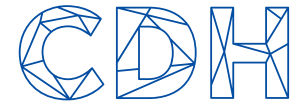


# Employment Law

ALERT | 23 September 2024



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## Deep dive into the Supreme Court's decision in *Symon Wairobi Gatuma v Kenya Breweries Limited*

It is now well understood that any unilateral amendment to an employment contract amounts to an unfair labour practice under section 45 of the Employment Act 11 of 2007 (the Employment Act). This has recently been reiterated by the Supreme Court of Kenya in *Symon Wairobi Gatuma v Kenya Breweries Limited and Three Others*, Petition E023 of 2023 (the Supreme Court decision).

The Supreme Court decision is, however, more than just a decision on unilateral amendments to employment contracts. It addresses and provides guidance as to how to treat employees during business restructuring exercises and redundancies.

### Contextualising the Supreme Court decision

Symon was employed from 3 November 1986 by Kenya Breweries Limited (KBL) as an Artisan Grade F attached to the engineering department in its malting unit. He was declared redundant on 23 April 2003 following a business restructuring exercise that saw the delinking of KBL's malting operations from its beer business. Symon was offered a redundancy package amounting to KES 2,083,852. Two days after being declared redundant, Symon received a letter of employment from Kenya Maltings Limited, the third respondent in the Supreme Court decision for the position of a technical operator in its production department. However, this position came with a reduced salary from a gross of KES 66,064 to KES 29,665. Symon later claimed that he was intimidated into signing this employment agreement owing to the absence of his trade union representation from the Kenya Union of Commercial, Food & Allied Workers.

Regardless, he continued to work for Kenya Maltings Limited and to earn this salary until 31 May 2009 when his position was once again declared redundant by East Africa Maltings Limited, the fourth respondent in the Supreme Court decision and the parent company of Kenya Maltings Limited. He was paid a redundancy package once again and, following this exercise, he felt that he had been treated unfairly and initiated a suit at the then Industrial Court.

### Industrial Court case

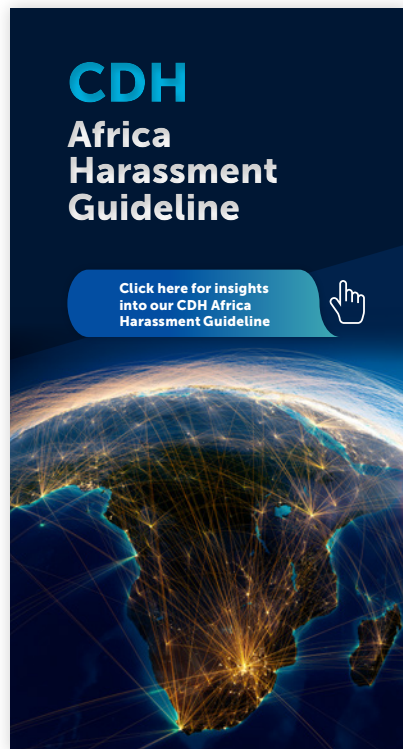
At the Industrial Court, Symon's main argument was that the restructuring was a facade to reduce his salary and deny him employment rights. He argued that he was continuously working for KBL, despite his reemployment with Kenya Maltings Limited, which he claimed was KBL's specialised malting department. To this end he argued that, in reality, KBL remained his principal employer and further buttressed his arguments by positing that his work and shift schedules remained the same, along with the production and machines carrying out the operations; not to mention, all communications and actions involving statutory benefits were undertaken by and through KBL.

The Industrial Court lifted the corporate veil and held that despite corporate restructurings, labour courts must be ready to disregard corporate separation between parent and subsidiary entities and allocate responsibility to the ultimate decision maker, adding that in labour law, such subsidiaries do not insulate their parents against wrongful or abusive control. The Industrial Court held that KBL's subsidiaries functioned as divisions, given that KBL's fundamental business, which is beer production, was the end user of collateral functions such as the sourcing of barley, sorghum and malt. Consequently, the Industrial Court held that the first redundancy was a sham and was

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instead akin to a business transfer exercise that should have complied with the rules of business transfer, which include the continuance of employment terms of retained employees. Given that there was continuity of business, the Industrial Court found that there was no justification to consider Symon as a new employee and lower his salary.

### Court of Appeal proceedings

Aggrieved by the decision of the Industrial Court, KBL appealed to the Court of Appeal where the Industrial Court's judgment was set aside for two primary reasons:

**Legal personality:** The Court of Appeal reiterated the legal personality rule that each corporate entity is an entity of its own with its own personality, liabilities and obligations. Consequently, the Court of Appeal determined that Kenya Maltings Limited was a distinct entity from KBL.

