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TWELFTH PARLIAMENT – FIFTH SESSION

STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE

REPORT ON THE PETITION REGARDING THE PLIGHT OF FORMER EMPLOYEES AT KENYA UNITED STEEL COMPANY (KUSCO) LTD

Rt. Hon. Speaker
You may approve for tabling.
30/11/21

PAPERS LAID	
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CLERK AT THE TABLE	Kawata M.

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ABBREVIATIONS AND ACRONYMS

KUSCO	-	Kenya United Steel Company
SRM	-	Steel Rolling Mills
KCB	-	Kenya Commercial Bank
PWC	-	PricewaterhouseCoopers
SACCOs	-	Savings and Credit Cooperative Society
CBA	-	Collective Bargaining Agreement

PREFACE

The Standing Committee on Labour and Social Welfare is established under standing orders 187 and 218 (3) of the Senate Standing Orders. The Committee is mandated to consider all matters related to: *manpower and human resources planning, pension, gender, culture and social welfare, youth, National Youth Service, children's welfare; national heritage, betting, lotteries and sports, public entertainment, public amenities and recreation.*

In executing its mandate, the Committee oversees the Ministry of Labour and Social Protection; the Ministry of Public Service, Youth and Gender Affairs; and the Ministry of Sports Culture and the Arts. The membership of the Committee includes -

- 1) Sen. Sakaja Johnson Arthur, CBS, MP - **Chairperson**
- 2) Sen. Mwaruma Johnes, MP - **Vice Chairperson**
- 3) Sen. Madzayo Stewart Mwachiru, CBS, MP -Member
- 4) Sen. Mwangi Paul Githiomi, MP -Member
- 5) Sen. Kihika Susan Wakarura , MP -Member
- 6) Sen. Makori Beatrice Kwamboka, MP -Member
- 7) Sen. (Dr.) Milgo Alice Chepkorir, MP -Member
- 8) Sen. Masitsa Naomi Shiyonga, MP -Member
- 9) Sen. (Dr.) Mwaura Isaac, CBS, MP -Member

Mr. Speaker Sir,

The petition regarding the plight of former employees of the Kenya United Steel Company (KUSCO) Limited was reported at a sitting of the Senate by Senator Mohammed Faki, MP held on the 7th July 2021 pursuant to Standing Order No. 230. The Petition was referred to the Committee on Labour and Social Welfare pursuant to Standing Orders 232(1).

In processing the petition, the Committee held five (5) sittings and engaged the following stakeholders:

- (i) The petitioners
- (ii) The former Director, KUSCO LTD
- (iii) PricewaterhouseCoopers; and
- (iv) The Kenya Commercial Bank

Mr. Speaker Sir,

During the consideration of this petition the Committee observed that-

1. KUSCO was registered on 12th July 1965 as a private company;
2. There is evidence that KUSCO obtained a loan from KCB Limited vide a Debenture dated 9th March 1998;
3. KUSCO was unable to pay the loan and its land and other assets were sold to another company called S.R.M Limited (KUSCO (2006) Limited) in the year 2005;
4. That KUSCO was placed under receivership on the 18th September, 2003 as it was indebted to Kenya Commercial Bank (KCB) hence the appointment of the receiver managers, Pwc Limited.
5. The dispute was initiated under the then Trade Disputes Act, Cap 234 the Laws of Kenya, and is therefore not time barred;
6. KUSCO (2006) Limited or S.R.M Limited is a bona fide purchaser for value without notice;
7. The claim against the Receiver Manager (PricewaterhouseCoopers) was dismissed and the ruling was not challenged on appeal;
8. Some employees who previously worked for KUSCO were absorbed by KUSCO (2006) Limited. Those employed, worked under KUSCO (2006) Limited from around 2007 to 2012, when their contracts were terminated by KUSCO (2006) Limited. 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;
9. 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 to retain the market share enjoyed by the collapsed KUSCO business;
10. The former employees of KUSCO sued KUSCO (2006) Limited instead of KUSCO;
11. The applicable labour and company laws to this matter were reviewed in 2007 and 2015 respectively.
12. The Sale Agreement of 1st December, 2005 was challenged in Court and the challenge rejected;
13. Ministry of Labour and Human Resources Development in 2009 was the arbitrator in the trade dispute between KUSCO (under receivership) and the Kenya Engineering Workers Union with issues under dispute pertaining to failure by PwC to pay 153

former employees of their four (4) months salaries and gratuity benefits as per their collective bargaining agreements.

14. The Ministry of Labour in 2009 noted that the Kenya Engineering Workers Union failed to register the debts owed by KUSCO together with other debtors like KCB who had by then proceeded to court.
15. The Ministry of Labour had in 2014 recommended that the matter be put to rest.
16. Upon the sale of assets, KUSCO was declared insolvent and as such the credit due to KCB could not be 100 percent secured.

Mr. Speaker Sir,

With the foregoing, the Committee is of the view that the former employees of KUSCO have a constitutional right to petition the Senate to look into their plight including issues dating back to 2003. However, the Committee is of the opinion that the matters canvassed in the petition have been extensively addressed by the various institutions. For instance, the Ministry of Labour dating back to 2009; the courts from 2012 to 2018, all with unfavourable outcomes.

In view of the fact that KUSCO as an entity upon undergoing receivership and subsequently following the sale of its assets, KCB as a major creditor failed to secure its loan; Further, recognising the courts ruling that the claimants sued the wrong entity, KUSCO (2006) instead of KUSCO Limited.

Further, taking into consideration the petitioners' prayers to the Senate the Committee therefore **recommends that the matter be put to rest.**

Mr. Speaker Sir,

The Committee wishes to acknowledge the time and considerable effort made by all stakeholder involved in addressing the matter in question. I also wish to express my gratitude to my colleagues for their thoughtful input and engaged contributions. Further, the Committee is indebted to the Office of the Speaker and the Clerk of the Senate for facilitating all virtual meetings and subsequent activities that led to the production of this report.

The Committee also wishes to recognize the commitment and dedication of the staff serving the Committee and that made its work and the production of this report possible.

Mr. Speaker Sir,

It is now my pleasant duty, pursuant to Standing Order 232 (2) to table the report of the Standing Committees of Labour and Social Welfare on the petition regarding the plight of former employees of the Kenya United Steel Company Limited.



SIGNATURE:

CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS, MP.

STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE

DATE: Saturday, 27th November, 2021

CHAPTER ONE: INTRODUCTION

1.1 The Underlying Issues and the Petition Prayers

The petition regarding the plight of former employees of the Kenya United Steel Company was reported at the sitting of the Senate by Senator Mohammed Faki, MP on the 7th July 2021. The petition sought to draw the attention of the Senate to the fate of the said citizens upon termination of employment.

The petition raises the following salient issues that-

- (a) The 163 undersigned petitioners were former employees of KUSCO;
- (b) KUSCO was based in Jomvu sub county, Miritini area on Mombasa County;
- (c) The employees were illegally dismissed from employment but were never compensated by their employer but instead the said company, KUSCO was sold to a second party;
- (d) The petitioners through Joseph Ashioya and 171 others filed the matter in court in 2011 under petition number 703 of 2011;
- (e) The matter was subsequently transferred to Mombasa Employment and Labour Relations Court under case no. 10 of 2012. However, the case was dismissed by the high court;
- (f) It was demonstrated that by December, 2003, the petitioners had pending dues of 4 months;
- (g) In January 2004, petitioners were asked to leave their places of work and report back on 1st March 2004;
- (h) That the claimants were not dismissed, there was no claim of redundancy, no terminal dues, and in that regard, no communication from the employer at any one time;
- (i) The petitioners reported the matter and was in constant consultation with the Engineering Workers union;
- (j) At the point of filing the case, the employer owed the employees salaries and terminal dues amounting to Ksh 35,813,990 broken down as; Salaries Kshs. 5,974,791 and All other benefits Kshs. 29,839,199;
- (k) Remittances of employees owed to SACCOs amounting to Ksh 12,342,345 which the claimants sought through the courts in vain;
- (l) The Company was placed under receivership, PwC being the receiver manager;
- (m) The Labour Office recommendation was that PwC pay the claimants all dues for work done between September 2003 and December 2003;

- (n) That the judge held that KUSCO (2006) existed in 2006 and that the idea of changing the name was intended to mislead the court and the applicants; and
- (o) The petitioner exhausted all available avenue to have the matter addressed and following the fact that the matter is not pending in any court of law, constitutional office or legal body (the *matter was dismissed in court*).

The petitioners' humbly prays that the Senate-

1. Investigates the issue of termination and compensation of the former employees of KUSCO with a view to establish whether the matter was concluded within the law, fairly and whether justice prevailed;
2. Invites the directors of the then KUSCO, PwC, Department of Labour and all the respondents and their directors to answer questions regarding the matter;
3. Recommends that KUSCO company and its director remit to the petitioners Kshs. 12,342,644 owed to SACCOs; and
4. Recommends a mechanism / framework with timelines to have the former employees compensated in terms of both salaries and benefits amounting to Kshs. 35,813,990 (Kshs. 5,974,791 and Kshs. 29, 839,199 respectively).

CHAPTER TWO: BACKGROUND

2.1 About KUSCO LTD¹

The Kenya United Steel Company Limited (KUSCO) was registered as a private company on 12th July 1965, *reg. no. C.6962*, with offices at Miritini, Mombasa. Further, according to the annual returns filed in 2002, its directors, shareholders were as follows:

Director	Shareholder
East Africa Wire Industries Limited	11,279,219
Development Bank of Kenya	2,717,156
Shailesh Jayaantilal Rajani	-
Hirji Shah	-
Nitin Jayantilal Rajani	-
TOTALS	13,996,378

Source: Submission by petitioners on the 25th July 2021

The Company was however placed under receivership, under PricewaterhouseCoopers Limited (PwC) on the 18th September 2003 with the company indebted to Kenya Commercial Bank (KCB). In January, 2006, Steel Rolling Mills (SRM) procured KUSCO and renamed the company as KUSCO (2006) Limited. KUSCO (2006) was placed under Alam Group of Companies based Uganda, whose director was Mr. Abed.

2.2 Relevant laws Underpinning the Issues in the Petition: Receivership

In considering the petition, the Committee identified the following themes and made reference to the following laws:

- (a) Insolvency of an employer and its supporting laws; and
- (b) Termination of employment and laws protecting both employees and employers

(a) Insolvency of an Employer or Company

i. The Companies Act, Cap. 486 (The repealed law)

KUSCO operated under the applicable Company law (Companies Act, Cap. 486 of the laws of Kenya) *now repealed*. The relevant part of the law then was Part VII on receivers and managers. Section 347 of the repealed Act on the power to appoint official receiver as receiver for debenture holders or creditors provides-

“Where an application is made to the court to appoint a receiver on behalf of the debenture holders or other creditors of a company which is being wound up by the court the official receiver may be so appointed.”

Section 348 of the repealed Act on the receivers and managers appointed out of court provides as follows-

(1) A receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the court for directions in relation to any particular matter arising in connection with the performance of his functions, and on any such application the court may give such directions, or may make such order declaring the rights of persons before the court or otherwise, as the court thinks just.

(2) A receiver or manager of the property of a company appointed as aforesaid shall, to the same extent as if he had been appointed by order of a court, be personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets; but nothing in this subsection shall be taken as limiting any right to indemnity which he would have apart from this subsection, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

(3) This section shall apply whether the receiver or manager was appointed before or after the appointed day but subsection (2) shall not apply to contracts entered into before the appointed day.

Section 352 of the Act on the special provisions as to the statement submitted to receiver, provides the statement as to the affairs of a company required by section 351 to be submitted to the receiver (or his successor) shall show as at the date of the receiver's appointment-

- (a) the particulars of the company's assets, debts and liabilities;
- (b) the names, postal addresses and occupations of its creditors, the securities held; by them respectively, the dates when the securities were respectively given; and
- (c) such further or other information as may be prescribed.

ii. The Insolvency Act, 2015

Part VIII on the Administration of Insolvent Companies is the relevant Part.

A person may be appointed as administrator of a company-

- (a) by administration order of the Court;
- (b) by the holder of a floating charge; or
- (c) by the company or its directors.

Under section 56 (4), as soon as practicable after becoming administrator of a company, the administrator shall give notice requiring one or more relevant persons to provide the administrator with a statement of the company's affairs that—

- (a) is verified by a statutory declaration;
- (b) gives the particulars of the company's property, debts and liabilities prescribed by the insolvency regulations for the purposes of this section;
- (c) gives the names and addresses of the company's creditors;
- (d) specifies the security (if any) held by each creditor;
- (e) gives the date on which each such security was given; and
- (f) contains such other information (if any) as may be so prescribed.

The Fourth Schedule to the Insolvency Act provides for powers of an administrator to include power to—

- (a) take possession of, collect and get in the property of the company and, for that purpose, to take such proceedings as the administrator considers necessary;
- (b) sell or otherwise dispose of the property of the company by public auction or private contract;
- (c) borrow money for the beneficial realisation of the company's assets and to give security over those assets for the borrowing;
- (d) appoint an advocate solicitor or accountant or other professionally qualified person to assist the administrator in the performance of the administrator's functions;
- (e) bring or defend any action or other legal proceedings in the name and on behalf of the company;
- (f) refer to arbitration any question affecting the company;
- (g) effect and maintain insurance policies in respect of the business and property of the company;
- (h) use the company's seal;

- (i) all acts and to execute in the name and on behalf of the company any deed, receipt or other document;
- (j) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- (k) appoint any agent to do any business that the administrator is unable to do himself or that can more conveniently be done by an agent and power to employ and dismiss employees;
- (l) do all such things (including carrying out works) as may be necessary for the realisation of the property of the company;
- (m) make any payment which is necessary or incidental to the performance of the administrator's functions;
- (n) carry on the business of the company;
- (o) establish subsidiaries of the company;
- (p) transfer to subsidiaries of the company the whole or any part of the business and property of the company;
- (q) grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company;
- (r) make any arrangement or compromise on behalf of the company;
- (s) call up any uncalled capital of the company;
- (t) rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividends, and to accede to trust deeds for the creditors of any such person;
- (u) make or defend an application for the liquidation of the company; and
- (v) change the location of the company's registered office.

iii. Labour Relations Act, 2007

Paragraph 2(4) of the Fifth Schedule to the Act provides that where any of the following matters commenced before the commencement of the Labour Relations Act, 2007 the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed)-

- (a) any trade dispute that arose before the commencement of this Act;
- (b) any trade dispute referred to the Industrial Court before the commencement of this Act;
- (c) any revision or interpretation of an award by the Industrial Court; and
- (d) any summary dismissal that took place before the commencement of this Act.

iv. Employment Act, 2007

Part VIII on Insolvency of Employer of the Employment Act speaks to this petition. Section 66 on insolvency of an employer provides that where an application is made to the Cabinet Secretary for the time being responsible for matters relating to labour matters in writing by an employee or a representative and the Cabinet Secretary is satisfied that-

- a) the employer of an employee has become insolvent;
- b) the employment of the employee has been terminated; and
- c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies

The Cabinet Secretary shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Cabinet Secretary, the employee is entitled in respect of the debt.

