



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 10 OF 2012

[Formerly Cause Number 703 of 2011 IC at Nairobi]

BETWEEN

- 1. JOSEPH ASHIOYA**
- 2. KIMWELE NDAMBU**
- 3. ALI HAMISI**
- 4. AGGREY DANIEL**
- 5. SIMBA MOHAMED**
- 6. ALI KIMERA**
- 7. MUTHAMI MUTHUGI**
- 8. SWALEH MOHAMED**
- 9. DANIEL MWANGANGI**
- 10. OSMAN ABDI**
- 11. DAVID ODONGO**
- 12. NYUNDO NYIRO**
- 13. JOSEPH KITIVI**
- 14. PETER OSUNGA**
- 15. SALIM CHAMBOGA**
- 16. JACKSON NZAI**
- 17. FRANCIS LUKHAFWA**
- 18. NDITE KYALO**
- 19. CHARO MWAGANDI**
- 20. ROBINSON NZAI**
- 21. WALLACE INGAIZA**

22. OMARI A. MWAJABE
23. GIDEON MUKETO
24. JABIR SAHA
25. MOHAMED MWAKAUZWA
26. OMAR SALIM
27. SAIDI MOHAMED MASAA
28. GERALD OKELLO
29. SAMMY MUMBI
30. KARISA H. KEMBA
31. DICKSON OTIENDE
32. MESHACK SIWO
33. NGALA MWANDEGE
34. ALI MUHORO
35. VINCENT MWAZIGHE
36. MWAMUNGA KIMERA
37. ABDALLA JUMA
38. MILU KILUNGYA
39. MULWA NGULI
40. SHABAN KHERI
41. MASEKI NZILI
42. NJUGUNA GICHURU
43. COLMAN ODHIAMBO
44. GEORGE MUTEKE
45. JACKSON LUNGUSU
46. MVAYA MUYUGO
47. JULIUS MUNYAO
48. JOHN CHAKA
49. JULIUS OWUOR
50. CHOGA SWALEH
51. SALIM KIBWANA
52. SALIM H. SAUTI

53. NYAWA NYIRO
54. CHITI TSUMA
55. SEBASTIAN KIAMBA
56. YAWA NDONGA
57. NYANGASI MOHD
58. KHAMISI BAKARI
59. MWINYI H. KIBWANA
60. KATANA KOBO
61. FRANCIS KAZUNGU
62. TSILO MBOGO
63. AFRICARD MWARO
64. JOHN KAZUNGU
65. JOHN MENYA
66. PAUL ATUKHA
67. ELVIS ISANGI
68. JULIUS CHARO
69. MUTINDA KUYALA
70. WILLIAM KIVISU
71. GEORGE ODEMBO
72. EMMANUEL MKANDO
73. SHADRACK OUMA
74. SAMUEL MWAMANZI
75. PHINIAS KANYAGIZA
76. JUSTUS NZENGU
77. ALI MWALIMU
78. KAMANZI MWATELA
79. GIDEON HARE
80. FESTUS MADEGWA
81. PETER KOI
82. HERBERT MADOYA
83. SOLOMON KELWA

84. JACKTONE ONYANGO
85. MWADZALA WASHE
86. PETER KITEMA
87. FRANCIS MWAI
88. JOSPHAT MWENDWA
89. JACKTONE WAMEYO
90. RICHARD MWENDWA
91. JACKSON KIAMBA
92. SEBASTIAN NZOKA
93. MWAKIDUDU CHIMERA
94. CRISPINUS ODOLI
95. RASHID MBEGA
96. DOMINIC MAGUNDA
97. THOYA MZUNGU
98. MWANIA KITHEKA
99. DAVID YUMBYA
100. WILFRED ODUORY
101. JOHN OMBOGO
102. JOHN EDAGIBA
103. KYALO MBWIKA
104. MULWA KIMINZI
105. GEORGE ANYUL
106. SAIDI KAHINDI
107. JULIUS OKENO
108. WALTER MWANDO
109. OCHIENG OBEL
110. MOSES JUMA
111. AUGUSTIN MOKUA
112. JUSTIN NJUKI
113. ALI HASSAN
114. KENNETH KIMANZI