**Redundancy process and employment terms:** The Court of Appeal held that KBL had good reason to declare redundancies, which was to restructure its business in light of the evolving commercial environment. Moreover, it held that Symon accepting the first redundancy severance payment from KBL in 2003 and further accepting the subsequent letter of offer in respect of employment from Kenya maltings Limited, then proceeding to work under the agreed terms and conditions for six years, debunked his argument that KBL's decision to declare him redundant was unilateral and unprocedural.

### Supreme Court decision

Symon appealed and, besides the question on the relief sought, the Supreme Court framed the following two issues for determination:

- Is it fair labour practice to change terms of employment especially as they refer to remuneration while retaining basic tenets of said employment?
- Was Symon's right to fair labour practices infringed?

On the first issue, the Supreme Court reiterated the provisions of sections 10 and 13 of the Employment Act in finding that any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract, be deemed as constructive dismissal and amount to an unfair labour practice. On the issue of the corporate veil, the Supreme Court determined that the corporate veil can only be lifted in exceptional circumstances, such as when the court is construing a statute, contract or other document that requires the veil to be lifted. Moreover, the corporate veil can only be lifted where it can be shown that the company is being used as a mere façade or sham to perpetrate fraud, avoid legal obligations, or achieve some other improper purpose.

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The Supreme Court determined that in such cases, it is the duty of a claimant to show that the parent and the subsidiary operate in a single economic unit. To this end, it might be useful to point out that the actions of the parent control the subsidiary and, further, that the parent and subsidiary are engaged in fraud or improper conduct, or the subsidiary is being used as a mere façade.

On the second issue, the Supreme Court determined that there was an ill motive on the part of KBL and that while Symon had continuity in terms of station, work and medical scheme, the redundancy process was followed as per law. Consequently, the Supreme Court determined that Symon's subsequent employment with Kenya Maltings Limited was a fresh contract and not subject to the terms and conditions of the initial contract with KBL.

## Way forward for employers

While the Supreme Court decision comes at a time when basic tenets of employment law are close to settled, there are certain nuances to this case that are important for employers going forward. For instance, the Supreme Court has pronounced itself on the step-by-step process of how to implement section 13 of the Employment Act on variation of employment contracts. Via obiter and our best practices we also interpret that the Supreme Court has provided guidance on how to treat employees during restructuring exercises and redundancies.

## Variation of employment contracts

The Supreme Court has now laid out the procedure envisaged by section 13 of the Employment Act that should be followed by employers when varying employment terms. The procedure is as follows:

1. Issuance of a prior written notice to the employee, which should be given at the earliest opportunity possible. Our advice, based on best practice, is that such notice should be given one month before the intended change.
2. Consultation with the employees to be affected.
3. Revision of the contract to reflect the variation.
4. Issuance of the written notice to the employee of the changes.
5. Written consent by the employee to the variation often through the signing of the amendment to the employment agreement.



# Deep dive into the Supreme Court's decision in *Symon Wairobi Gatuma v Kenya Breweries Limited*

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## Redundancy

The Supreme Court reiterated the provisions of section 40 of the Employment Act in setting out the process for redundancy in Kenya, which is as follows:

1. Issuance of one month's notice of the intended redundancy to employee/trade union setting out the reasons for and extent of the redundancy.
2. Issuance of one month's notice of intended redundancy to the Labour Officer.
3. Consultation process running for one month.
4. Issuance of notice of redundancy, new appointment or retention, which should set out if the employee has been retained, transferred to a new position or been made redundant.
5. Issuance of certificate of service and payment of redundancy dues.

## Business restructuring and transfer of employees

The Supreme Court pronounced itself on the issue of business restructuring in the context of business reorganisation. To this end, employers must ensure that any restructuring exercise must be precipitated by existing and actual commercial considerations. Importantly,

restructurings may not be used as a tool to evade legal obligations, nor a tool to suppress employment rights. As was the case in the Supreme Court decision, an aggrieved employee may show that the restructuring is a sham and that indeed both the parent and the subsidiary operate in a single economic unit and are indistinguishable. Notably, business restructurings may lead to redundancies and the process laid out above must be adhered to.

Moreover, where there is transfer of business, the Supreme Court reiterated that there must be plans as to how employee rights and liabilities are to be addressed. In this case, where the transfer was to a different entity, there were no existing obligations as these were new entities. However, if it is proven that the transfer to the new entity is to evade legal rights and responsibilities, the courts are likely to find a link between the two entities.

## Conclusion

The Supreme Court decision has offered practical insights for employers looking to vary terms of employment and those undergoing business restructurings or redundancies. In this alert we have outlined these nuggets and offered best practice advice for businesses.

**Njeri Wagacha and Kevin Kipchirchir**

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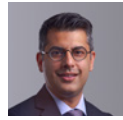
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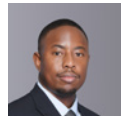
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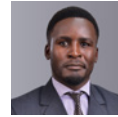
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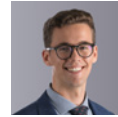
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