Section 67 (b) provides that an employer, if a company is considered insolvent if-

- (i) a winding-up order or an administration order has been made, or a resolution for voluntary winding-up has been passed, with respect to the company; or
- (ii) a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.

Section 68 provides the debts to which the employment law on receivership under the Employment Act applies to include-

- (a) any arrears of wages in respect of one or more months, but not more than six months or part thereof;
- (b) any amount which the employer is liable to pay the employee for the period of notice required by section 36 or for any failure of the employer to give the period of notice required by section 35 (1) (ii) and (iii);
- (c) any pay in lieu of leaves for annual leave days earned but not taken in accordance with section 28;
- (d) any basic award of compensation for unfair dismissal; and
- (e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice.

Section 69 provides a limitation on the amount payable to an employee by an insolvent employer as follows-

- (a) ten thousand shillings or one half of the monthly remuneration whichever is greater in respect of any one month payable; or
- (b) in respect of a shorter period an amount proportionate to the shorter period based on the amount payable under paragraph (a).

(b) The Law on Termination of Employment

v. Employment Act, 2007

Section 35 of the Employment Act, 2007 state that, where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

Section 36 on the termination in lieu of notice provides that, either of the parties to a contract of service, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given.

While Section 45 on unfair termination provides-

- (a) an employer shall not terminate the employment of an employee unfairly;
- (b) termination of employment by an employer is unfair if the employer fails to prove—
 - (i) that the reason for the termination is valid;
 - (ii) that the reason for the termination is a fair reason—
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

CHAPTER THREE: COMMITTEE PROCEEDINGS AND SUBMISSIONS

This chapter provides key highlights of the proceedings of the Committee during its engagement with the petitioners and other concerned parties regarding the issues raised in the petition. The Committee held meetings with the petitioners, the Director, KUSCO Ltd and representatives of the PwC and KCB. The meetings were held on 29th July 2021, 17th August 2021 and 18th October 2021.

3.1 Submission by the Petitioners, Former Employees of KUSCO Ltd

The meeting between the Committee and the former employees of KUSCO was held on 29th July 2021 at 10.00a.m. During the meeting the petitioners reiterated issues as raised in the petition and informed the Committee that-

1. The 163 undersigned were former employees of KUSCO based in Jomvu Sub County, Miritini area of Mombasa County and that they were illegally dismissed from employment but were never compensated by their employer. Further, that KUSCO was sold before the issue of pending dues was addressed.
2. As claimants, they were not dismissed as there were no claim of redundancy, no terminal dues and as such there was no communication from the employer at any time prompting the petitioners to report the matter to the Engineering Workers union;
3. Given the above status, the petitioners through Joseph Ashioya and 171 others filed the matter in court in 2011 under petition number 703 of 2011; the matter was subsequently transferred to Mombasa Employment and Labour Relations Court under case no. 10 of 2012.
4. At the time of filing the case, the employer owed the employees' salaries and terminal dues amounting to Ksh 35.8million in terms of salaries Ksh 5.97million and other benefits amounting to Ksh 29.8 million; Further, the pending SACCO remittance amounting to Ksh 12million remain unpaid.
5. The Company was however placed under receivership, Pwc being the receiver manager;
6. Prior to the court cases, KUSCO issue was arbitrated in two separate occasions by the Ministry of Labour and Human Resources Development in 2009 and Ministry of Labour, Social Security Services in 2014.
7. For the case of 2009, the Ministry of Labour and Human Resources Development arbitrated in the trade dispute between KUSCO (under receivership) and The Kenya Engineering Workers Union. However, the receiver manager at the time, Pwc failed to

make their submissions. The issues under dispute were the failure by PwC to pay 153 former employees of their 4 (four) months salaries and the failure for the receiver manager to pay severance /gratuity benefits to 153 formers KUSCO employees as per the agreements.

8. In its findings, the Labour department asserted as follows:
 - (a) KUSCO was placed under receivership on the 18th September 2003, however, 153 employees continued to offer services to the company of the subsequent 4 (four) months – September 2003 and December 2003;
 - (b) The debt owed to KCB resulted in a court case which resulted in the sell of company and its assets for debt recovery.
 - (c) The Kenya Engineering Workers Union failed to register the debts of M/S KUSCO together with others who moved to court. As such the receiver manager PwC who were managing the company at that time on behalf of KCB failed to take care of the dues among other liabilities;
 - (d) The Ministry through its investigator therefore recommended that the dispute be put to rest.
9. For the case of 2014, investigations by the Ministry of Labour, Social Security Services headed by the Chief Industrial Relations Officer, Mr. Macharia resulted in the following findings.
 - (e) KUSCO had a valid recognition agreement with the Union by virtue of being a member of the Engineering and Allied Industries Employers Association of the FKE;
 - (f) KUSCO was indebted to KCB hence the subsequent receivership on the 18th September 2003 and sale in 2006. However, liabilities of the previous owner ended upon appointment of the receiver manager, and as such any unpaid dues were to be considered as secured debt in accordance with the then repealed Employment Act (Cap 226) and the Company Law Cap 486;
 - (g) The Chief Industrial Relations Officer, therefore recommended that PwC pays each of the claimant retained for work done between September 2003 and December 2003. Further that severance and any other benefits be paid to all employees in accordance with the then existing CBA.
10. The Claimants further proceeded to court and a judgement was issued on the 21st December 2018 in Mombasa. However, the case was dismissed by the high court. In its judgement, the court noted as follows:

- a. There was no fault in the receivership and sale of KUSCO Limited's assets to S.R.M Limited and that S.R.M. Limited did not take over any liabilities of KUSCO Limited;
- b. S.R.M Limited is the same as KUSCO (2006) Limited;
- c. it would be very difficult for the Court to extend KUSCO Limited liabilities including its former Employees to S.R.M Limited (KUSCO (2006) Limited);
- d. S.R.M. Limited, KUSCO Limited and KUSCO (2006) Limited were part of the same enterprise;
- e. There was evidence that KUSCO Limited is a company still in existence, as it was never wound up or liquidated. However, its land and other specific assets were sold on receivership. The receivership as far as the Court was able to deduce from the record, was no longer in place;
- f. The dispute was initiated under the then Trade Disputes Act, Cap 234 the Laws of Kenya, and is therefore not time barred;
- g. the claim against the Receiver Manager was dismissed and the ruling was not challenged on appeal;
- h. The file was closed; and
- i. KUSCO (2006) Limited or S.R.M Limited was declared a bona fide purchaser for value without notice.

3.2 Committee Meeting with the Directors, KUSCO Ltd

The Committee held a meeting with the then director of KUSCO Ltd on the 17th August 2021 at 9.20am. The former director was represented by Mr. J.M Njenga & Co. Advocates on behalf of Mr. Shailesh Rajani. In his submission, the advocate stated as follows:-

1. The petitioners were not employed by an individual but by a limited company KUSCO hence the former director ought not to be called upon to answer to issues that would otherwise be dealt with by a company;
2. Since KUSCO was placed under receivership on 16th September 2003, it was the receiver's responsibility to settle all the secured and unsecured creditors including the petitioners. As such the receiver manager ought to be answerable on questions relating to the state of the company post 2003 as thereafter, KUSCO' assets were disposed;
3. The termination of the former KUSCO employees were therefore done by the receiver manager or the new owner of the company and therefore had nothing to do with the former directors of KUSCO Limited;

4. All the employee records were taken over by the receiver manager at the point of receivership on the 16th September 2003
5. Evidence shows that the petition as is has gone through the court process and was dismissed. As such the claim is *Res judicata* and therefore has no basis with which the petitioners can sustain such a claim as it has already been dealt with by a competent court.

3.3 Committee Meeting with the PricewaterhouseCoopers

The Committee held a virtual meeting with the representatives of the then receiver managers Pwc, legal representation, Caplan and Stratton on 18th October 2021 at 12noon. Further, the Committee also received submissions from the Chief Executive Officer, Kenya Commercial Bank on the 15th October 2021. In the case of Pwc, the Committee was informed that:-

1. PwC was appointed as the receiver and manager as per Section 103 of the (*former Companies Act, Cap 486*) through the deed of transfer, (Annex 4) on the 16th September 2003;
2. Issues raised in the petition have been previously canvassed in the Employment and Labour Relations Court under Cause No. 10 of 2012.
3. Further, that the claims against Pwc were dismissed vide a ruling dated July 26, 2013. An application to review the dismissal was also rejected by the Court on September 29, 2016.
4. In terms of the credit owed to KCB by KUSCO, KUSCO was declared insolvent and as such the credit could not be 100 percent secured; and
5. A further meeting with Committee and the Directors of KUSCO between 2003 and 2006 should organized so as to further substantiate matters as raised in the petition.

3.4 Submission by the Kenya Commercial Bank

A further submission by KCB as received by the Committee on the 15th October 2021 and signed by the Group CEO and Managing director Mr. Joshua Oigara, CBS reiterated as follows:

1. Taking into consideration that the petition as presented to the Senate did not mention KCB in the matter, and further given the time lapse between 2003 and 2021, KCB may not respond to the issues conclusively;
2. In terms of receivership, a Mr. Adrian Dearing, former director Pwc was appointed as receiver and manager for KUSCO by KCB on th16th September 2003. This was in line with the terms of debenture as signed by KUSCO for a facility granted by KCB to

- KUSCO. In essence all responsibilities of managing the company during the receivership period in line with the then Company Act was the responsibility of PwC;
3. Given the foregoing, the receivership proceeded to its logical conclusion culminating to the sale of existing company's assets as at 10th June 2005. This preceded the settlement of receivership obligations in order of priority in line with the Company Act, Cap 486 (now *repealed*);
 4. The final receipt and payment return and a notice of ceasing to act as receiver of KUSCO were filed with the registrar of Companies on the 4th August 2006 by PwC, signaling the end of receivership;
 5. Responsibilities of the remaining assets and liabilities reverted to the directors; and
 6. KCB as a creditor would not have any direct management over KUSCO or dealt with the employees during the receivership.

CHAPTER FOUR: COMMITTEE OBSERVATIONS & RECOMMENDATIONS

4.1 Committee Observations

The Committee, in considering the various submissions by the stakeholders on the issue and taking into consideration the petitioners prayers, Further, taking into consideration the petitioners' prayers to the Senate which were to investigate the issue of termination and compensation of the former employees of KUSCO with a view to establish whether the matter was concluded within the law, fairly and whether justice prevailed; and recommend that KUSCO directors remit to the petitioners Ksh 12,342,644 owed to SACCOs; and Ksh 35,813,990 as compensation for both salaries and benefits;

The Committee observes as follows:-

1. KUSCO was registered on 12th July 1965 as a private company;
2. There is evidence that KUSCO obtained a loan from KCB Limited vide a Debenture dated 9th March 1998;
3. KUSCO was unable to pay the loan and its land and other assets were sold to another company called Steel Rolling Mills (S.R.M) Limited (KUSCO (2006) Limited) in the year 2005;
4. That KUSCO was placed under receivership on the 18th September, 2003 as it was indebted to Kenya Commercial Bank (KCB) hence the appointment of the receiver managers, Pwc Limited.
5. The dispute was initiated under the then Trade Disputes Act, Cap 234 the Laws of Kenya, and is therefore not time barred;
6. KUSCO (2006) Limited or S.R.M Limited is a bona fide purchaser for value without notice;
7. The claim against the Receiver Manager (PricewaterhouseCoopers) was dismissed and the ruling was not challenged on appeal;
8. Some employees who previously worked for KUSCO were absorbed by KUSCO (2006) Limited. Those employed, worked under KUSCO (2006) Limited from around 2007 to 2012, when their contracts were terminated by KUSCO (2006) Limited. 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;

9. 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 to retain the market share enjoyed by the collapsed KUSCO business;
10. The former employees of KUSCO sued KUSCO (2006) Limited instead of KUSCO;
11. The applicable labour and company laws to this matter were reviewed in 2007 and 2015 respectively.
12. The Sale Agreement of 1st December, 2005 was challenged in Court and the challenge rejected;
13. Ministry of Labour and Human Resources Development in 2009 was the arbitrator in the trade dispute between KUSCO (under receivership) and the Kenya Engineering Workers Union with issues under dispute pertaining to failure by PwC to pay 153 former employees of their four (4) months salaries and gratuity benefits as per their collective bargaining agreements.
14. The Ministry of Labour in 2009 noted that the Kenya Engineering Workers Union failed to register the debts owed by KUSCO together with other debtors like KCB who had by then proceeded to court.
15. The Ministry of Labour had in 2014 recommended that the matter be put to rest.
16. Upon the sale of assets, KUSCO became insolvent and as such the credit due to KCB could not be 100 percent secured.

4.2 Committee Recommendations

With the foregoing, taking into consideration the petitioners' prayers to the Senate, the Committee is of the view that the former employees of KUSCO have a constitutional right to petition the Senate to look into their plight including issues dating back to 2003.

In that regard, the Committee **recommends** that the matter be put to rest for the following reasons-

1. The matters canvassed in the petition have been extensively addressed by various institutions. For instance, the Ministry of Labour dating back to 2009; the courts from 2012 to 2018, all with unfavourable outcomes;
2. KUSCO as an entity upon undergoing receivership and subsequently following the sale of its assets, KCB as a major creditor failed to secure its loan;
3. Recognising the court's ruling that the claimants sued the wrong entity, KUSCO (2006) instead of KUSCO Limited.

