



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 925A OF 2014

(Before Hon. Lady Justice Maureen Onyango)

OMWENGA JOSEPH CHANAI.....	1 ST CLAIMANT
MOMANYI ABEL MORANGA.....	2 ND CLAIMANT
OOKO SAMUEL ANYANGO.....	3 RD CLAIMANT
MOHAMMUD EIDIN ADAN.....	4 TH CLAIMANT
GESIMBA SAMSON SIRIMANI.....	5 TH CLAIMANT
BULE DIMA JALDESA.....	6 TH CLAIMANT
MOMANYI GEORGE KEBUNGO.....	7 TH CLAIMANT
ORANGO EDWARD NYASENDE.....	8 TH CLAIMANT
EVANS OMARE.....	9 TH CLAIMANT
GUYO DUBA BORU.....	10 TH CLAIMANT
DAVID MWANGI KANGARA.....	11 TH CLAIMANT
SABIR BAKARI.....	12 TH CLAIMANT
MARTIN MBONDO.....	13 TH CLAIMANT
PETER OKAL.....	14 TH CLAIMANT
BONIFACE MOMANYI.....	15 TH CLAIMANT
ROBERT MWANGI.....	16 TH CLAIMANT
REBECAH SOMPIO.....	17 TH CLAIMANT
BILA MOSES AMAYO.....	18 TH CLAIMANT
ANTOR NDUKU JOSEPH.....	19 TH CLAIMANT
MARIAM ABDALAH.....	20 TH CLAIMANT

SHADRACK MWANGAGI MUYA.....21ST CLAIMANT
WABUKO IBRAHIM OBWENYA.....22ND CLAIMANT
ABDALA CHADI ELVINA.....23RD CLAIMANT
NURIA ADE.....24TH CLAIMANT
BONFACE OMWEBU.....25TH CLAIMANT
MOHAMED NOOR HASSAN.....26TH CLAIMANT
FREDRICK W. MWONYONYI.....27TH CLAIMANT

VERSUS

JACK AND JILL SUPERMARKET LIMITED.....RESPONDENT

JUDGMENT

The Claimants herein filed their Statement of Claim on 3rd June 2014 in which they aver that they lost employment and were declared redundant by the demolition of the Respondent's premises on 23rd May 2013. They aver that they were consequently wrongfully and unlawfully terminated and therefore seek the following reliefs:

- a. A declaration that the purported laying of the Claimants redundant amount to unfair termination.
- b. The Claimants be paid the amount they would have earned under the full term of their employment as well as renewed contracts if they would not have been terminated unfairly by the Respondent (as particularised under Paragraph 23 of the Claim).
- c. The Respondent be ordered to remit all the statutory deductions which it was supposed to remit to the Claimants retirement benefits scheme.
- d. Costs of the cause.
- e. Interest on (b) (c) and (d)
- f. Any other or further relief that the Court may deem fit to grant.

The Respondent filed its Reply to the Statement of Claim in which it admits that its premises were illegally demolished by hired thugs on 23rd May 2013. It however denied having declared any of its employees redundant or having terminated their employment. It avers that it does not owe the Claimants any dues.

Claimants' Case

JOSEPH OMWENGA CHANAI, CW1, testified on behalf of the claimants that he worked for the Respondent for 25 years. He testified that on 23rd May 2013 the claimants were at work when at 3.30 pm they heard bulldozers bring down the building housing the supermarket, the Respondent herein. He testified that they were not aware of the happenings and were not told whether they had been terminated or not. He testified that the respondent had been issued with a notice to vacate the premises but it did not inform its employees of the notice. He testified that they were not paid their May 2013 salary or salary in lieu of notice. He further testified that they were never issued with letters of appointment but they had their staff IDs and payslips to prove their employment.

In cross-examination, he testified that the terms of employment of the employees were different. He testified that he started working with the Respondent in 1990 but his staff ID stated that it was issued on 8th April 1997. He testified that they had been paid mid-month pay which was made on 15th May 2013 but they were not paid for the period worked between 15th May 2013 to 23rd May 2013 when the supermarket was demolished.

He testified that there was a Court Order issued on 24th March 2009 stopping the eviction of tenants including Jack and Jill Supermarket but the employees did not know about it. He testified that he knew Antor Nduku Joseph who ceased working on 27th July 2011. He however testified that the said Antor Nduku was at work during the demolition.

