980.38	37,867.26
22	Sorokey Musdaf Edin	Mar-17	10,000	11,926.40	4,785.40	10,733.76	4,013.71	41,459.27
23	Fatuma Abkul Kotola	Jan-16	10,000	11,926.40	4,785.40	35,779.20	16,054.85	78,545.85
24	Fatuma Gurancha Bisiko	Aug-14	19,269	19,269	NIL	64,800	46,690	150,028.00

25	Quresho Mohamed Ali	Sep-13	16,000	16,000	NIL	115,200	51,692.31	198,892.31
26	Njoli Abdi	Aug-13	27,346	27,346	NIL	129,600	88,348.62	211,910.00
27	Adan Abdub Komba	Aug-14	22,634	22,634	NIL	86,400	54,843.92	85,148.85
28	Joseph Kioko Nzau	Jul-15	19,269	19,269	NIL	45,000	47,987.52	161,318.09
29	Said Mohamed	Apr-16	12,000	12,000	NIL	28,800	12,923.10	71,365.38
30	Nzau Kiusya	Jul-16	19,269	19,269	NIL	25,200	16,860.38	134,932.96
31	Samuel King'ori	Oct-16	12,000	12,000	NIL	18,000	8,076.92	147,580.91
32	Faith Munyao	Mar-17	10,000	10,000	4,785.40	10,733.76	4,031.69	168,667.36
33	Hawa Mohammed	Nov-16	10,000	10,000	4,785	17,889.60	7,724.65	319,667.38
34	Rodgers Mambo	Feb-16	21,269	21,269	NIL	57,426.40	25,768.21	291,732.31
35	Daudi Hassan	May-15	14,000	14,000	NIL	81,900	36,750	199,528.46
36	Isika Kiema	Aug-13	27,586	27,586	NIL	108,000	89,124	90,143.48

It is so ordered.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**