MINUTES OF THE 90TH MEETING OF THE STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE HELD ON SATURDAY, 27TH NOVEMBER 2021 AT 11 AM IN CONFERENCE ROOM 1B, TRADEMARK HOTEL, VILLAGE MARKET, KIAMBU COUNTY.

MEMBERS PRESENT

- | | |
|---------------------------------------|-----------------------------------|
| 1. Sen. Johnson Sakaja, CBS | - Chairperson |
| 2. Sen. Johnes Mwaruma | - V. Chairperson (Virtual) |
| 3. Sen. Madzayo Stewart Mwachiru, CBS | - Member (Virtual) |
| 4. Sen. Paul Mwangi Githiomi | - Member |
| 5. Sen. Susan Kihika | - Member (Virtual) |
| 6. Sen. Makori Beatrice Kwamboka | - Member (Virtual) |
| 7. Sen. Naomi Masitsa Shiyonga | - Member |
| 8. Sen. (Dr.) Milgo Alice Chepkorir | - Member |

ABSENT WITH APOLOGIES

- | | |
|---------------------------------|----------|
| 1. Sen. (Dr.) Isaac Mwaura, CBS | - Member |
|---------------------------------|----------|

SENATE SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Mr. Kevin Kibet | - Clerk Assistant/HO |
| 3. Ms. Marale Sande | - Senior Research Officer |
| 4. Mr. Jeremy Chabari | - Legal Counsel |
| 5. Mr. Frank Mutulu | - Media Relations Officer |
| 6. Ms. Fatuma Abdi | - Audio Officer |
| 7. Mr. Ruben Kimosop | - Serjeant-At-Arms |
| 8. Ms. Lydia Nyagol | - Secretary |
| 9. Mr. Hassan Adow | - Office Assistant |

MINUTE SEN/SCLSW/388/2021: PRELIMINARIES

The Chairperson called the meeting to order at 11 a.m. followed by a word of prayer.

MINUTE SEN/SCLSW/389/2021: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted after it was proposed by Sen. Makori Beatrice Kwamboka, MP and seconded by Sen. Paul Mwangi Githiomi, MP as follows—

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
3. **Consideration and adoption of Reports;**
 - (a) **Report on the Petition Regarding the Plight of Former Employees at Kenya United Steel Company (KUSCO) LTD;**
 - (b) **Report on the Petition Regarding the State of ‘Inua Jamii’ Programme; and**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/390/2021: ADOPTION OF THE REPORT ON THE PETITION REGARDING THE PLIGHT OF FORMER EMPLOYEES AT KENYA UNITED STEEL COMPANY (KUSCO) LTD

The Committee considered the report on the petition regarding the plight of former employees at Kenya United Steel Company (KUSCO) Ltd. and adopted it after being proposed by Sen. Masitsa Naomi Shiyonga, MP and seconded by Sen. (Dr.) Alice Chepkorir Milgo, MP.

MINUTE SEN/SCLSW/391/2021: ADOPTION OF THE REPORT ON THE PETITION REGARDING THE STATE OF 'INUA JAMII' PROGRAMME

The Committee considered the report on the petition regarding the state of 'Inua Jamii' programme and adopted it after being proposed by Sen. (Dr.) Alice Chepkorir Milgo, MP and seconded by Sen. Paul Mwangi Githiomi, MP.

MINUTE SEN/SCLSW/392/2021: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the meeting was adjourned at 12.30 p.m.



SIGNATURE:

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: Saturday, 27th November, 2021

MINUTES OF THE 72ND (ZOOM ONLINE) MEETING OF THE STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE HELD ON MONDAY, 18TH OCTOBER 2021 AT 12.00 NOON.

MEMBERS PRESENT

- | | |
|---------------------------------------|----------------------|
| 1. Sen. (Dr.) Milgo Alice Chepkorir | - Member (Ag. Chair) |
| 2. Sen. Madzayo Stewart Mwachiru, CBS | - Member |
| 3. Sen. Susan Kihika | - Member |
| 4. Sen. Makori Beatrice Kwamboka | - Member |
| 5. Sen. Naomi Masitsa Shiyonga | - Member |

ABSENT WITH APOLOGIES

- | | |
|---------------------------------|--------------------|
| 1. Sen. Johnson Sakaja, CBS | - Chairperson |
| 2. Sen. Johnes Mwaruma | - Vice-Chairperson |
| 3. Sen. Paul Mwangi Githiomi | - Member |
| 4. Sen. (Dr.) Isaac Mwaura, CBS | - Member |

IN-ATTENDANCE

- | | |
|--------------------------|--|
| 1. Mr. Peter Gachuhi | - Partner, Kaplan & Stratton
Advocates, PricewaterhouseCoopers
(PWC) |
| 2. Mr. George Weru | - Partner, PricewaterhouseCoopers
(PWC) |
| 3. Ms. Margaret Wamaitha | - Senior Associate, PWC |
| 4. Mr. Samuel Makome | - Chief Commercial Officer, KCB |
| 5. Mr. Bonnie Okumu | - Group Legal Counsel, KCB |

SENATE SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Mr. Kevin Kibet | - Clerk Assistant |
| 3. Ms. Marale Sande | - Senior Research Officer |
| 4. Mr. Jeremy Chabari | - Legal Counsel |
| 5. Mr. Frank Mutulu | - Media Relations Officer |
| 6. Ms. Fatuma Abdi | - Audio Officer |
| 7. Mr. Ruben Kimosop | - Serjeant-At-Arms |

MINUTE SEN/SCLSW/313/2021: PRELIMINARIES

The Ag. Chairperson called the meeting to order at 12.22 p.m. followed by a word of prayer.

MINUTE SEN/SCLSW/314/2021: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted after it was proposed by Sen. Makori Beatrice Kwamboka, MP and seconded by Sen. Susan Kihika, MP as follows-

AGENDA

1. Preliminaries (Prayers & Introductions);
2. Adoption of the Agenda;
3. **Meeting with KCB Ltd and PricewaterhouseCoopers on the Petition concerning the plight of former employees of Kenya United Steel Company (KUSCO); and;**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/315/2021: MEETING WITH KCB LTD AND PRICEWATERHOUSECOOPERS ON THE PETITION CONCERNING THE PLIGHT OF FORMER EMPLOYEES OF KENYA UNITED STEEL COMPANY (KUSCO)

(a) Presentation by Kenya Commercial Bank (KCB)

1. PWC was appointed as receiver and manager of KUSCO by KCB on 16th September 2003 under the terms of debenture signed by KUSCO for a facility granted by KCB Bank to KUSCO.
2. The receivership continued to its logical conclusion culminating in the sale of existing company's assets as at 10th June 2005 and the settlement of receivership obligations in order of priority.
3. Details regarding the distribution of the proceeds of realization of company assets in order of priority, as per the old Companies Act (Chapter 486), can be obtained from PWC.
4. Final receipts and payment return and a notice of ceasing to act as receiver of KUSCO were filed with the registrar of companies on 4th August 2006 by PWC, thus concluding receivership. The responsibility of the remaining assets and liabilities reverted to the directors on lifting of the receivership.

5. Responsibilities of managing the company during receivership period, in line with the old Companies Act (Chapter 486), were the responsibility of PWC.
6. KCB Bank, in its capacity as creditor did not have any direct management over KUSCO in the receivership or dealt with the employees in any manner.

(b) Presentation by PricewaterhouseCoopers (PWC)

1. The issues being raised by former KUSCO employees had already been canvassed in the Employment and Labour Relations Court which dismissed the issues in a ruling dated 13th July 2013;
2. An application was done to review the matter was also dismissed.
3. After appointment of PWC as the receiver manager, directors of KUSCO sought an injunction which was issued on 18th September 2003 preventing the receiver from carrying out their mandate;
4. The injunction was lifted in June, 2005, and during this period, the receiver was not in control of KUSCO;
5. PWC notes that it is during this period that employees' salaries were not paid and their contacts were terminated;
6. When the injunction was lifted, and the receiver resumed their duty, they did not find any employees, operations or records on site. The receiver only found assets of the company which included land, plant and equipment;
7. The receiver sold the assets and the proceeds were used to settle the liabilities due to KCB. The amount owed to KCB was Kshs.1.4 billion but the amount realized from the sale of assets was Kshs169 million, almost 10% of the amount that was due;
8. PWC proceeded to close the receivership and filed with the registrar of companies a notice of ceasing to act as receiver in August 2006. Subsequently, KUSCO went into liquidation; and
9. PWC feels that the directors of KUSCO Ltd. are better placed to answer what happened between 2003 to 2005 in regards to the issues raised by the former employees.

c) Way Forward

The Committee resolved to invite the Ministry of Labour to give their views on the matter before retreating to write a report on the petition.

**MINUTE SEN/SCLSW/316/2021: ANY OTHER BUSINESS AND
ADJOURNMENT**

There being no other business, the meeting was adjourned at 1.10 p.m.



SIGNATURE:

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: Thursday, 28th October, 2021

MINUTES OF THE 49 ZOOM ONLINE MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON TUESDAY, 17TH AUGUST, 2021, AT 9.30 AM.

MEMBERS PRESENT

- | | |
|-------------------------------------|-------------------------------------|
| 1. Sen. Mwaruma Johnes | -Vice-Chairperson (Chairing) |
| 2. Sen. (Dr.) Milgo Alice Chepkorir | - Member |
| 3. Sen. Kihika Susan Wakarura | - Member |
| 4. Sen. Makori Beatrice Kwamboka | - Member |
| 5. Sen. Masitsa Naomi Shiyonga | - Member |

ABSENT WITH APOLOGIES

- | | |
|---|----------------------|
| 1. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 2. Sen. Madzayo Stewart Mwachiru | - Member |
| 3. Sen. Mwangi Paul Githiomi | - Member |
| 4. Sen. (Dr.) Mwaura Isaac, CBS | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|-----------------------|
| 1. Mr. Kevin Kibet | - Hansard Reporter/CA |
| 2. Mr. Jeremy Chabari | - Legal Counsel |
| 3. Ms. Marale Sande | - Research Officer |
| 4. Ms. Fatuma Abdi | - Audio Officer |

IN ATTENDANCE

- | | |
|---------------------------------|--------------------------|
| 1. Sen. Mohamed Mwinyihaji Faki | |
| 2. Mr. Omari Ali Mwajabe | - Lead Petitioner |
| 3. Mr. Lawrence Charo | - Former Employee, KUSCO |
| 4. Mr. Shailesh Rajani | - Former Director, KUSCO |
| 5. Mr. Haggai Okeyo | - Mr. Rajani's Lawyer |

MINUTE SEN/SCLSW/213/2021: PRELIMINARIES

The Vice-Chairperson called the meeting to order at 9.45 a.m. followed by a word of prayer. This was followed by introductions by all present.

Members sent condolence messages to the family and friends of the late Sen. Victor Prengei.

MINUTE SEN/SCLSW/214/2021: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted having been proposed by Sen. Makori Beatrice Kwamboka, MP and seconded by Sen. Masitsa Naomi Shiyonga, MP as follows-

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
- 3. Meeting the Management of KUSCO Ltd on the Petition concerning the Plight of former employees of KUSCO Ltd; and**
3. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/215/2021: MEETING THE MANAGEMENT OF KUSCO LTD ON THE PETITION CONCERNING THE PLIGHT OF FORMER EMPLOYEES OF KUSCO LTD

Mr. Shailesh Rajani's lawyer, Mr. Haggai Okeyo, presented as follows-

- (i) The Committee letter was addressed to an individual, but the petitioners were employed by a limited liability company (KUSCO), and therefore Mr. Rajani cannot be called upon to answer to issues that should be answered by the company.
- (ii) Raised concerns that only 9 persons signed the petition, though the contents speak of 163 persons.

- (iii) KUSCO was placed under receivership by Kenya Commercial Bank Ltd (KCB) in September 2003 and we trust that legally, it was the Receiver's responsibility to settle all secured and unsecured creditors including the petitioners. As such, only the Receiver Manager can tell what happened to the company, when and to who it was sold to, how much it was sold for and which debts were settled and/or why the employees' dues were not settled. (Attached is a copy of the Deed of appointment.)
- (iv) If the employment of the then KUSCO employees was terminated, the termination was either by the Receiver Manager and/or the new owners of the company and it is only them who can explain the issue further.
- (v) The Directors of KUSCO (prior to it being placed under receivership) were not given a chance to even collect the company records when the Receiver Manager moved in, thus all employees' records were taken over by the receivership manager
- (vi) KUSCO was placed under receivership over eighteen (18) years ago and it would possibly be asking too much from the previous directors to defend a claim that is legally statute barred guided by the provisions of Section 4 of the Limitation of Action Act (Cap 22).
- (vii) From the petition, it is evident that the claim has done its rounds in court(s) and the claim(s) dismissed. Isn't the claim therefore *Res judicata* and/or on what basis could the petitioners sustain a claim that has already been dealt with by competent court(s) of law?
- (viii) Our client is ready to co-operate to the best of his ability with the Committee.

(a) Members interventions

1. Members stated that no statutory acts limit the Senate from considering the petition. The right for the petitioners to petition the Senate is enshrined in the Constitution.
2. Members noted that receivership was a consequence of Directors mismanagement that resulted in defaulting to pay loans and salary non-payment.
3. Members sought to be apprised about monies that employees had saved in the Sacco.
4. Members indicated that Parliament's operations are guided by the Constitution, Standing Orders and relevant statutes and has the capability to revive any case even if it has been adjudicated in court.
5. Members asked the petitioners to address further questions to the Directors of KUSCO for conclusive responses.
6. Members sought to know the name of the receiver manager.
7. Members sought for the physical address and contacts of the current KUSCO.

(b) Responses by Mr. Shailesh Rajani's lawyer, Mr. Haggai Okeyo

1. Sacco remittances were paid before KUSCO was placed under receivership. The only remittances not paid are salaries equivalent to Kshs.5,974,791 for September to December when the KUSCO Directors were in court fighting against the company's takeover.
2. It is normal for companies to have financial problems and it became difficult for the KUSCO managers to restructure the loans in time before the receiver manager took over. The receiver manager should have settled the dues owed to the employees when they were settling other debts.