115. JOSEPH MUGO
116. ALBERT WAKHUNGU
117. DANIEL KITHEKA
118. MUNYALO KIEMA
119. JOHNAH LIGARE
120. SEFU MWANYAMA
121. GEORGE OBONYO
122. JOHN OTULA
123. MKALA PUNGA
124. PETER MULWA
125. COLLISTA OWITI
126. JOHN OMONDI
127. BAKARI MASILA
128. SWALEH JUMA
129. SAMSON NYINZA
130. WELLINGTON OGORE
131. PAUL KISUI
132. SULEIMAN ABDALLA
133. WAMBUA MUTHOKA
134. JOSEPH MUTHAMI
135. NOBERT BARAZA
136. ADAM ISSACK
137. ALBERT OCHANDA
138. MESHACK OKEYO
139. BOSWELL FUMBU
140. FREDRICK GIBSON
141. LAWRENCE CHARO
142. WILLIAM OPWAPO
143. GEORGE MUTIA
144. JOSEPH MUTHINI

145. WILBERFORCE KADERE
146. SALIM MWATSAKA
147. MWANGEKA VENANT
148. JIMMY KIMINA
149. JOHN ARIWO
150. MANUEL CHARO
151. S.L. DARMAR
152. HAMISI KITEMA
153. PETER WANJE
154. JOSPHAT KITAVI
155. ERIC MOINDI
156. JOSEPH KIMUNYU
157. JOSHUA MUTAMBUKI
158. HASSAN NJAMA
159. MANILAL JOSHI
160. MBWANA ALI MOHAMED
161. VITALIS MAGOMBA
162. GEORGE MUNYESHE
163. BENSON AZOROZO
164. NGOMANO NGOVI
165. KAMAU MUTHOMO
166. DAVID KAKUNDU
167. ERNEST JUMA
168. OMARI MWAKULAMBA
169. ABDALLA AYUBU
170. MOHAMED MBUI
171. PETER MUASYA
172. JOHN MUTUNGA

VERSUS

KENYA UNITED STEEL COMPANY [2006] LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

JUDGMENT

1. This Claim was filed by Kituo Cha Sheria, registered at the Industrial Court at Nairobi, as Cause Number 703 of 2011. It was filed on 9th May 2011.
2. The Statement of Claim, which is accompanied by an Authority to Act, lists 164 Claimants. The Claimants applied to amend the Statement of Claim in an Application filed on 5th September 2012. The Application was granted on 27th September 2012. 8 Claimants were added to the Claim, but subsequent Pleadings still refer to 'Joseph Ashioya & 165 Others.' The Court has carefully looked at the Pleadings, and found the number of Claimants is 172, as listed above.
3. The Respondent is named as Kenya United Steel Company [2006] Limited. Its acronym is KUSCO [2006] Limited.
4. The Claimants state, they were employed by the Respondent Company on various dates, in different positions.
5. The Employer was placed under receivership upon failing to meet loan obligations, under debenture concluded with the Kenya Commercial Bank [KCB] Limited. Pricewaterhouse Coopers Limited was appointed as the Receiver-Manager. This was on 16th September 2003. Pricewaterhouse Coopers Limited was initially named as the 2nd Respondent by the Claimants. The Claim against Pricewaterhouse Coopers Limited was dismissed, through a Ruling of the Court delivered on 26th July 2013 [Radido J]. The Claimants were placed at liberty to proceed with the Claim against the sole Respondent named above.
6. By end of December 2003, the Claimants aver, they had not received salaries for 4 months, dating back to September 2003.
7. In January 2004, they were asked to leave, and report back to work on 1st March 2004. They were in February 2004, asked to keep patient, and wait for further communication from the Respondent.
8. Sometime in July 2005, the Claimants learnt that their Employer Company had been sold to a Ugandan Investor by the Receiver-Manager, on behalf of the Debenture-Holder, KCB Limited.
9. The Claimants' contracts were never terminated. There was no declaration of redundancy made. No terminal dues were paid. There was no communication from the Respondent. The Claimants considered themselves to be on unpaid leave.
10. There were consultations between the Claimants' Union, Kenya Engineering Workers Union [KEWU] and the Respondent. The Provincial Labour Officer was also involved. The Union and the Employer had concluded a collective agreement, which formed part of the Claimants' contracts of employment.
11. It emerged in the course of the consultations and negotiations, that some of the Claimants had reached the age of retirement, at the time the Respondent fell into financial difficulties.
12. Kamau Muthomo, David Kakundu, Ernest Juma, Omari Mwakulamba, Abdalla Ayubu, Mohamed Mbui, Peter Muasya and John Mutunga were retired by the Respondent, without payment of retirement benefits. They were owed at the time of filing the Claim, a total sum of Kshs. 2,253,347.
13. The Claimants aver that in total, they are owed unpaid salaries and terminal dues, at Kshs. 35,813,990.
14. If at all the Claimants' contracts were terminated, they state they were entitled to redundancy benefits under the relevant collective agreement. They state they were entitled to notice or notice pay; arrears of salaries; and gratuity.
15. The Claimants pray for Judgment against the Respondent for:-
 - a) 4 months' salary and benefits amounting to Kshs. 5,974,791, covering the period immediately prior to, the Claimants being sent on unpaid leave.
 - b) All benefits including severance pay, annual leave pay, housing and other allowances for the years served with the Respondent as per the collective agreement applicable to the Parties, amounting to Kshs. 29,839,199.
 - c) Interest.
 - d) Costs.
16. Pricewaterhouse Coopers Limited filed its Statement of Response on 20th May 2013. As Pricewaterhouse Coopers Limited, the Receiver-