He testified that it was not true that the demolition was unexpected since the demolition was not abrupt. He testified that there was no written notice. He testified that none of the claimants was issued with a notice of termination and that none of the 27 employees went on leave. He testified that they ought to have been paid half (½) salary for the month of May 2013.

Respondent's Case

SHAWN NURANI, RW1 testified that he is the Managing Director of Jack and Jill Supermarket but was currently jobless. He testified that the company was incorporated in 1988 and the allegation by one of the Claimants Mohammed Eidin Adan that he was employed in 1984 is not true. He testified that the supermarket no longer operates as it was destroyed by his then Landlord on 23rd May 2013 as the landlord forcefully evicted them.

He testified that the respondent had been issued with a notice to vacate but the Business Premises Tribunal issued orders barring the landlord from interfering with the business. That the matter was further canvassed in Judicial Review Application No. 185 of 2009. He denied that he orchestrated the demolition as alleged by the Claimants. He testified that the claims by the employees are not genuine since he always issued the employees with an employment application form and that they were issued with contracts. He testified that the staff IDs produced by the Claimants were fake and that all persons who claimed to have worked between 29 to 3 years were fake employees. He further testified that all documents were destroyed. That the payslips produced by the Claimants were computer generated and were not from his office. He testified that he reported the eviction to Kilimani Police Station where it was registered as OB No. 60/97/06/2014.

RW1 testified that he paid the Claimants mid month and at the end of the month. That even if the Claimants were to be paid they are only entitled to be paid for the 7 days worked before the demolition. He testified that the respondent paid leave every year. Further, that the claimants applied for leave by making a formal application which none of them had produced. He testified that he had produced bank statements and documents from Kenya Revenue Authority (KRA) which indicate that there was no money in the respondent's bank account. It was his evidence that he did not sack the Claimants.

In cross-examination RW1 testified that the Respondent has never been wound up and neither has it been declared bankrupt. However it is not operational. He testified that the Respondent is unable to pay the sums claimed if awarded.

He testified that he is not a Director of any company other than the respondent.

Claimants' Submissions

It is submitted for the Claimants that those who were not listed as employees being Mariam Abdallah, Rebecah Simpjo, Antor Nduku Joseph and Nurai Ade had received their salaries as evidenced in the payslips and the staff IDs.

It was further submitted that the termination was a result of demolition which was not occasioned by the claimants and that such loss of employment is redundancy and attributable to the Respondent. The claimants relied on the definition of redundancy under Section 2 of the Employment Act and the Court of Appeal decision in *Kenya Airways Limited v Aviation & Allied workers Union Kenya & 3 Others [2014] eKLR*.

The Claimants submitted that it is common ground that they were not notified of the termination as required under section 40(1)(a) and (b) of the Employment Act. They submitted that no termination letters or notification of redundancy letters were issued to them or the labour officer. It was submitted that consultations were imperative as required under the law.

It is their submission that they are entitled to an award of damages since their termination was not substantively and procedurally justified. They submitted that the Respondent failed to remit their statutory deductions and was therefore in breach of section 40(1)(e) (f) and (g) of the Employment Act. They further submitted that they are entitled to payment of their salaries for the period between 15th May 2013 and 23rd May 2013. They submitted that they are entitled to interest at court rates and costs of the suit.

Respondent's Submissions

The Respondent submitted that the employment records presented by the Claimants were inconsistent and would not assist the court reach a just finding as Antor Nduku and Mariam Abdalla had resigned at the time of demolition while Mohamed Eidin Adan stated that he started working for the respondent even before the Respondent was incorporated.

It submitted that the circumstances of the loss of the claimants' loss of employment by the claimants cannot be attributed to redundancy as defined under section 2 and section 40 of the Employment Act as the employment contracts between the Claimants and Respondents were frustrated by an intervening act of a third party.

It submitted that the salary payable to the claimants for the month of May would be a sum of Kshs.234,000 being the remaining 8 days in the month of May.

It submitted that the claim on salary in lieu of notice is untenable as it was impractical to issue a notice as the contracts were frustrated by an intervening event beyond the Respondent's control. It submitted that the Claimants have not proved their entitlements to leave. It submitted that the Claimants contracts having been frustrated through the intervening actions of a third party the Claimant cannot be paid damages. It further submitted that it had proved that it paid the statutory deductions.

Determination

It is not disputed that the premises in which the respondent operated was demolished by the Landlord on 23rd May 2013. The result of the demolition was the loss of employment by the Claimants which is the issue of contention in this suit. The main issues for consideration are therefore:

- a. Whether the loss of employment by the claimants was on account of redundancy.
- b. Whether the Claimants are entitled to the reliefs sought.