3. The employees' contracts were terminated by the receiver manager and not the directors since the deed of appointment of the receiver manager is dated 16th September 2003.
4. Adrian Spencer Dearing of PricewaterhouseCoopers (PwC) Limited was the receiver manager.
5. He informed the meeting that they do not have physical address and contacts of the current KUSCO as they are not aware of the current owner.

Way Forward

The Committee to write and invite Kenya Commercial Bank (KCB), PWC, the petitioners and KUSCO's management in three weeks.

**MINUTE SEN/SCLSW/216/2021: ANY OTHER BUSINESS AND
ADJOURNMENT**

There being no other business, the meeting was adjourned at 10.33 a.m.



SIGNATURE:
(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: Wednesday, 25th August, 2021

MINUTES OF THE 48TH (ZOOM ONLINE) MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON WEDNESDAY, 11TH AUGUST, 2021, AT 10.00 AM

MEMBERS PRESENT

- | | |
|-------------------------------------|--------------------|
| 1. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 2. Sen. Mwaruma Johnnes | - Vice-Chairperson |
| 3. Sen. Makori Beatrice Kwamboka | - Member |
| 4. Sen. (Dr.) Milgo Alice Chepkorir | - Member |
| 5. Sen. Masitsa Naomi Shiyonga | - Member |

ABSENT WITH APOLOGIES

- | | |
|----------------------------------|----------|
| 1. Sen. Madzayo Stewart Mwachiru | - Member |
| 2. Sen. Mwangi Paul Githiomi | - Member |
| 3. Sen. Kihika Susan Wakarura | - Member |
| 4. Sen. (Dr.) Mwaura Isaac, CBS | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Mr. Kevin Kibet | - Hansard Officer/CA |
| 3. Ms. Marale Sande | - Research Officer |
| 4. Mr. Jeremy Chabari | - Legal Counsel |
| 5. Mr. Frank Mutulu | - Media Relations Officer |
| 6. Mr. Reuben Kimosop | - Senior SAA |
| 7. Ms. Fatuma Abdi | - Audio Officer |
| 8. Mr. David Njoroge | - Chairman's office |

MINUTE SEN/SCLSW/206/2021: PRELIMINARIES

The Chairperson called the meeting to order at 10.16 a.m. followed by a word of prayer.

MINUTE SEN/SCLSW/207/2021: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted after being proposed by Sen. Mwaruma Johnnes, MP and seconded by Sen. Makori Beatrice Kwamboka, MP as follows –

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
- 3. Confirmation of Minutes 46, 45, 44 and 43**
- 4. Consideration of amendments on the Museums and Heritage Bill, 2021;**
- 5. Briefing on the Petition concerning the plight of former workers of the Kenya United Steel Company;**
- 6. Consideration of the Committee Work-schedule for August-September, 2021; and**
7. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/208/2021: CONFIRMATION OF MINUTES

1. The Minutes of the 46th meeting held on Wednesday, 4th August, 2021 at 10:30 a.m. were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. (Dr.) Alice Milgo, MP and seconded by Sen. Beatrice Kwamboka, MP.
2. The Minutes of the 45th meeting held on Thursday, 29th July, 2021 at 10:00 a.m. were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. Beatrice Kwamboka, MP and seconded by Sen. (Dr.) Alice Milgo, MP.
3. The Minutes of the 44th meeting held on Wednesday, 28th July, 2021 at 11:00 a.m. were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. Beatrice Kwamboka, MP and seconded by Sen. Mwaruma Johnnes, MP.
4. The minutes of the 43rd meeting held on Tuesday, 27th July, 2021 at 10:00 a.m. were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. (Dr.) Alice Milgo, MP and seconded by Sen. Beatrice Kwamboka, MP.

MINUTE SEN/SCLSW/209/2021: CONSIDERATION OF AMENDMENTS ON THE HERITAGE & MUSEUMS BILL, 2021

The Committee noted the Letter from the Council of Governors Ref. COG/6/10 Vol. 10 (25) dated 4th August 2021 which requested for additional time to enable the Council submit its memorandum on the Heritage and Museums Bill, 2021. The Committee resolved to give the Council up to 20th August to make their submissions. The Committee therefore resolved to

consider the submissions during the report writing retreat to be held from 26th to 31st August, 2021.

MINUTE SEN/SCLSW/210/2021: BRIEFING ON THE PETITION CONCERNING THE PLIGHT OF FORMER WORKERS OF THE KENYA UNITED STEEL COMPANY (KUSCO)

a) Briefing by the Research Officer

Ms. Marale Sande presented as follows-

1. Documentations show that the then Ministry of Labour and Human Resources Development in 2009 was the arbitrator in the trade dispute between KUSCO (under receivership) and the Kenya Engineering Workers Union.
2. The issues under dispute were the failure by PwC to pay 153 former employees of their 4 (four) months salaries and the failure for the receiver manager to pay severance/gratuity benefits to 153 formers KUSCO employees as per the agreements.
3. The findings by the Labour department were that KUSCO was placed under receivership on the 18th September 2003 with the company indebted to Kenya Commercial Bank (KCB) hence the appointment of the receiver managers being PwC limited.
4. According to documentation, 153 employees continued to offer services to the company for the subsequent 4 (four) months - September 2003 and December 2003.
5. In January, 2006, Steel Rolling Mills procured KUSCO and renamed the company as Kenya United Steel Company (2006); Limited (KUSCO (2006) Limited. The latter was under Alam Group of Companies based Uganda, whose director was Mr. Abed.
6. Some employees who previously worked for KUSCO were absorbed by KUSCO (2006) Limited. The Company therefore argued that they were not aware of any unpaid wages. Further, that the company was bought from a receiver manager.
7. It was also established that KCB went to court at that time to seek redress on the monies owed to it by KUSCO, hence the receiver manager was appointed and directed to sell the company including the assets for debt recovery.
8. According to the findings by the Ministry of Labour in 2009, the Kenya Engineering Workers Union failed to register the debts of M/S

- KUSCO together with others who moved to court. This would have ensured that the receiver manager PwC who were managing the company at that time on behalf of KCB to pay the dues.
9. The Ministry through its investigator therefore recommended that the dispute be put to rest.
 10. In 2014 the Ministry of Labour, Social Security Services undertook its investigation on the matter headed by the Chief Industrial Relations Officer, Mr. Macharia. The findings of the report were as follows:-
 - (i) KUSCO had a valid recognition agreement with the Union by virtue of being a member of the Engineering and Allied Industries Employers Association of the FKE;
 - (ii) KUSCO was indebted to KCB hence placed under receivership on September 2003 under the PwC. The receive manager retained some 153 employees between September 2003 and December 2003, however, their dues were not paid;
 - (iii) PwC sold the company and was therefore renamed KUSCO (2006) Limited;
 - (iv) Liabilities of the previous owner ended upon appointment of the receiver manager, as such any unpaid dues were then to be considered as secured debt in accordance with the then Employment Act (Cap 226) repealed and the Company Law Cap 486
 11. The Chief Industrial Relations Officer, therefore recommended that PwC pays each of the claimant retained for work done between September 2003 and December 2003. Further that severance and any other benefits be paid to all employees in accordance with the then existing CBA.
 12. The Claimants preceded to court and a judgement was issued on the 21st December 2018 in Mombasa.
 13. Worth noting, following the arbitration and investigation by the Ministry of labour and Human Resource Development in 2009, PwC failed to make its submissions.
 14. Worth noting, a letter attached to the submissions dated 11th July 2013 from the Department of the Registrar General showed that as at the time of writing the letter, KUSCO (2006) Limited could not be verified as a registered company or business.
 15. On the way forward, the Committee may consider:-

- (i) Reviewing the judgement as issued by the High Court in Mombasa
- (ii) Invite the following stakeholders for further clarification on the issue-
 - I. PwC;
 - II. KUSCO (2006) Limited Directors;
 - III. The Directors of the Steel Rolling Mills (*Purchased KUSCO in 2006 and renamed it KUSCO (2006)*)
 - IV. Ministry of Labour and Social Protection (*The issue was dealt with by the Ministry of Labour and Human Resource Development (2009) and the Ministry of Labour Social Security Services (2014); and*
 - V. The Kenya Engineering Workers Union (*The Union where the former employees of MUSCO were domiciled*).

b) Briefing by the Legal Counsel

Mr. Jeremy Chabari presented as follows-

1. The petitioners sued the wrong company, KUSCO (2006) Limited instead of KUSCO;
2. KUSCO Limited is still in existence, it was not wound up or liquidated;
3. KCB had loaned KUSCO limited some money to purchase mechanical installations and when they failed to pay their debt, KCB sold part of the machinery to SRM limited. SRM limited later renamed itself to KUSCO (2006) Limited;
4. Operations of KUSCO went on under the receivership of PWC and during this period is when the petitioners claim that they did not receive their four-month salaries.
5. The petitioners did not consolidate their claims with those of KCB when KCB went to court to recover their debt. The petitioners should have enjoined with KCB to seek redress for salaries and pensions; and
6. According to a court ruling, KUSCO (2006) Limited purchased the machineries from KUSCO without prior knowledge of prior debts to petitioners, and thus, KUSCO (2006) Limited cannot be charged to pay.

Way forward

1. The Committee resolved to invite the Management of KUSCO Limited since it was still in existence.

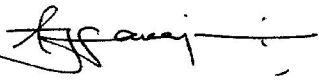
MINUTE SEN/SCLSW/211/2021: CONSIDERATION OF THE COMMITTEE WORK-SCHEDULE FOR AUGUST AND SEPTEMBER, 2021

1. The Committee reviewed and adopted the work schedule for August and September as follows –

MINUTE SEN/SCLSW/212/2021: ANY OTHER BUSINESS AND ADJOURNMENT

	Activity	Date & Time	Stakeholders	Recommendations
43	Meeting the Management of KUSCO Online	Tuesday, 17 th August, 2021 9.30 am	Shailesh Rajani, Director KUSCO, Petitioners	
44	Stakeholder meeting on the welfare of Children	Wednesday 18 th August, 2021 10.00 am	Ministry of Labour and Social Protection	
45	Report Writing & Work Planning Retreat Mombasa County	Thursday – Tuesday 27 th – 31 st August, 2021	<u>Reports to be adopted</u> - Heritage and Museums Bill, 2021 - Labour Migration Report - Creative Industry Report - KUSCO Report	
46	County Visit	Wednesday - Saturday 1 st – 5 th Sept, 2021	Kisii, Nyamira, Kericho and Bomet Counties on Tea Worker issues	
47	Committee Meeting	Wednesday, 8 th September, 2021 10.00 am	Meeting on one-off honorarium and monthly pension to former councillors	Treasury, MLSP, Min of Devolution & ASALS

1. Members sought to know the status on the payment of workers of Kenya Railways since there are concerns of non-payment.
2. There being no other business, the meeting was adjourned at 10.55 a.m.

SIGNATURE: 

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: **Wednesday, 25th August, 2021**

**MINUTES OF THE 45TH ZOOM ONLINE MEETING OF THE
STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD
ON THURSDAY, 29TH July, 2021, AT 10.00 AM.**

MEMBERS PRESENT

1. Sen. Sakaja Johnson Arthur, CBS - Chairperson (Member)
2. Sen. Mwaruma Johnes -Vice-Chairperson (Chairing)
3. Sen. (Dr.) Milgo Alice Chepkorir - Member
4. Sen. Kihika Susan Wakarura - Member
5. Sen. Makori Beatrice Kwamboka - Member
6. Sen. Madzayo Stewart Mwachiru -Member
7. Sen. Mwangi Paul Githiomi - Member

ABSENT WITH APOLOGIES

1. Sen. Masitsa Naomi Shiyonga - Member
2. Sen. (Dr.) Mwaura Isaac, CBS - Member

SENATE SECRETARIAT

1. Ms. Mwanate Shaban - Clerk Assistant
2. Mr. Jeremy Chabari - Legal Counsel
3. Mr. Kevin Kibet - Hansard Reporter/Clerk Assistant
4. Ms. Fatuma Abdi - Audio Officer
5. Mr. Ruben Kimosop - Serjeant-at-Arms

IN ATTENDANCE

1. Mr. Omari Ali Mwajabe - Lead Petitioner, Former Employee
of Kenya United Steel Company
(KUSCO)
2. Former Employees of KUSCO

MINUTE SEN/SCLSW/195/ 2021: PRELIMINARIES

The Chairperson called the meeting to order at 10.29 a.m. followed by a word of prayer. This was followed by introductions by all present.

MINUTE SEN/SCLSW/196/2021: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted having been proposed by Sen. Stewart Mwachiru Madzayo, MP and seconded by Sen. Paul Mwangi Githiomi, MP as follows-

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
3. **Meeting the Petitioners on the Petition Concerning Plight of Former Employees of Kenya United Steel Company (KUSCO); and,**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/197/2021: MEETING THE PETITIONERS ON THE PETITION CONCERNING PLIGHT OF FORMER EMPLOYEES OF KENYA UNITED STEEL COMPANY (KUSCO)

a) Presentation by the Petitioners

1. KUSCO was closed in 2003 and employees were ordered to go for unpaid leave from September 2003 to December 2003;
2. They claim that they were not dismissed and as such, they are deemed to be employees of KUSCO to date;
3. Expressed disappointment with the way they were oppressed by KUSCO's management;
4. Sought the support of the Committee so that they can be paid a four-month salary arrears, gratuity and their monthly Sacco contributions; and
5. Informed the Meeting that 2 people from Kilifi County had committed suicide due to frustrations by KUSCO management.

b) Members interventions

1. Members empathized with the former employees of KUSCO;
2. Members stated that companies should be compelled to fully adhere to the labour laws since they were dismissed illegally;
3. Members undertook to follow-up on the issue to ensure that the sacked employees are paid their dues; four-month salary arrears, gratuity and Sacco contributions;
4. Proposed lifting of the corporate veil so that the directors of KUSCO are prosecuted individually; and

5. KUSCO's management to appear before the Committee to answer on the petition.

c) Way Forward

The Committee to invite the Ministry of Labour and Social Protection in the subsequent meetings with the management of KUSCO.

MINUTE SEN/SCLSW/198/2021: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the meeting was adjourned at 11.11 a.m.