Manager, was discharged by the Court from the proceedings, it is not necessary to go into details of this Statement of Response.

17. The Respondent filed its Statement of Response on 8th February 2012. Its position is that by 1st December 2005, the Employer was a Company known as Kenya United Steel Company Limited, [KUSCO Limited].

18. This Company was placed under receivership by Debenture-Holder, KCB Limited.

19. On 1st December 2005, KUSCO Limited and KCB Limited sold the land and other assets of KUSCO Limited, on receivership to S.R.M Limited.

20. By a special resolution of its Board of Directors, S.R.M Limited changed its name to Kenya United Steel Company [2006] Limited. The rationale in this change was, to retain the market share and the clientele of KUSCO Limited. A Certificate of Change of Name was issued on 26th July 2006 by the Registrar of Companies. A copy is exhibited in the Statement of Response filed by the Respondent.

21. The Respondent recruited staff sometime in 2006, and commenced operations in April 2007.

22. The Respondent did not have any employment relationship with the Claimants, at the time liability is said to have arisen. Its predecessor, S.R.M Limited, was an innocent purchaser of value, without notice.

23. The Respondent states the Claim is time-barred under the Limitation of Actions Act. The Court notes this line of response was considered, and rejected in the Ruling of the Court discharging the Receiver - Manager, dated 26th July 2013. Nothing therefore turns on Limitation of Actions Act.

24. The matter has not proceeded to full hearing since 2011, for one reason or the other. The Claimants spent some considerable time, after the Receiver-Manager was discharged, attempting to bring back the Receiver-Manager into the proceedings. There was a Ruling on 29th September 2016, reaffirming the discharge of the Receiver-Manager.

25. The Federation of Kenya Employers [FKE] filed an Application on 25th September 2018, seeking leave to cease acting for the Respondent. It was explained to the Court that the FKE was not able to contact their Client, which is a registered Company, with a physical place of business, as far as the record shows.

26. The Court allowed FKE to cease acting for the Respondent, and directed on 22nd November 2018, that this longstanding dispute is disposed of through Rule 21 of the Employment & Labour Relations Court [Procedure] Rules 2016. This directive was based on the current Judiciary Policy, to have matters filed on, or before the year 2013, matters 5 years or older, concluded by the end of the year 2018.