Redundancy.

The Claimants case is that the respondent was aware of the impending demolition of the premises as it had been in a protracted legal battle with its Landlord, and there were a series of cases at both the Business Premises Rent Tribunal and at the High Court resulting to the Judgment in *Jack and Jill Supermarkets v Victor Maina Njunjiri [2018] eKLR* delivered on 25th October 2018. CW1 testified that the demolition was not abrupt and also stated that he was aware that there was a Court order barring the eviction of the Respondent.

The Respondent avers that the loss of employment was not occasioned by the Respondent but by a third party.

Section 2 of the Employment Act defines redundancy as:

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

The Black's Law Dictionary, 10th edition defines redundancy as:

A situation in which an employee is laid off from work because the employer no longer needs the employee.

From the foregoing definitions, redundancy entails loss of employment at the initiation of the employer. The present instance though perhaps not anticipated by the employer occurred when the Landlord, a third party, descended upon the Respondent's premises on 23rd May 2013 with bulldozers and brought down the premises where the respondent was operating the business. Despite, the legal battle between the Landlord and the Respondent, the Respondent cannot deny having anticipated the demolition of the premises at the time it was done and the resultant loss of property. Further, the employment of the Claimants in this instance cannot be termed as being superfluous in strict sense. Should the premises not have been destroyed the employees would have continued to work

In *Kenya Airways Limited -V- Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR*, which this Court shall further cite, Maraga JA (as he then was) defined redundancy as follows –

“There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases 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. The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.”

The circumstances of this case are unique. The respondent had received notice to vacate the premises. He had gone to court way back in 2009 and obtained orders staying the demolition both in the High Court and the Business Premises Tribunal. According to the evidence on record, the demolition was carried out in defiance of court orders and the Landlord was subsequently found guilty of contempt.

Does this however mean that he is not responsible for his employees whose employment came to an end as a result of the illegal demolition? In my opinion, the eviction was not an excuse to terminate the employment of the workers in the manner that it was done. The respondent had a responsibility to notify the employees of the likelihood of termination of their employment should the demolition occur, or to make alternative arrangements for premises to carry on the businesses. It was aware that the Landlord had been sued by the City Council, Department of Public Health over the poor state of repairs and renovations of the premises which would eventually have to be demolished or vacated by the tenants for the renovations and repairs. It was only a matter of time. . The respondent had been given adequate notice and valid reason for vacating the premises, which a prudent person would have heeded to either wind up or relocate the business.

The respondent however did nothing up to the date of the demolition of the premises. His reaction to the demolition was also to do nothing. He did not bother about the plight of his employees. He did not care what happened to their jobs after the demolition.

The employment of an employee does not come to an end merely because the premises where the employee was working have been destroyed. The respondent had a duty to either relocate to alternative premises or formally bring the employment of the claimants to an end on the grounds of the demolition. The respondent however did neither.

He cannot be heard to say, as he has argued, that the contract was frustrated by acts of a third party. The acts of the third party did not make it impossible for the respondent to formally terminate the employment relationship or relocate the employment premises.

The definition of redundancy, as expressed by Maraga JA (as he then was) in the case of *Kenya Airways Limited -V- Aviation and Allied Workers Union Kenya and 3 Others* (supra) is on point. It has to be involuntary, that is, not initiated by or due to the fault of the employee, and also be due to factors beyond the employer.

Going by that definition, the circumstances of the loss of employment by the claimants herein amount to a redundancy. The demolition of

the premises where the respondent operated and the claimants worked caused the loss of employment by the claimants. This was a factor that was (immediately) beyond the control of the employer.

For these reasons, I find and declare the loss of employment by the claimants to have arisen through redundancy.

Whether the Claimants are entitled to the reliefs sought

Before determining whether the Claimants are entitled to the reliefs sought this Court must first determine whether all the Claimants were the Respondent's employees at the time of the demolition. The Court appreciates that the Respondent's documents may have been destroyed or lost at its business premises during demolition as stated by RW1. The Claimants and RW1 agree that the mid-month salary payment was made on 15th May 2013 before the demolition. CW1 testified that the Claimants were in employment at the time of the demolition but admitted that Antor Nduku ceased working on 27th July 2011. Mohamed Eidin Adan alleged that he started working in 1984 while the Respondent was incorporated in 1988.