SIGNATURE:
(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: Wednesday, 11th August, 2021

THE SENATE
RECEIVED
24 JUN 2021

THE SENATE
RECEIVED
25 JUN 2021
DIRECTOR LEGISLATIVE AND
PROCEDURAL SERVICES

Petition concerning the Plight of workers of former Kenya United Steel Company LTD

15th June 2021

Mr. J.M. Nyegenye. CBS.
The Clerk,
Senate of the Republic of Kenya,
P.O Box 41842-00100
NAIROBI.

① DLPS
Please deal,
MOR
25/6/21

② Mr. Mogyre (DLPS)
ps process
25/6/21

Dear Sir,

RE: PETITION UNDER ARTICLE 10, 25, 28, 29, 30, 37, 41, 119, OF THE
CONSTITUTION OF KENYA, SECTIONS 5(4) B, 16 A. OF THE
EMPLOYMENT ACT, REGARDING THE FATE OF THE FORMER
KUSCO EMPLOYEES

We the undersigned Petitioners are citizens of Kenya who largely reside in Mombasa County and largely in the Coastal region of Kenya. We are the former employees of Kenya United Steel Company (KUSCO), and wish to draw the attention of the Senate on the fate of the said citizens upon termination of their employment-

Facts of the case:

- a. THAT the undersigned 163 people were employed by a Company called Kenya United Steel Company Limited herein referred to as Kusco;
- b. THAT the Company was based in Mombasa County, Jomvu Sub County in Miritini area.
- c. THAT the Petitioners were illegally dismissed from their employment but were not compensated by the employer, instead, the Company was sold and employees left languishing in poverty.
- d. THAT the Petitioners through Joseph Ashioya and 171 others filed the matter in Court in the year 2011 under the Petition No. 703 of 2011.
- e. THAT the matter was subsequently transferred to Mombasa in Employment and Labour relations court under Cause No.10 of 2012. The case was subsequently dismissed by the High Court.
- f. THAT it was demonstrated that by December 2003, the Petitioners had not been paid for 4 months;

③ NS. Kavata
Please process.
24
25.06.21

Petition concerning the Plight of workers of former Kenya United Steel Company LTD

- g. **THAT** in January 2004, the Petitioners were asked to leave their place of work and report back on 1st March 2004.
- h. **THAT** the Claimants were not dismissed. There was no claim for redundancy. No terminal dues were paid. There was no communication from the Employer at any point while at work.
- i. **THAT** at the point when the matter arose, the Petitioners reported the matter to Engineering Workers Union, and as such were in constant consultations with them.
- j. **THAT** at the point of filing the case, the employer owed them salaries and terminal dues amounting to Kshs. 35,813,990, which can be broken down to:
 - 1. Salaries amounting to 5,974,791
 - 2. All other benefits amounting to Kshs. 29,839,199
- k. The remittance of the employees were ~~Kshs.12,342,644~~ owed to their Sacco, which was not remitted:
 - The Claimants sought for payment of the above from the court in vain.
- l. **THAT** when the Company was placed under receivership, Pricewaterhouse Coopers Limited was the Receiver Manager of the Company.
- m. **THAT** the Labour officer filed a report dated 16th April 2014 indicating that the Claimants herein were employees of Kenya United Steel Company Limited.
- n. **THAT** the Labour Officer recommended that the Receiver Manager pay to the Claimants all their dues worked for during the months of September 2003 to December 2003.
- o. **THAT** it is the Petitioners' case that the Company name Kenya United Steel Company (2006) Registrar of Companies other than as a business name.
- p. **THAT** the judge at the Employment and Labour Relations Court held that Kenya United Steel Company (KUSCO) Limited existed even in 2006.
- q. **THAT** the idea of changing the name was only intended to mislead the court and the applicants.

The law:

- i. **THAT** the Petitioners hold that the regulators failed to observe due diligence when they allowed transactions by employer the employer thus significantly exploiting its employees by contravening articles 10 and 232 of the

Petition concerning the Plight of workers of former Kenya United Steel Company LTD

Constitution of Kenya on National values and principles of governance and on values and principles of public service including negating the requirement of high standards of professional ethics in the work.

- ii. **THAT** the Petitioners have suffered inhuman and degrading treatment as a result of the failure to be condemned to unpaid work by the Respondent in the eye of the regulator, contrary to articles 25 of the Constitution of Kenya.

Petition concerning the Plight of workers of former Kenya United Steel Company LTD

- i. **THAT** the Petitioners contend that their freedom from slavery and servitude have been violated because of their idea to employing them, subjected them unpaid conditions hence relegating them to squalor conditions contrary to articles 25 (b) and article 30 (1) and (2) of the Constitution of Kenya.
- ii. **THAT** the actions of the Respondents and the regulator have subjected them to a situation where their inherent human dignity is violated contrary to Article 28 of the Constitution. They are unable to live decently and provide for their households despite having worked for the company until the days when they aged.
- iii. **THAT** the Petitioners do forward this Petition under the above mentioned articles and also Articles 37 and 119 of the Constitution of Kenya.
- iv. **THAT** Petitioners right to acquire and own property has been deprived courtesy of the conditions they have subjected to this matter.

THAT, we have exhausted all available avenues to have the matter addressed to no end.

THAT, the issues in respect to which this Petition is made were dismissed in court and are thus not pending before any court of law, or constitutional or legal body.

We humbly request that the Senate-

- (i) investigates into the issue of termination and compensation of the former employees of Kenya United Steel Company (KUSCO) referred to in this Petition, with a view to establish whether the matter was done within the law and was just and fair;
- (ii) invites the Kenya United Steel Company Limited, the then Directors of Kenya United Steel Company Limited, PricewaterhouseCoopers Kenya, the Department of Labour and all the respondents and their Directors to answer questions regarding to the matter herein in the matter;
- (iii) recommends that Kusco Company Limited and their Directors do remit to the Petitioners Kshs.12,342,644 owed to them by the Sacco, which was not remitted, and

Petition concerning the Plight of workers of former Kenya United Steel Company LTD

- (iv) recommends a mechanism/framework, with timelines, to have the former employees compensated both salaries and benefits amounting to Kshs.35, 813,990 (Kshs.5, 974,791 and Kshs. 29,839,199, respectively) in a timely manner.

Kindly, below find the undersigned-

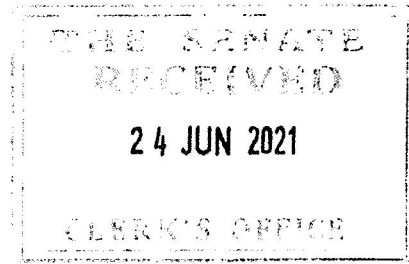
NO.	NAME	DESIGNATION	ID NO.	SIGNATURE
1.	OMARU ALIMWAZABI	STORES CLERK	2255004	<i>[Signature]</i>
2.	DANIEL A. MAZOU	PROD ASSISTANT	2142663	<i>[Signature]</i>
3.	COLMAN ODHAMBO	ARTISAN	16047730	<i>[Signature]</i>
4.	DALIA YUMBUA NZENZI	MASSAI	2215142	<i>[Signature]</i>
5.	ALI KIBUKU MURUKI	PULP PITY	2254810	<i>[Signature]</i>
6.	ALI HASAN MWAUMBARA	LABEL MAN	5412259	<i>[Signature]</i>
7.	JOHN JOSEPH CHAKA	MACHINE OPERATOR	4644181	<i>[Signature]</i>
8.	SWALEH MURUGU HAMES	CRANE OPERATOR	5633932	<i>[Signature]</i>
9.	ISWANA ALI MURUGU	PROD. ASS.	0505414	<i>[Signature]</i>

Dated: 15/06/2021

Countersigned by:

[Handwritten Signature]

Sen. Mohammed Faki, MP,
Senator, Mombasa County.



CMS-Africa House, 5th Floor (Near Yaya Centre)
Chania Avenue, off Ring Road Kilimani
P.O Box 1297-00100 Nairobi, Kenya
Tel: +254 20 224 8277, 222 6201
Fax: +254 20 222 8510
Cell: 0708 448195

Email: info@jmntlaw.org

Jeremy Njenga Llb(Hon.Nrb),Dip(Ksl)CPs(k)
Victoria Wambua Llb(Hon.Nrb),Dip.Ksl.)
Vivianne Wachanga Llb(Hon.Moi).Dip.Ksl.)
Haggai OkeyoLl.b (Hon.Nrb) Dip (Ksl)

Our Ref: 330/GEN/21

16/8/21

Your Ref: SEN/SCLSW/2021/44

Date.....

The Clerk of the Senate
Clerk's Chambers
Parliament Buildings
P.O.BOX 41842-00100
NAIROBI (csenate@parliament.go.ke)

'advance copy via e-mail'

Dear Sir,

**RE: PETITION CONCERNING ALLEGED FORMER EMPLOYEES
OF THE KENYA UNITED STEEL COMPANY (KUSCO)**

We refer to your letter dated 6th August 2021 which was hand delivered in our chambers on 13th August 2021 on behalf of the addressee Shailesh Rajani and our instructions are to highlight the following issues:-

- (i) Whereas the letter is addressed to an individual, we note that the petitioners were not employed by the said individual but rather by a limited liability company (KUSCO) and in law, our client as an individual cannot be called upon to answer to issues that should otherwise be answered by a company. Indeed and going through the petition, the same relates to 'KUSCO' not the addressee of your letter.
- (ii) Inasmuch as the petition is allegedly by 163 persons, those who have signed the petition are nine (9) thus its hard to tell who the others are and whether they were indeed employees or not.
- (iii) As pointed out in paragraph L of the petition, KUSCO was placed under receivership by Kenya Commercial Bank Ltd (KCB) in September 1993 and we trust that legally, it was the Receiver's responsibility to settle all secured and unsecured creditors including the petitioners. As such, only the Receiver Manager can tell what happened to the company, when and to who it was sold to, how much it was sold for and which debts were settled and/or why the employees' dues were not settled. (Attached is a copy of the Deed of appointment.)

VAT No. 0128034P
PIN No. A0012911705

When replying please quote our reference

- (iv) If the employment of the then KUSCO employees was terminated, the termination was either by the Receiver Manager and/or the new owners of the company and its only them who can explain the issue further.
- (v) The Directors of KUSCO (prior to it being placed under receivership) were not given a chance to even collect the company records when the Receiver Manager moved in thus all employees' records were taken over by the receivership manager
- (vi) As you will appreciate, KUSCO was placed under receivership over eighteen (18) years ago and it would possibly be asking too much from the previous directors (and which category our client falls under) to defend a claim that is legally statute barred guided by the provisions of S. 4 of the Limitation of Action Act (Cap 22).
- (vii) From the petition, it is evident that the claim has done its rounds in court(s) and the claim(s) dismissed. Isn't the claim therefore Res judicata and/or on what basis could the petitioners sustain a claim that has already been dealt with by competent court(s) of law?

Please note however that the above notwithstanding, our client is ready to cooperate to the best of his ability with the relevant Senate Committee.

Yours faithfully,
For: J.M. NJENGA & CO. ADVOCATES



Jeremy Njenga

Encls.

cc. Sen. Mohammed Faki
Parliament Road,
Parliament Buildings
Nairobi

cc. Mr. Shailesh Rajanii

Jm/pm

DATED 16-9- 2003

KENYA COMMERCIAL BANK LIMITED

APPOINTMENT OF RECEIVER AND MANAGER

Kenya United Steel Company Limited

ADVOCATES:

OMONDI WAWERU & COMPANY
ADVOCATES
CANNON TOWER II
PENT HOUSE - 11TH FLOOR
MOI AVENUE
P.O. BOX 1666
MOMBASA
TEL: 228716/222037/313667/227491/230402
EMAIL ADDRESS: ow@omondi-waweru.com

Deed of Appointment

THE COMPANIES ACT
(Cap. 486)

NOTICE OF APPOINTMENT OF A RECEIVER OR MANAGER
(Section 103)

Name of Company **KENYA UNITED STEEL COMPANY LIMITED**

Presented by **KENYA COMMERCIAL BANK LIMITED**

To the Registrar of Companies.

I **M. A. RAYI** of **KENYA COMMERCIAL BANK LIMITED OF**

PO Box 90254, Mombasa with reference to Kenya United Steel Company Limited hereby give notice that -

~~(a) I have obtained an Order of the (b).....
Dated the day of, 2002, for the appointment of of
as (c)
*delete as necessary * (1) of the whole or substantially the whole of the property of this Company,
* (2) of part of the property of this Company,
* (3) of the income arising from the property or part of the property of this company
on behalf of the holders of (d).....~~

(b) On the 16TH day of SEPTEMBER, 2003. I appointed

ADRIAN SPENCER DEARING of PricewaterhouseCoopers Limited, as (c) Receiver and Manager of

- * (1) of the whole or substantially the whole of the property of this Company,
- ~~* (2) of part of the property of this Company,~~
- ~~* (3) of the income arising from the property or part of the property of this company,~~

on behalf of the holders of (d) the debentures set out in schedule 'A' granting the holder fixed and floating charges over the whole of the assets of the company under the powers contained in that instrument.

Dated... **15.9.2003**2003

Signed.....


Fee Sh. 10.