27. The Law Firm of Moses Mwakisha & Company filed Notice of Appointment of Advocates, dated 5th December 2018, on instructions of the Respondent.

28. Parties confirmed the filing of their Submissions on 7th December 2018. The Respondent also filed a Further Affidavit sworn by its Managing Director Abid Alam on 11th December 2018. The Court had placed Parties at liberty to file with their Closing Submissions, Further Affidavits. The Further Affidavit exhibits documents, which had already been filed by the Parties years back.

29. The dispute was subject of conciliation at the Labour Office, before escalation to Court. The Labour Office filed a Report in Court on 16th April 2014.

30. The Labour Office made the following findings and recommendations:-

- The Claimants were employed by Kenya United Steel Company Limited.
- The Company was indebted to KCB Limited, and placed under receivership.
- Pricewaterhouse Coopers Limited was appointed Receiver-Manager.
- The Company was sold by the Receiver-Manager.
- The business was renamed Kenya United Steel Company [2006] Limited.
- The renamed Company reabsorbed some of the Employees of the previous Company.
- The Receiver-Manager retained employment of 153 Employees from September 2003 to December 2003.
- They were not paid salary for this period.
- The Receiver-Manager was their Employer for this period.
- The Labour Office recommended that the Receiver-Manager pays to the Claimants salary for days worked from September 2003 to December 2003. It was recommended further that each Claimant is paid severance and any other benefits in accordance with the collective agreement.

It is not clear from the further recommendation, if the Receiver-Manager was to pay severance and any other benefits, in accordance with the collective agreement.

31. It is against the background of the Report from the Labour Office, that the Claimants sought review of the Ruling, which discharged the

Receiver-Manager from the proceedings. They argued that the Court did not have the benefit of the Report from the Labour Office, at the time of discharge. The Court rejected the Application for review, on the ground that review would amount to the Court sitting on appeal against its own decision. There was no Appeal lodged by the Claimants against the Ruling discharging the Receiver-Manager, or the subsequent Ruling, declining review.

Claimants' Submissions

32. The Claimants submit that Kenya United Steel Company Limited, was never wound up, and remained in existence throughout the pendency of the Claim.

33. The Company named as Kenya United Steel Company [2006] Limited did not appear in the Companies Registry, meaning it was only registered as a Business Name.

34. The contention by the Respondent, that these are separate Companies, is meant to mislead the Court. Kenya United Steel Company Limited, and the 2006 entity, are one and same Company. This Company unlawfully terminated Claimants' employment.

35. Termination took place under the repealed Employment Act, Cap 226 the Laws of Kenya. The Respondent was required under Section 5[4] [b] of this law, to deliver to the local District Labour Office, a written Report, specifying the circumstances leading to, and reasons for dismissal, and giving details of terminal benefits the Employees would have been entitled to. The Respondent did not do so.

36. In ***Chapman v. Goonvean and Rostowrack China Clay Limited [1973] 2 All ER***, it was held that redundancy was not genuine where the requirements of the business for affected Employees, continues. The Respondent in this case misrepresented to the Claimants that it had been wound up. Official records show otherwise. The Respondent constructively terminated Claimants' contracts, and then re-hired some of them, to undertake the same roles. This was not a fair redundancy. There was no consultation in this process, as was found to be a requirement, in ***Aviation and Allied Workers' Union v. Kenya Airways Limited & 3 Ors [2012] e-KLR***.

37. These procedural requirements are reiterated in Section 16 A of the repealed Employment Act. The Respondent and the Claimants' Union had a collective agreement dated 15th January 2012. Clauses 18, 24 and 26 of that agreement, granted to the Claimants the reliefs they seek in this Claim.

38. Official records show Kenya United Steel Company [2006] Limited, [KUSCO 2006 Limited], is only a business name, and not a new entity. The Claimants have exhibited pay slips, issued in the name of KUSCO. This demonstrates that, the two entities are one. The Claimants were Employees of KUSCO. This notwithstanding, the Court has held that Employers cannot hide behind complex business registrations, to escape employment liabilities.

39. The Claimants are elderly People who worked hard in their prime, only to lose the sweat of their brow, as a result of unfair labour practices.