The Court finds that based on the Payment Generation Report filed by the respondent for the payments made on 15th May 2013, all the Claimants were included in the payroll except Rebecca Sompio, Antor Nduku Joseph, Mariam Abdalah and Nuria Ade. Consequently the court finds that these four claimants have not proved that as at the time of demolition they were in the Respondent's employment. I further find that Mohammad Eidin Adan and Bule Dima Jaldesa were paid in full and final settlement as is evident from documents filed by the respondent. This leaves only the remaining 21 claimants as valid beneficiaries of this judgment.

The Claimants having worked for the period between 15th May 2013 to 23rd May 2013, they are only entitled to payment for the days worked between 15th May 2013 and 23rd May 2013. This was admitted by the respondent to be the sum of Kshs.234,000.

The Court having found that the termination of the claimants was as a result of redundancy, the claimants are entitled to severance pay at the rate of 15 days' pay for each completed year of service.

The claim for leave pay is dismissed as the Claimants did not individually prove the period for which the leave pay is sought, except for leave for the year 2013 up to the date of demolition, being 4 months leave at 7 days based on 1.75 days per month. This is based on the fact that RW1 testified that the respondent paid leave at the end of each year.

They are also entitled to salary in lieu of notice.

Since this was a redundancy and considering the circumstances under which it occurred, the claimants are not entitled to compensation for unfair termination. I will also not penalise the respondent for failure to notify the employees and the Labour Office about impending redundancy as least one month prior to the event as this was not possible in the circumstances of this case.

I therefore award each of the claimants as set out on the table below-

EMPLOYEE NAME	SALARY PAYABLE FROM 16 TH - 23 RD MAY 2013 (Salary/26 x 8)	ONE MONTH'S PAY IN LIEU OF NOTICE	YEARS WORKED	SEVERANCE PAY AT 15 DAYS FOR EACH YEAR OF SERVICE (Salary/2 x years worked)	PAYMENT IN LIEU OF LEAVE (Salary/26 x 7)	TOTAL
1. OMWENG A JOSEPH CHANAI	6,461.54	21,000	23 years	241,500	5,653.85	274,615.38
2. MOMANYI ABEL MORANGA	9,230.77	30,000	19 years	285,000	8,076.92	332,307.69
3. OOKO SAMUEL ANYANGO	6,153.85	20,000	17 years	170,000	5,384.62	201,538.46
4. GESIMBA SAMSON SIRIMANI	4,307.69	14,000	10 years	70,000	3,769.23	92,076.92
5. MOMANYI GEORGE	4,307.69	14,000	13 years	91,000	3,769.23	113,076.92

KEBUNGO						
6. ORANGO EDWARD NYASENDE	4,615.38	15,000	10 years	75,000	4,038.46	98,653.85
7. EVANS OMARE	4,615.38	15,000	10 years	75,000	4,038.46	98,653.85
8. GUYO DUBA BORU	3,692.31	12,000	8 years	48,000	3,230.77	66,923.08
9. DAVID MWANGI KANGARA	4,615.38	15,000	4 years	30,000	4,038.46	53,653.85
10. SABIR BAKARI	4,615.38	15,000	4 years	30,000	4,038.46	53,653.85
11. MARTIN MBONDO	3,692.31	12,000	4 years	24,000	3,230.77	42,923.08
12. PETER OKAL	4,615.38	15,000	1 year	7,500	4,038.46	31,153.85
13. BONIFACE MOMANYI	4,615.38	15,000	1 year	7,500	4,038.46	31,153.85
14. ROBERT MWANGI	4,615.38	15,000	1 year	7,500	4,038.46	31,153.85
15. BILA MOSES AMAYO	6,153.85	20,000	19 years	190,000	5,384.62	221,538.46
16. SHADRACK MWANGI MUYA	4,615.38	15,000	6 years	45,000	4,038.46	68,653.85
17. WABUKO IBRAHIM OBWENYA	4,615.38	15,000	13 years	97,500	4,038.46	121,153.85
18. ABDALA CHADI ELVINA	3,184.62	10,350	9 years	46,575	2,786.54	62,896.15
19. BONFACE OMWEBU	3,692.31	12,000	4 years	24,000	3,230.77	42,923.08
20. MOHAMED NOOR	5,230.77	17,000	16 years	136,000	4,576.92	162,807.69

HASSAN						
21. FREDRICK W. MWONYO NYI	4,615.38	15,000	13 years	97,500	4,038.46	121,153.85
TOTAL						2,322,665.38

The respondent shall pay claimants' costs.

Interest shall accrue from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF AUGUST 2019

MAUREEN ONYANGO

JUDGE