(a) Of these two paragraphs, strike out that which does not apply.
(b) Name of Court making the order
(c) "Receiver" or "Manager" or "Receiver and Manager" as the case may be
(d) Describe fully the instrument under which appointment is made, and state whether it is a debenture secured by a floating charge

SCHEDULE 'A' OF DEBENTURES

Date	Description of Document	Date of Registration	Principal Amount Secured in Kshs. & U.S.\$
02.02.1971	Debenture	06.02.1971	3,600,000/-
17.08.1973	First Further Debenture	28.08.1973	2,400,000/-
21.08.1974	Deed of Transfer and Variation of Debenture and Deed of Debenture by way of Further Charge	28.07.1974	6,500,000/-
07.11.1977	Third Further Debenture	23.11.1977	2,305,000/-
06.04.1979	Fourth Further Debenture	02.05.1979	4,600,000/-
15.09.1980	Fifth Further Debenture	23.09.1980	3,195,000/-
11.10.1983	Sixth Further Debenture	17.10.1983	2,000,000/-
23.10.1984	Seventh Further Debenture	26.10.1984	1,900,000/-
03.12.1986	Eighth Further Debenture	09.12.1986	19,584,000/-
26.05.1988	Ninth Further Debenture	29.06.1988	7,726,652/-
20.02.1990	Tenth Further Debenture	09.03.1990	31,500,000/-
05.12.1991	Eleventh Further Debenture	16.12.1991	33,000,000/-
26.06.1995	Twelfth Further Debenture	04.07.1995	115,189,348/-
29.04.1997	Thirteenth Further Debenture	06.05.1997	24,500,000/- and U.S.\$2,000,000/-
09.03.1998	Fourteenth Further Debenture	11.03.1998	215,400,000/-

APPOINTMENT OF RECEIVER AND MANAGER

KENYA UNITED STEEL COMPANY LIMITED

WE, KENYA COMMERCIAL BANK LIMITED a banking company incorporated in the Republic of Kenya whose address is care of Post Office Box Number 48400 Nairobi in the said Republic (hereinafter called "the Bank" which expression shall where the context so admits include its successors and assigns) being the holder of Debentures particulars of which are set out in the Schedule hereto ("the Debenture") created by KENYA UNITED STEEL COMPANY LIMITED a limited liability company incorporated in the said Republic whose address is care of Post Office Box Number 90550 Mombasa aforesaid (hereinafter called "the Company") in pursuance of the powers in that behalf conferred by the Debentures and by statute and otherwise HEREBY APPOINT ADRIAN SPENCER DEARING of Post Office Box Number 43963 Nairobi aforesaid to be Receiver and Manager (hereinafter called "the Receiver"), of all the property and assets charged by the Debenture so that the Receiver may exercise all and any of the powers set out in the Debenture in addition to and without limiting any general powers conferred upon him by law.

IN WITNESS WHEREOF the duly constituted Attorney of the Bank has hereunto set his hand this 16th day of Sept Two Thousand and Three.

SIGNED by M. A. RAY

the duly constituted Attorney of
KENYA COMMERCIAL BANK LIMITED in
the presence of:-

M. N. WAWERU
ADVOCATE
P. O. BOX 1908
MOMBASA

KENYA COMMERCIAL BANK LTD.
16/9/73
P/A 2452

SCHEDULE OF DEBENTURES

Date	Description of Document	Date of Registration	Principal Amount Secured in Kshs. & U.S.\$
02.02.1971	Debenture	06.02.1971	3,600,000/-
17.08.1973	First Further Debenture	28.08.1973	2,400,000/-
21.08.1974	Deed of Transfer and Variation of Debenture and Deed of Debenture by way of Further Charge	28.07.1974	6,500,000/-
07.11.1977	Third Further Debenture	23.11.1977	2,305,000/-
06.04.1979	Fourth Further Debenture	02.05.1979	4,600,000/-

15.09.1980	Fifth Further Debenture	23.09.1980	8,195,000/-
11.10.1983	Sixth Further Debenture	17.10.1983	2,000,000/-
23.10.1984	Seventh Further Debenture	26.10.1984	1,900,000/-
03.12.1986	Eighth Further Debenture	09.12.1986	19,584,000/-
26.05.1988	Ninth Further Debenture	29.06.1988	7,726,652/-
20.02.1990	Tenth Further Debenture	09.03.1990	31,500,000/-
05.12.1991	Eleventh Further Debenture	16.12.1991	33,000,000/-
26.06.1995	Twelfth Further Debenture	04.07.1995	115,189,348/-
29.04.1997	Thirteenth Further Debenture	06.05.1997	24,500,000/- and U.S.\$2,000,000/-
09.03.1998	Fourteenth Further Debenture	11.03.1998	215,400,000/-

ADVOCATES:

OMONDI WAWERU & COMPANY

ADVOCATES

CANNON TOWER II

PKNT HOUSE - 11TH FLOOR

MOI AVENUE

P.O. BOX 1606

MOMBASA

TEL: 222037/223716/313667

EMAIL ADDRESS: ow@omondi-waweru.com



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

RULING IN

CAUSE NO. 10 OF 2012

BETWEEN

JOSEPH ASHIOYA & 165 OTHERS

VERSUS

**KENYA UNITED STEEL CO. LIMITED
PRICEWATERHOUSE COOPERS LIMITED**

DELIVERED BY

JAMES RIKA

JUDGE

REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 10 OF 2012

BETWEEN

JOSEPH ASHIOYA & 165 OTHERS CLAIMANTS

VERSUS

1. KENYA UNITED STEEL CO. LIMITEDRESPONDENT
2. PRICEWATERHOUSE COOPERS LIMITED INTENDED 2ND RESPONDENT

RULING

1. Hon. Judge Radido Stephen, delivered a Ruling dated 26th July 2013, dismissing the Claim against the 2nd Respondent, on the ground that the 2nd Respondent was a Receiver/Manager of the 1st Respondent, and could not be sued in its own name. The Claim against the 2nd Respondent was found to be incompetent, but the Claimants were allowed to proceed against the 1st Respondent.

2. The Claimants filed an Application dated 3rd July 2014, seeking to have the orders of 23rd July 2013 reviewed, and the Claim against the 2nd Respondent reinstated. The 2nd Respondent is opposed to the Application to have it rejoin the proceedings. Parties filed their respective Affidavits supporting their positions, and agreed to have the Application considered and determined on the strength of these Affidavits and Submissions.

3. In their Submissions, the Claimants list and argue 7 Grounds in support of the Application. These are mainly on matters of law, revolving around the finding by the predecessor Judge, that Receiver/Managers cannot be sued in their own names. They submit, in a manner characteristic of appellate language, that the predecessor Judge erred. They go on to give legal arguments on why the Judge erred.

4. In the respectful view of this Court, the Application has not been shown to fall within Rule 32 of the Industrial Court [Procedure] Rules 2010, which regulates the review jurisdiction of the Court. There is no discovery of fresh matter of evidence; there is no mistake apparent on the face of the record; the Ruling does not breach any written law; it does not require clarification; and there is no other sufficient reason to justify review.

5. The thrust of the Application is that the predecessor Judge misapprehended the law on Receiver / Managers. Such misapprehension, if indeed there was misapprehension, should be corrected by the Court of Appeal. Misapprehension of the law is not a sufficient reason to justify review. Contentious legal concepts are best taken through the process of distillation, within the hierarchy of Courts, rather than being circulated before different Judges in the same Court. Distillation allows the law to develop. This Court thinks the submission by the intended 2nd Respondent, that review would amount to the Court sitting on appeal, is persuasive. The Grounds listed by the Claimants in seeking review, should properly be Grounds of Appeal.

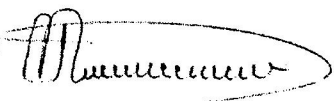
6. The Application for review of the orders made on 26th July 2013 is rejected. The Claimants have the option to pursue an Appeal against those orders, or prosecute the Claim against the remaining Respondent.

IT IS ORDERED:-

a) The Application dated 3rd July 2014 seeking review of the orders made on the 26th July 2013 is rejected.

b) Costs in the Cause

Dated and delivered at Mombasa this 29th day of September 2016

James Rika
Judge 

REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 10 OF 2012
(Originally Nairobi Cause No.703 of 2011)

JOSEPH ASHIOYA & 165 OTHERS

CLAIMANTS'

v

KENYA UNITED STEEL CO (2006) LTD
PRICE WATERHOUSE COOPERS

1ST RESPONDENT
2ND RESPONDENT

RULING

1. The Claimants' filed a Memorandum of Claim against the Respondents' on 9 May 2011 and the issue in dispute was stated as unpaid dues of Joseph Ashioya & 165 others.
2. The 1st Respondent filed its Memorandum of Response on 8 February 2012. One of the issues raised in the Response was the legal question of limitation. It was pleaded that the Cause had not been filed within 6 years as stipulated in the Limitation of Actions Act.
3. The Claimants' filed a Reply to the 1st Respondent's Memorandum of Response on 18 June 2012 and reiterated that the Cause was filed in compliance with the law.
4. On 5 September 2012 the Claimants' filed an application to amend the Statement of Claim. The application was allowed by Lady Justice Wasilwa on 27 September 2012.
5. On 22 April 2013 the Cause was listed before me and Mr. Noorani who appeared on behalf of the 2nd Respondent informed me that the 2nd Respondent had not

been served with any pleadings. I ordered the Claimants' to serve the 2nd Respondent.

6. On 25 April 2013 the 2nd Respondent filed a Notice of Appointment of Advocates. On 20 May 2013 the 2nd Respondent filed its Memorandum of Response and List of Documents. On the same day it also filed a Notice of Preliminary Objection.
7. The Response raised issues of law to the effect that the cause is bad, time barred and scandalous, frivolous and or vexatious. The Notice of Preliminary Objection mirrored the objections in the Response. I heard the parties on the Preliminary Objection on 13 June 2013.

The Preliminary Objection

8. The Preliminary Objection raised 3 grounds in objecting to the Claim and seeking its dismissal. These were in brief that
 - (i) the Cause was bad in law, misconceived and did not disclose a cause of action against the Respondent,
 - (ii) that the cause of action was time barred by virtue of the Limitation of Actions Act and
 - (iii) that the cause was scandalous, frivolous and or vexatious.

9. I will discuss each ground in turn.

The Cause was bad in law, misconceived and did not disclose a cause of action against the 2nd Respondent

10. Mr. Noorani's submissions on this point were that the legal status of a Receiver/Manager is that of an agent for a disclosed principal and that where

there is a disclosed principal, the agent cannot be sued in a personal capacity. It is the Principal to be sued.

11. It was further submitted that it is not open to a Receiver/Manager to bring proceedings in his own name. A Receiver Manager cannot and has no right of action by his appointment. In effect the legal principles applicable to suing a Receiver Manager and his capacity to sue were equally applicable.
12. For these submissions, Mr. Noorani relied on *Palmers Company Law* 20th edition at page 384, *Kerr on the Law and Practice of Receivers* at page 321, Civil Appeal Nos. 5 and 48 of 2002 *Wareham & 2 others v Kenya Post Office Savings Bank Ltd* at page 9 and *Kenya Planters Co-Op Union Ltd v Minister for Cooperative Development and Marketing*.
13. In reply to the first ground, Ms. Mbogo for the Claimants' submitted that a reasonable cause of action had been raised and that not only the agent (2nd Respondent) had been sued but also that the Principal (the 1st Respondent) had been joined. According to Ms. Mbogo, the 1st Respondent had formerly been known as Kenya United Steel Co Ltd before it changed its name to Kenya United Steel Co. (2006) Ltd. Ms. Mbogo asserted that no new company was incorporated or registered.
14. In any case, according to Ms. Mbogo the true status of the 1st Respondent was in dispute and could only be unlocked through evidence. In this regard, Ms Mbogo submitted that this ground could not constitute a true preliminary objection based on pure points of law.

15. Further, Ms Mbogo contended that the 2nd Respondent could not be separated from the individuals who performed the functions of Receiver. A director of a company, according to Ms. Mbogo acts as an agent of the company and has ostensible authority and that Mr. Dearing who had been appointed as the Receiver was a director of the 2nd Respondent.
16. And in any case it was open to the Claimants' to seek to amend the Claim at any stage.
17. Ms. Mbogo cited Treatise of Palmer's Company Law at page 627 and the cases of *Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base* (2013) eKLR, *Mehta Electricals Ltd & 4 others v N.K. Brothers (2005) Ltd*, Nairobi HCCC No. 37 of 2005, *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd & Another* (1964) 1 All ER 630 and *Ferguson v Wilson* (1866) LR 2 Ch 77.
18. The ratio in the Mehta case was on jurisdiction and arbitration proceedings and it does not help me in resolving the point under discussion.
19. I have considered the rival submissions by the parties on the first ground and has come to the conclusion that the correct and sound legal principle as far as the capacity of Receivers to sue and be sued is concerned is as stated in *Lochab Brothers v Kenya Furfural Co Ltd & Ar* (1976-1985) EALR 257, that receivers were authorized to take proceedings only in the name of the company whose agents they were...and that a receiver cannot sue in his own name as a receiver...In my view a similar principle applies where it is intended to sue a receiver.

20. The Receiver becomes on appointment, not the agent of any other company such as the 2nd Respondent but the company placed under receivership. For our purposes the Receivers who were appointed by the debenture holders became agents of Kenya United Steel Co. Ltd. Whether the said company changed its name or transferred ownership to the 1st Respondent is a matter of evidence. At this juncture the relationship between the 1st Respondent and that other company is not known.

21. The Claimants' case in the present Cause is against a person or entity who was their employer at one time. It is a case concerning their livelihoods. The letter responding to the legal counsel before action was on the letter head of the 2nd Respondent. But it was signed by one Adrian Dearing as Receiver and Manager.

* 22. The law on suits against and by Receiver/Managers is clear. It was therefore not competent for the Claimants' to join Price Water Coopers as a Respondent in this Cause. The claim against the 2nd Respondent is incompetent because of capacity and improper joinder. I would dismiss the claim against it and allow the Cause to proceed as against the 1st Respondent.

That the Cause was time barred by virtue of the Limitation of Actions Act

23. On this second ground, it was the submission of Mr. Noorani that the basis of the Claimants' claims was unpaid salaries from September to December 2003 and terminal/retirement benefits from the same period.

24. Counsel submitted that the claims arose from employment contracts which are contractual in nature and that at the material time the applicable statutes were the repealed Employment Act which did not have a specific limitation clause and

therefore the Limitation of Actions Act was applicable. This Act had set a limitation of 6 years for causes of action based on contract and the Claimants' should have filed their claims by December 2009.

25. Mr. Noorani relied on the cases of *Maria Machocho v Total Kenya Ltd* (2013) eKLR and *Sila Onyango Maugo & Ors v Kaluworks Ltd*, Mombasa Industrial Cause No. 85 of 2012 (unreported).

26. On the ground of limitation, Ms. Mbogo submitted that the Claim was brought in time and that the Claimants' were sent on unpaid leave in December 2003 and were to report back in March 2004. She further submitted that the Claimants' were notified on 13 February 2004 to await further communication.

27. Ms. Mbogo further submitted that the Claimants' are still technically employees because no formal communication of termination of employment has been made.

28. Attempts by the Ministry of Labour to have the employer address the issue of the Claimants' bore no fruit by the time there was a change of management in July 2005.