Respondent's Submissions

40. The Respondent submits that the Claim is time-barred under the Limitation of Actions Act, Cap 22 the Laws of Kenya. It is submitted that Justice Radido, who discharged Pricewaterhouse Coopers Limited from the proceedings, '*withheld a verdict on the question of limitation.*'

41. This submission is not correct. As stated elsewhere in this Judgment, the Court held that this dispute was initiated under the Trade Disputes Act, Cap 234 the Laws of Kenya, and is not time-barred. '*In my considered view therefore, the Limitation of Actions Act was/is not applicable to trade disputes envisaged under the repealed Trade Disputes Act,*' the Court states. Time-bar is not in issue any more.

42. The Respondent submits that the Report of the Labour Office, recommending that Pricewaterhouse Coopers Limited was liable to the Claimants, was rendered stillborn with the discharge of Pricewaterhouse Coopers from the proceedings.

43. The Respondent argues nonetheless, that the Report had merit because it was Pricewaterhouse Coopers Limited, which liquidated the assets of Kenya United Steel Company Limited. The Receiver-Manager would account for the proceeds of sale to creditors in order of preference.

44. In no circumstances can KUSCO [2006] Limited, be held liable to the Claimants.

45. There is a letter from the Registrar of Companies, dated 11th July 2013, exhibited by both Parties. As at this date, KUSCO Limited in fact still existed in the Register of Companies. The Directors and Shareholders are shown. KUSCO Limited therefore existed, even in 2013.

46. KUSCO [2006] has exhibited Certificate of Change of Name dated 26th July 2006. The Company, previously known as SRM Limited, resolved to change its name to Kenya United Steel Company [2006] Limited. The rationale is given in the Further Affidavit filed by the Respondent. The Court notes this was explained in the Statement of Response also. Although Parties are at times averse to proceeding under Rule 21, disposal of Claims is sometimes delayed by repeated statement of facts, and replication of documents. The Certificate of Change of Name is exhibited in the Statement of Response, as well as in the Further Affidavit.

47. SRM Limited purchased land, plant and equipment belonging to KUSCO Limited, from Debenture-Holder Kenya Commercial Bank Limited. The Sale Agreement is dated 1st December 2005. It is again part of the Statement of Response, and Further Affidavit. SRM Limited

did not buy shares in KUSCO Limited. It only bought land, plant and equipment. SRM Limited did not take over the liabilities of KUSCO Limited.

48. Lastly, the Respondent submits that the Claimants have exhibited contracts, showing some of them were employed by KUSCO [2006] Limited sometime in 2007. These contracts do not mention pre-existing liabilities. The Respondent submits that the Claimants have not established their case against the Respondent. They hang on the name KUSCO, without showing the legal nexus between KUSCO Limited and KUSCO [2006] Limited.

The Court Finds:-

49. The Claimants were employed by a Company known as Kenya United Steel Company Limited [KUSCO]. The registration details of this Company are captured in a letter dated 11th July 2013, from the Registrar of Companies, to the Claimants' Advocates.

50. The Company was registered on 12th July 1965.

51. There is evidence that the Company obtained a loan from KCB Limited vide a Debenture dated 9th March 1998. The Company was unable to pay, and its land and other assets were sold, to another Company called S.R.M Limited, in the year 2005.

52. The Claimants state they learnt their Employer's business was sold. They do not dispute sale. The Parties exhibited a Sale Agreement dated 1st December 2005, between KUSCO Limited [in receivership] and KCB Limited of the one part, and S.R.M Limited of the other part. S.R.M Limited purchased land and other assets of KUSCO Limited.

53. The Appointment of Receiver-Manager was challenged in ***Nairobi H.C.C.C Number 580 of 2003 between Kenya United Steel Company Limited v. Kenya Commercial Bank Limited & Another***. In a Ruling arising from this High Court Case, at the Court of Appeal of Kenya sitting in Nairobi, which is reported as ***Kenya United Steel Company Limited v. Kenya Commercial Bank Limited & Another [2005] e-KLR***, the Court of Appeal confirmed that KUSCO was advanced money by KCB Limited; KUSCO Limited's capacity to repay was weakening; and KUSCO Limited's business had not been operational since the year 2003. KCB Limited was granted the green light by the Courts to appoint a Receiver-Manager.

54. The Sale Agreement of 1st December 2005, followed after receivership was challenged in Court, and the challenge rejected. S.R.M Limited went on to buy the land and other assets of KUSCO Limited, for about Kshs. 185 million. There is a Certificate of Change of Name, given by the Registrar of Companies on 26th July 2006, showing that, with the sanction of a special resolution, S.R.M Limited changed its name to Kenya United Steel Company [2006] Limited. The adoption of a name similar to the collapsed business was explained by the Respondent. The Respondent intended to retain the market share enjoyed by the collapsed business.

55. The Court has formed the view, that the Company which initially employed the Claimants, has not been shown to be in any way connected to Kenya United Steel Company [2006] Limited.

56. Kenya United Steel Company [2006] Limited, was not the Company placed under receivership. It is not referred to as a Company under receivership, in the Statement of Claim, and in the Statements of Response.

57. This Court held in ***Miriam Saidi Mwabora & 70 others v Hotel Span Limited & 3 others, [2017] e-KLR***, that where a business collapses and is sold on receivership, such as the original Kenya United Steel Company Limited was, and the business later rises as a phoenix Company, bearing the same operational infrastructure as the collapsed business, the phoenix Company may be called upon to shoulder employment obligations accruing from the collapsed business.

58. The facts in ***Mwabora*** are however distinguishable, from the current dispute. Receivership in ***Mwabora*** was flawed. The Witness for the Debenture-Holder in ***Mwabora*** told the Court he did not know why a Receiver-Manager was appointed. It has not been established in the present dispute that KCB Limited acted fraudulently. Appointment of Receiver-Manager has not been faulted. KUSCO Limited, challenged the appointment of the Receiver-Manager up to the Court of Appeal. The challenge was unsuccessful. The Receiver-Manager, Debenture-Holder and the Purchasers in ***Mwabora***, were found to have made certain commitments to Employees, and failed to honour those obligations. KCB Limited, SRM Limited and Pricewaterhouse Coopers Limited did not assume any liability owed to the former Employees of Kenya United Steel Company Limited, under the Sale Agreement of 1st December 2005. The only undertaking made by S.R.M Limited, was that it would offer some of the former Employees of KUSCO Limited jobs, upon their application and interview.

59. S.R.M Limited has not been shown to be a phoenix Company, set up merely to assist the collapsed Kenya United Steel Company Limited, escape employment burdens. There was no element of fraud in the KCB Limited Debenture, and sale of the defaulter's assets. Receivership was sanctioned by the Courts.

60. The Court is not persuaded that Kenya United Steel Company [2006] Limited is properly joined to this Claim. S.R.M Limited, which was renamed KUSCO [2006] Limited, did not have a relationship with the Claimants. S.R.M Limited assumed the name KUSCO [2006] Limited, in order to retain the market share previously enjoyed by KUSCO Limited. There is no ground to justify imposition of employment liability on S.R.M Limited, which bought the land and other assets of KUSCO Limited, through a regular receivership transaction. The Labour Officer who investigated the matter found, that the business was sold on receivership. He suggested that the Receiver-Manager should bear responsibility for obligations to Employees, arising for the period of receivership. He suggested that Employees should be paid severance and other benefits under the collective agreement. It is not clear if his suggestion was that the Receiver-Manager should have paid arrears of salaries, as well as severance and other terminal benefits. The Report did not take into account the legal aspects of the Parties' relationships, highlighted in the Ruling of the Court of 26th July 2013. Seen against the Ruling, it seems to this Court, that the Report of the Labour Office is not sustainable. Even had the Claimants succeeded in bringing back the Receiver-Manager on review, the legal findings in the Ruling of

26th July 2013 would not have changed.