29. According to Ms. Mbogo it is the Trade Disputes Act (now repealed) that was applicable and the Claimants' lodged a dispute with the Minister for Labour through their union, the Kenya Engineering Workers Union. An Investigator was appointed but he did not finalise investigations and a second one was appointed who eventually sent a confidential report to the Minister. The report was not released and the matter was left hanging forcing the Claimants' to approach the Court and in the interests of justice the dispute should be heard and not dismissed at the preliminary stage.

30. The Statement of Claim was filed on 9 May 2011. And it outlined two main prayers, one up to 4 months wages and benefits covering the period immediately prior to the Claimants' being sent on unpaid leave and two, benefits including severance pay, outstanding pay in lieu of accrued leave, housing and other allowances as per the Collective Bargaining Agreement in place.
31. Ms. Mbogo was right that the Trade Disputes Act (now repealed) was the applicable law. My dilemma is that the parties did not really address me on the interplay between the sui generis nature of dispute resolution provided under the Trade Disputes Act and the Limitation of Actions Act.
32. The real question is whether under the Trade Disputes Act, trade disputes had to be brought before the then Industrial Court within 6 years, assuming that some trade disputes such as the one under discussion were contractual in nature.
33. The Trade Disputes Act (now repealed) is not one of the statutes expressly excluded from the purview of the Limitation of Actions Act under Part V of the Act. The Limitation of Actions Act is a statute of general application unlike the Trade Disputes Act (now repealed).
34. The Trade Disputes Act had its own timelines. Under section 4(4), disputes concerning dismissal or termination of an employee had to be reported to the Minister within 28 days. But the Minister could accept a report after 28 days. The Minister had a wide array of options of dealing with the reported trade dispute including reference to the Industrial Court.
35. Under the Trade Disputes Act, a party could not move directly to the Industrial Court. Section 14(9)(b) and (c) of the Trade Disputes Act provided that

9. The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith-

(a).....

(b) unless the trade dispute has been reported to the Minister and twenty-one days have elapsed since the date on which the dispute was so reported;

(c) *while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written;...*

36. Section 14(9)(b) and (c) of the repealed Trade Disputes Act was explicit that the Industrial court could not take cognizance or deal with a trade dispute which was in the process of settlement, investigations or determination by other lawful means. This section holds the key to unraveling the issue of limitation raised by Mr. Noorani.

37. The dispute currently before the Court was reported to the Minister. The Minister appointed an Investigator(s) who allegedly prepared a confidential report. It is stated that the Minister has never released this report. The statute under which the dispute will stand to be determined has now been repealed.

38. In my considered view therefore, the Limitation of Actions Act is/was not applicable to trade disputes as envisaged under the repealed Trade Disputes Act. However where an employee predicates his claim on the ordinary law of contract before the commencement of the Employment Act, 2007, the claim

would be subject to the Limitation of Actions Act and if after the commencement, to the limitation set out in section 90 of the Employment Act.

39. My ruling in Mombasa Cause No. 85 of 2012, *Sila Onyango Maugo v Kaluworks Ltd* was on the basis of the ordinary law of contract and not as a trade dispute under the repealed Trade Disputes Act and, is not helpful in the case under discussion. I may need to state that ordinary employees did not have access to the Industrial Court. The access was restricted to unions with recognition agreements and collective bargaining agreements with employers. But the Employment Act, 2007 has now significantly changed the position.

40. This ground of objection in my view must also fail.

Cause is scandalous, frivolous or vexatious

41. On this last ground Mr. Noorani submitted that under section 345 of the Companies Act, a corporate body is not capable or qualified to act as a Receiver and therefore the 2nd Respondent was the wrong party to sue.

42. Because of my finding above it will be merely academic to deal with this ground and such an exercise will not serve any useful purpose. In any case the Cause has raised serious legal and employment right issues which need to be determined by the Court on merit should the Cause eventually proceed to hearing.

Conclusion and Order

43. In conclusion I do find and hold that it was incompetent for the Claimants' to bring proceedings against the 2nd Respondent and do dismiss the claim against and further hold the Industrial Court could not take cognizance of a trade dispute

which was under settlement or investigations and therefore the Limitation of Actions Act is/was inapplicable.

44. I do order that this ruling be served upon the Minister/Cabinet Secretary for Labour and the Investigator by the Claimants' Advocate on record and that this Cause be stayed pending/until the release of the Investigations report as envisaged under the Trade Disputes Act.

45. There be liberty to apply.

46. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 26th day of July 2013.



Justice Radido Stephen

Judge

Appearances

Ms Mbogo

for Claimants'

Mr. Nduna

for 1st Respondent

Mr. Noorani

for 2nd Respondent

22 September 2021

Clerk of the Senate,
The Senate,
Clerk's Chambers,
Parliament Buildings,
P.O. Box 41482 – 00100,
NAIROBI.

Kencorn House,
Moi Avenue,
P.O. Box 48400 - 00100,
Nairobi, Kenya.
Tel: +254 20 3270000,
2852000, 2851000
Mobile: +254 711012000/
734 108200

Dear Sir,

Attention: J. M. Nyeneny

**RE: PETITION CONCERNING THE PLIGHT OF FORMER EMPLOYEES OF
THE KENYA UNITED STEEL COMPANY**

We refer to the above captioned matter and your letter under Reference Number SEN/SCLSW/2021/56 dated 14 September 2021 requesting the attendance of KCB Bank Kenya Limited ("**KCB Bank**") for a meeting slated for 23 September 2021 with the Senate Standing Committee on Labour and Social Welfare ("**Committee**") to deliberate on matters relating to a petition concerning the plight of former workers of the Kenya United Steel Company ("**KUSCO**") further to a petition countersigned by Sen. Mohammed Faki, MP (Senator Mombasa County).

We have reviewed the content of the petition and note that the same does not specifically mention KCB Bank in the matters set out therein. We further confirm that, applying our best effort taking into account the short notice given by your letter, we are unable to trace any records relating to KUSCO.

We would be grateful if the Committee can provide any additional information that would assist KCB Bank substantially respond to the matters in question.

In light of the foregoing, we would respectfully request that we be excused from attending the proposed meeting subject to the Bank receiving additional information that could assist in providing a substantive response to the Committee.

Further to the above, the undersigned is further unfortunately unavailable to attend a meeting with the Committee on the proposed date and time.

As a commercial bank operating in Kenya, we have great respect for, and appreciate the important oversight role, of the Senate. Accordingly, we would like to assure the Committee of our willingness to assist with its inquiries to such extent as we are able.

Yours faithfully,



JOSHUA OIGARA, CBS

GROUP CHIEF EXECUTIVE OFFICER & MANAGING DIRECTOR



-SENT VIA EMAIL-

The Senate
Clerk's Chambers
Parliament Buildings
PO Box 41842-00100
csenate@parliament.go.ke

21 September 2021

Attention: J.M. Nyegenye, CBS

Your ref: SEN/SCLSW/2021/56

Dear Sir,

Subject: Petition concerning the plight of former employees of the Kenya United Steel Company

We refer to your letter dated 14 September 2021 which was received by us via email on 17 September 2021. The above subject refers.

Please note that the issues raised by the employees in their petition were canvassed in the Employment and Labour Relations Court under Cause No. 10 of 2012 and the claim as against PwC was dismissed vide a ruling dated July 26, 2013. An application to review the dismissal was also rejected by the Court on September 29, 2016. We are therefore unable to respond substantively to the issues raised in the petition.

We confirm that a representative from our organisation will be available to appear before the Senate Standing Committee on Labour and Social Welfare on Thursday September 23, 2021 at 9:30a.m.

Yours faithfully,
For: PricewaterhouseCoopers Limited

Muniu Thoithi
Director

*PricewaterhouseCoopers Limited. PwC Tower, Waiyaki Way/Chiromo Road, Westlands
P O Box 43963 – 00100 Nairobi, Kenya
T: +254 (20)285 5000 F: +254 (20)285 5001 www.pwc.com/ke*

Directors: U Akpata* S Cheruiyot J Kabochi E Kerich B Kimacia M Mugasa T Mukora A Murage F Muriu S Mutinda P Ngahu R Njoroge
S O Norbert's O Nyambego S Okello B Okundi I Otolu K Saiti M Thoithi G Weru (* Nigerian)

29TH JULY, 2021

ATTENDANCE LIST (KUSCO)

NO.	NAME	ID.NO	TEL.NO	SIGNATURE
1	DIMIRI AZI MWASABE	2255014	0720658570	<i>[Signature]</i>
2	JOSHUA JOSEPH CHAKA	4644131	0722427676	<i>[Signature]</i>
3	GEORGE O ANYUL	8256775	022424396	<i>[Signature]</i>
A	ELVIS E. MURRAYA	6095406	0701982618	<i>[Signature]</i>
5	YANA MBOGGA	2254991	0723345573	<i>[Signature]</i>
6	MULIYAD. BAKARI	5+3374	0752058400 0753355	<i>[Signature]</i>
7	WILBERTO K MWANJE	2254908	0718242135	<i>[Signature]</i>
8	HAMISI S KITEMA	2254978	0711905544	<i>[Signature]</i>
9	STANLEY A. ZOWA	6132922	0729285546	<i>[Signature]</i>
10	WILLIAM FRANK OPWARI	072810116 2255032	0728940116	<i>[Signature]</i>
11	OWONA DR. MUHAMMAD	0505414	0717789310	<i>[Signature]</i>
12	MUMBE MUYIRO NGOME	2254861	0727913215	MUMBE
13	ROBINSON MATEO NZAI	2180322	0724480911	<i>[Signature]</i>
14	ALI Mwanimili Mwanamoi	2254904	0727943323	<i>[Signature]</i>
15	DOMINIC MUKUNDU UMBU	6057596	0725770682	<i>[Signature]</i>
16	TSILO MBOGO	4644082	0716343864	<i>[Signature]</i>
17	JACKSON M. NZAI	2180220	0712008590	<i>[Signature]</i>
18	ALI HASSA	5412859	0705291185	<i>[Signature]</i>
19	PETER OSUNGA NADERE	2254965	0721545503	<i>[Signature]</i>

REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT KOMBASA

HISCO CIVIL APPLICATION NO. 426 OF 2016

CHARLES MBATHA, being as the LIQUIDATOR OF
STEEL SAFCO SOCIETY LIMITED (IN LIQUIDATION) APPLICANT

VERSUS

KENYA UNITED STEEL COMPANY (2006) LTD..... RESPONDENT

RULING

1. The applicant through an application dated 19th May, 2016 brought under sections 64(1) and 228 of the Companies Act, Cap 486, under schedule 1 part (1) of the Co-operative Societies Act and Order 51 rule 1 of the Civil Procedure Rules seeks the following orders:-

- (i) That leave be granted to the applicant to commence proceedings against Kenya United Steel Company (2006) Limited; and
- (ii) That the costs of this application be provided for.

2. The application is supported by the affidavit of Charles Mbatha sworn on 19th May, 2016 and the grounds in support of the said application. The respondent filed its grounds of opposition on 4th July, 2016 and a replying affidavit on 14th day of December, 2016. Counsel for the applicant thereafter filed his written submissions on 27th March, 2017 while Counsel for the respondent filed his on 10th May, 2017.

MUHLI MWANGI

2. Mr. Jumbale, Learned Counsel for the applicant in highlighting his submissions stated that Steel Sacco Society Limited (Steel Sacco) was placed under liquidation with the liquidator being one Charles Mbatha. He further stated that in the process of liquidation it was realized that money was deducted from members of the Steel Sacco was supposed to be remitted to the said Sacco by the respondent but instead of so doing, it retained the money. He relied on the annexure marked CM4 attached to the applicant's affidavit. He argued that it revealed clear non-remittance of the money. He also referred to the letter dated 10th June, 2005 attached to the said affidavit which shows that deductions were not being remitted to the Steel Sacco. Counsel sought leave to file a substantive claim.
3. It was submitted that the respondent has tried to avoid responsibility by selling the company to other parties but in this case, the applicant has cited the entity which the Steel Sacco was dealing with. He added that a search from the Registrar of Companies dated 11th July, 2013 disclosed the identity of the Directors of Kenya United Steel Company. In another letter addressed to Kituo cha Sheria dated 11th July, 2013, it showed that Kenya United Steel Company (2006) Limited does not appear in the database at the Registrar of Companies.
4. Mr. Jumbale made reference to a letter dated 16th April, 2014 wherein an inquiry was made to the Registrar of Companies for a search for Steel Rolling Mill (SRM) Limited where a response was received to the effect that the company was under a Receiver Manager from 15th August, 1989. Counsel submitted that the said company which was under receivership had no capacity to transact and enter into the agreement for sale of land that was

entered into on 1st December, 2005. He stated that since they had no capacity to transact, the agreement was a sham.

5. In making reference to the annexures attached to the respondent's replying affidavit, Counsel for the applicant stated that a certificate of change of name of the Company from United Steel Company Ltd to Kenya United Steel Company (2006) Ltd. was attached. He further stated that the respondent is in a fix as its operations are ongoing but the Registrar of Companies states that the company is not in their database as per the letter dated 11th July, 2013. It was also submitted that the respondent had not availed a certificate of incorporation of SRM Limited but had attached a certificate of change of name to its replying affidavit. He prayed for the application to be allowed.
6. Mr. Bosire, Learned Counsel for the respondent opposed the application and stated that with regard to the letter dated 11th July, 2013, the applicant failed to pursue the issue of the registration number of Kenya United Steel Company (2006) Limited yet registration numbers distinguish one company from another. He submitted that the letter dated 19th June, 2013 gave the registration number for the said company as 6962. He stated that the same number is replicated in clause 1 of the agreement between Kenya United Steel Company (Ltd) and SRM where the latter gives its registration No. as 110522. Counsel further submitted that Kenya Commercial Bank sold the property of SRM to Kenya United Steel Company Limited. Counsel referred to clause 13.2 at page 11 of the said agreement where the buyer on the request of the purchaser agreed to the use of its name, Kenya United Steel Company Ltd. Counsel further stated that at clause 13.1 of the said

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agreement, the buyer was to pass on a list of its employees for absorption into the purchasing company, if necessary. Mr. Bosire argued that no liability was passed onto the buyer.