61. The Claim against the Receiver-Manager was dismissed. The Ruling was not challenged on appeal. The Claim against the Respondent, in light of the documents on record, is not sustainable. S.R.M Limited has not been shown to have any relation, other than that of an innocent purchaser, with Kenya United Steel Company Limited. It is not suggested anywhere, by the Claimants, that the Directors of KUSCO Limited, and S.R.M. Limited, are the same. On 18th December 2018, the Claimants filed Supplementary Submissions, and a Further Affidavit sworn by Lawrence Charo on 17th December 2018. Filing was done contrary to the orders made on 7th December 2018, which was, that Submissions and any other Affidavits, shall be filed and exchanged on or before 14th December 2018. The Submissions restate, which the Court has affirmed, that the Claim is not time-barred. The Claimants state in the fresh Affidavit that S.R.M Limited did not have the capacity to enter into the Sale Agreement of 1st December 2005, as S.R.M Limited was itself under receivership, from 15th February 1989. They exhibit a letter from the Assistant Registrar of Companies to this effect. This letter is dated 13th May 2014. Why would it be introduced to the proceedings, 3 days to the date of Judgment? The Claimants have not questioned the Sale Agreement of 1st December 2005, until now, 3 days to the date reserved for Judgment. The Sale Agreement was filed as an annexure to the Statement of Response, way back on 8th February 2012. It is not a fresh document, introduced by Abid Alam through his Further Affidavit, filed on 14th December 2018. S.R.M. Limited and KCB Limited, are not direct Parties in this Claim. Appointment of Receiver-Manager, was challenged at the High Court and Court of Appeal, unsuccessfully. The Sale Agreement of 1st December 2005, followed the Rulings of the High Court and the Court of Appeal. Any fresh evidence, questioning the validity of the Sale Agreement, appears to this Court to have arrived too late in the day. Claimants' Advocates have had the Assistant Registrar's Letter, from 13th May 2014. They had time to challenge the role of S.R.M Limited and KCB Limited, and even perhaps, join S.R.M. Limited and KCB Limited, to the proceedings. Is the Court to declare the Sale Agreement of 1st December 2005, invalid and of no legal consequence, in the absence of the Parties to that Agreement? Did KCB Limited receive Kshs. 185 million from a phantom, in enforcing debenture rights? The Claimants, in their evidence, and paragraph 13 of the Statement of Claim, state that sale was made to a Ugandan Investor. Their position is inconsistent and unreliable. Claimants' Further Affidavit and Supplementary Submissions filed on 18th December 2018, were in any event, filed contrary to the procedural orders made on 7th December 2018. They are expunged from the record. If the Claimants' position is that there is no Company known as KUSCO [2006] Limited, and that this is just a business name, why then sue a nonentity? Is not this position self-defeatist? The Claimants have sued KUSCO [2006] Limited, and submitted that this Company is non-existent.

62. To its credit, Kenya United Steel Company [2006] Limited employed some of the Claimants after 2006. This was pursuant to clause 13.1 of the Sale Agreement of 1st December 2005, which stipulated that S.R.M Limited, may offer employment to any of the Employees, subject to such terms and conditions as S.R.M Limited and the Employees, may agree. The Report of the Labour Office on record, confirms this. It is also confirmed by the Claimants, in their Witness Statements. There were contracts issued upon the Claimants by the Respondent, after job application and interview. Those so employed, state they worked under the Respondent from around 2007 to 2012, when their contracts were terminated by the Respondent. Those employed by KUSCO [2006] Limited, did not raise issues of any obligations owed to them by KUSCO [2006] Limited, at the time they executed the contracts of employment in 2007. The cause of action against the Respondent if any, in the view of the Court, should have been from the date of termination in 2012. The Claimants have not established any link, between the Respondent, and the events of 2003. KUSCO [2006] Limited is shown to be an entity that was known as S.R.M Limited, which purchased land and other assets of KUSCO Limited, a Company found by the Court of Appeal, to have been unable to meet its financial obligations to KCB Limited, warranting receivership and sale of assets.

63. S.R.M Limited came upon the scene through receivership. It altered its name to KUSCO [2006] Limited, after buying the land and other assets of KUSCO Limited. S.R.M Limited did not take over any liabilities of KUSCO Limited. It offered to employ, and did employ, some of the Claimants, from around the year 2007. It was not shown that S.R.M Limited acted fraudulently in changing its name to KUSCO [2006] Limited. The registration of KUSCO [2006] Limited whether under the Companies or Business Names' regimes, has not been shown to have been fraudulent. There was a Board resolution to change the name, and a Certificate of Change of Name subsequently issued by the Registrar of Companies. There is in fact, no Certificate exhibited in Court, supporting the submission that KUSCO [2006] Limited is somehow, under Registration of Business Names Act. S.R.M Limited made a commercial decision to continue trading in the name of the collapsed KUSCO, with the year 2006, added to that name. Such change of name does not cast the Respondent in the mould of a phoenix, which should bear the employment liability of the original KUSCO Limited. The rationale for this commercial decision has been given by the Respondent, and looks to the Court, to be sufficient.

64. Regrettably, the Court is not able to find in favour of the Claimants. There was no fault in the receivership, and sale of KUSCO Limited's assets to S.R.M Limited. S.R.M. Limited did not take over any liabilities of KUSCO Limited. S.R.M Limited is KUSCO [2006] Limited. It would be very difficult for the Court, to extend liabilities of KUSCO Limited to its former Employees, to S.R.M Limited now called KUSCO [2006] Limited. The Court agrees with the Claimants that Employers must not be allowed to escape employment liability, through clever manipulation of multiple layers of legal and business structures. For this principle to apply, Employees must be able to show that their Claim is directed against a common business or enterprise, of which the disparate legal and business structures are components. They must show that indeed, the Party brought before the Court, whatever the legal or business form, is an Employer, or is a party capable of assuming employment liability. In *Issa Shekue Shali v. Buscar Limited [2008] e-KLR*, which the Claimants have cited, the Court found that a businessman named Salim Sheikhan Salim, was the common thread in different entities, alleged to have employed the Claimant. There should be a common thread, running through the different legal or business structures. Salim instructed Shekue, in running a luxury bus transport company, which operated through various legal and business structures. Is S.R.M Limited, a component of KUSCO or what is described in some letterheads on record, as Alam Group? There is no material placed before the Court by the Claimants, showing that any of them, was, as at the year 2003, employed by S.R.M Limited, now called KUSCO [2006] Limited. They have not established that S.R.M. Limited, KUSCO Limited, and KUSCO [2006] Limited, were part of the same enterprise. They state their Employer's business was sold to a Ugandan Investor. They have not supplied evidence of any common directorship or management. They have not shown that the Respondent was their Employer over the period in dispute, or an entity capable of assuming employment liability. The Claimants have not established why S.R.M Limited, currently KUSCO [2006] Limited should assume liability for KUSCO Limited. In fact, there is evidence that KUSCO Limited is a Company, still in existence. It was not wound up. It was not liquidated. The Claimants, as shown at paragraph 32 of this Judgment, submit KUSCO Limited was never wound up, and remained in existence throughout the pendency of the Claim. Only its land and other specific assets were sold on receivership. The receivership, as far as the Court can deduce from the record, is no longer in place. KUSCO Limited's assets were realized for the benefit of the one secured creditor who made the appointment of the Receiver - KCB Limited. There was no liquidation, where all assets were sold, and KUSCO Limited dissolved. Parties agree, KUSCO Limited is still in

existence. KUSCO Limited is still in place. The Claimants obtained documents, from the Registrar of Companies, complete with details of directors and shareholders of KUSCO Limited, as late as the year 2013. Why litigate against KUSCO [2006] Limited or S.R.M Limited, a bona fide purchaser for value without notice?

IT IS ORDERED:-

a) The Claim is rejected.

b) No order on the costs.

c) The file shall be marked as closed.

d) Parties, who wish to appeal against this Judgment, shall be supplied by the Court, upon payment of requisite fees, with certified proceedings and a copy of the Judgment.

Dated and delivered at Mombasa this 21st day of December 2018.

James Rika

Judge