7. Counsel stated that the certificate of change of name issued on 26th July, 2006 changed the name of SRM to Kenya United Steel Company (2006) Limited and that the registration certificate remains No. C.110522. He further said that the applicant has not disclosed the identities of the persons whose money was deducted. He made reference to various figures which differed in the letters dated 10th February, 2003, 28th August, 2003 and 8th September, 2008. Counsel indicated that the mandate given to Charles Mbatha, the liquidator elapsed on 27th November, 2015 and therefore he had *no locus standi* to file this suit.
8. In response to the foregoing submissions, Mr. Jumbale reiterated that the respondent had not attached a certificate of incorporation for SRM Limited but a certificate of change of name and that a search that was done did not reveal any information about Kenya United Steel Company (2006) Limited.
9. Counsel stated that the respondent had not disputed the amount being claimed in its replying affidavit hence it could not dispute the same from the bar.
10. On the issue raised by Counsel for the respondent of the lack of *locus standi* by the liquidator to file the present application, Mr. Jumbale stated that the applicant in his supporting affidavit filed on 20th May, 2016 did attach a copy of gazette Notice No. 2979 dated 28th November, 2015 which extended

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the mandate of the liquidator of Steel Sacco Society Limited (in liquidation (SC/2089) for a period not exceeding one year from the said date. It therefore follows that as at the time the applicant filed the present application on 20th May, 2016, he had the *locus standi* to do so.

ANALYSIS AND DETERMINATION

The main issue for determination is if the applicant is entitled to leave to file a suit against the respondent.

11. Leave to institute a suit in this case is being sought as a result of Steel Sacco Society Limited being under liquidation. Section 64 of the Co-operative Societies Act provides that certain sections of the Companies Act specified in part I and part II of the Schedule to the Co-operative Societies Act shall apply *mutatis mutandis* in relation to the winding up of a Cooperative Society as they apply to a company registered under the Companies Act. One of the sections of the Companies Act listed in part I of the said schedule is section 228 of the Companies Act. It provides as follows:-

“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and to such terms as the court may impose.”

12. Counsel for the respondent when opposing the application argued that the respondent is not one and the same with the company that had employed the persons whose share contributions are said not to have been remitted to the respondent. In his view, due to lack of a contractual obligation on their part

they could not be sued for recovery of the share contributions which should have been remitted to Steel Sacco Limited. The applicant's Counsel submitted that it is Kenya United Steel Company Limited that should have remitted contributions and not Kenya United Steel Company (2006) Ltd.

13. At this point in time the duty of this court is not to look into the merits or demerits of a case that is yet to be filed as the counsel for the respondent would seem to suggest. Issues of whether the assets and liabilities of Kenya United Steel Company Limited were taken over by SRM Limited which later changed its name to Kenya United Steel Company (2006) Ltd., is a matter to be canvassed in the main suit if leave to institute one is granted.

14. The submissions from both Counsel and the affidavit relied upon leave me with no doubt that Kenya United Steel Company Limited (in liquidation) a Kenya United Steel Company (2006) Ltd. with a company SRM Limited and the respondent herein do share a relationship but the same can only be laid bare by giving the applicant an opportunity to commence action against the respondent. For the said reason, I grant the applicant leave to commence proceedings against the respondent within 60 days from today's date. Costs of this application are granted to the applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2017.


NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant

MINISTRY OF LABOUR AND HUMAN RESOURCE DEVELOPMENT

Telegrams: "LABCOM", Mombasa
Telephone: Mombasa 220956
If calling or telephoning please ask for
.....
When replying please quote



DISTRICT LABOUR OFFICE
SOCIAL SECURITY HOUSE
NKRUMAH ROAD
P.O. Box 90361
MOMBASA

ML/IR/13/118/2005

14th January, 2009

The Chief Industrial Relations Officer
Ministry of Labour & Human Resource Development
P.O. Box 40326
NAIROBI

RE: TRADE DISPUTE:

KENYA UNITED STEEL COMPANY (UNDER RECEIVERSHIP)
C/O PRICE WATER HOUSE COOPERS
P.O. BOX 43963 - 00100 - NAIROBI

VERSUS

KENYA ENGINEERING WORKERS UNION - NAIROBI

Issue in dispute:

- (a) Failure by the Price Water House Coopers (Receiver) to pay 153 Ex Kenya United Steel Company employees 4 months salary worked.
- (b) Failure by the Receiver to pay Severance/Gratuity benefits for 153 Ex-Kenya United Steel Company employees.

Every effort has been made by the Investigator to have the Price Water House Coopers (Receiver Managers) submission with no success.

SUBMISSION BY THE UNION:

The union started by submitting that Kenya United Steel Company was placed under receivership on the 18th September, 2003. The employees (153) of this company continued offering services to the company for 4 months without being paid their salaries. This was as from September to December 2003. By this time the company was being managed by Price Water House Coopers as Receiver Managers.

The Union made several attempts to have the employees paid their salary arrears with no success thus the union formalizing the dispute.

Finally the union prays that the Receiver Managers, Price Water House Coopers be compelled to pay the workers salary arrears and Severance pay/Gratuity as per the parties' Collective Bargaining Agreement (C.B.A.) at the time they took over the running of KUSCO.

FINDINGS:

The findings established that M/s. Kenya United Steel Company, a steel engineering company went into receivership in the year 2003. by that time the company was indebted to Kenya Commercial Bank. Price Water House Coopers were appointed as Receiver Managers.

Steel Rolling Mills bought the company in January, 2006 and renamed it Kenya United Steel Company (2006) Limited. Full operations started in July, 2007. KUSCO (2006) Limited is under Alam Group of Companies based in Uganda, Mr. Abeid is the Director.

Some of the employees that previously worked for KUSCO were absorbed by KUSCO (2006) Limited.

From their side, KUSCO (2006) Limited is not aware of employees' unpaid wages from their former employer. The Management stated that they bought the company from the Receiver Managers - Price Water House Coopers Limited.

The findings established that Kenya Commercial Bank went to court to seek legal redress for the recovery of the money they had loaned KUSCO, thus a receiver manager was appointed to sell the company plus its assets for the recovery of the debt. There were also other debtors

At that stage the union could have moved to court urgently at that time for the recovery of employees' dues when the receiver manager was still at the firm so that the workers' dues could have been paid as part of other debts.

RECOMMENDATION:

Having gone through the Unions submissions and the findings, despite the receiver manager's failure to submit, it emerges that the Union is also to take blame for having not moved fast to register the debtors of M/S Kenya United Steel Mills Company (KUSCO) together with others who had also moved to court. This could have been possible where the receiver manager, Price Water House Coopers was still managing the firm on behalf of Kenya Commercial Bank (KCB)

I recommend that the dispute be put to rest.

C. N. Mwinami
(INVESTIGATOR)

c.c.

Provincial Labour Officer
Coast Province
MOMBASA

CNM/rmn

Kenya United Steel Co. Ltd.

P O BOX 90550
CABLES. "KUSCO" (3)
TELEPHONE. 433601-8
TOWN OFF. 313020/32
TELEX. 21197/21443
FAX. 315025
M O M B A S A
K E N Y A

16th September, 2003

TO THE RETIREES

THE MANAGEMENT REGRETS TO INFORM YOU THAT DUE TO UNFORESEEN CIRCUMSTANCES, THE ARRANGEMENTS WHICH WERE MADE FOR YOUR FINAL PAYMENTS COULD NOT BE MADE. AS SUCH, ARRANGEMENTS ARE BEING MADE AND THE MANAGEMENT WILL BE INFORMING YOU IN DUE COURSE THROUGH YOUR CONTACTS WITH THE MANAGEMENT.

THIS INCONVENIENCE IS HIGHLY REGRETTED.


N.J. RAJANI
ALT. DIRECTOR

DIRECTORS. J. G. RAJANI, M. P. CHANDARIA (BRITISH), S. J. RAJANI, S. M. CHANDARIA (BRITISH), D.F.C.K. LTD.



MINISTRY OF LABOUR, SOCIAL SECURITY & SERVICES

Telegram: 'LABCOM', Nairobi
Telephone: Nairobi 2729800
If calling telephoning ask for

SOCIAL SECURITY HOUSE,
BISHOPS ROAD,
P.O. BOX 40326,
NAIROBI.

When replying please quote Ref:

Ref. No. ML/IR/13/118/2005

16th April, 2014

The General Secretary
KEWU
P. O. Box 73987-00200
NAIROBI

Kenya United Steel Company
(under receivership)
C/O Price Water House Coopers
P. O. Box 43963-00100
NAIROBI

RECEIVED
"A"
RECEIVED BY THE GENERAL SECRETARY OF
Joseph Ashoya & Coers
12
March 2014
General Secretary of KEWU

Dear Sirs,

RE: TRADE DISPUTE

Please refer to our letter of even reference dated 7th July, 2006 in which Mr C. N. Mwinami of Mombasa Labour Office of was appointed to act as an investigator in the above dispute. I append herein the Minister's findings and recommendations.

Issue in Dispute

- (a) Failure by price water House Coopers(receivers) to pay 153 ex-Kenya United Steel Company for 4 months worked.
- (b) Failure by the receiver to pay severance/gratuity benefits for ex-Kenya United Steel Company"

Union Submissions

The union submitted that United Steel Company was placed under receivership on 18/9/2003. At this time the company was being run by the receiver managers namely; Price Water House Coopers.

The Union submitted that at this time the 153 employees of the company continued offering services from September, to December 2003. They were however, not paid for the four months they worked under the receiver manager.

The company was subsequently bought by steel rolling mills in January 2006 and renamed Kenya united steel company (2006) limited. The new owner denied any unpaid wages from the former employer as they bought the company from the receiver managers. Price Water House

coopers Limited. The union therefore demands that the workers salary for the four months worked between September and December 2003 as well as all the arrears and severance/gratuity as per the parties then existing Collective Bargaining Agreement.

Submission By the Management

When Kenya United Steel Company was put under receivership the receiver managers namely: Price Water house Coopers totally failed/ignored to either submit any memorandum nor attend scheduled investigation meetings.

Findings

Investigations established that Kenya United Company had valid recognition agreement with the union by virtue of it being a member of engineering and Allied Industries Employers Association of the FKE.

It was established that the company was indebted to Kenya Commercial Bank who on 18/9/2003 placed it under receivership with the firm of Price Water House Coopers as receiver managers. Investigations further established that the company was eventually sold by the receiver managers and some of the employees absorbed in the renamed Kenya United Steel Company (2006) Limited.

Investigations established that the liabilities of the previous owners ended upon the appointments of a receiver manager. To that extent the if any of the employees had any amount due this was to be considered as secured debt in accordance with the then employment Act(cap. 226 LOK)(now repealed)and the company law (cap 486 LOK).

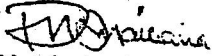
Investigations established that the receiver managers retained the employment of the 153 grievant from September to December 2003. The grievants gave out their services to the receiver manager who then was an employer. For this period the grievants did not receive any salary which was an earned right. Employees should be paid for the days worked during the period in consideration i.e. between September and December 2003. The receiver manager was for all practical purposes the employer of the grievants but not the owners of Kenya United Steel Company.

Recommendations

After a careful consideration of both parties submissions coupled with the above findings, I recommend that the receiver manager Price Water House Coopers pay to each of the grievants the four months earned but not paid for between September and December 2003. I further recommend that each of the employees be paid severance pay and any other benefits in accordance with the then existing Collective Bargaining Agreement between the parties.

Finally, both parties are requested to accept the above recommendation as a basis of settling this dispute.

Yours faithfully,



P.N. Macharia

For: CHIEF INDUSTRIAL RELATIONS OFFICER

CLO - Mombasa

Deputy Registrar
Industrial Court of Kenya at Mombasa
(cause no 10 of 2012)

LABOUR COMPLAINT

PROVINCIAL LABOUR OFFICE
COAST

Areas of unpaid wages at

at Kenya United Steel Co. Ltd

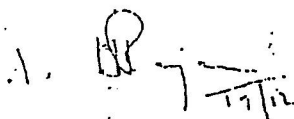
During consultations at the Provincial Labour Office over the above matter it was agreed as follows:

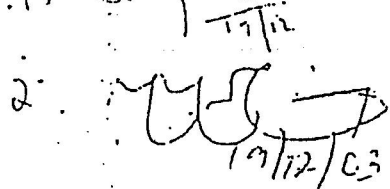
1. That the workers shall be paid ~~some~~ Ksh. 2000/- each and proceed on unpaid leave w.e.f. 20/12/2003.
2. That if the court case is resolved on 15th Jan. 200

the workers will receive one month's salary each by the end of the same month.

3. That workers will resume work on 1st March 2004, or before if need arises.

Signed for and behalf of Manage

1.  N. J. Basani (Mgt. Director)


2.  M. N. Murtaza (F&D)

Signed for and behalf of Union (ICEM)

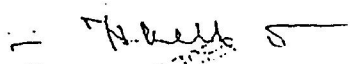
1. Chris Nalin General Secretary, Bump

2. Jovan Murga National Chairman, OTOBY

3. Peter Mulu Chief Shop Steward, F&D

4. Bumbo Azorov ASST - 11 

In the presence of
19/12/03


PROV. Fin. Officer
PL/CO ASST

RESUMPTION OF DUTY

This is with reference to our Agreement on 19.12.2003.
The Court had informed us that our case with K.C.B. will now be
mentioned on 19.3.2004 and the Full Hearing Fixed thereafter.

Please be patient and bear with us until you hear further communication
from us.

FOR KENYA ENGINEERING
WORKERS UNION.

.....
Mt. John Muzu

FOR KENYA UNITED STEEL
COMPANY LIMITED.

.....
Mr. M. N. MUSA

WITNESSED BY
PROVINCIAL LABOUR OFFICER, COAST

.....
Mr. T. L. Okello

DATED THIS 13th DAY OF FEBRUARY 2004

PROVINCIAL LABOUR OFFICER
COAST

Kenya United Steel Co. Ltd.

P. O. BOX 90550
CABLES. "KUSCO"
TELEPHONE. 433601-6
TOWN OFF. 316020/32
TELEX. 21197/21443
FAX. 316025
M O M B A S A
K E N Y A

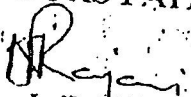
28th JANUARY 2004

TO ALL EMPLOYEES:

THE MANAGEMENT WISHES TO INFORM THAT THE COURT
CASE OF 15th JANUARY 2004 HAS BEEN DEFERRED TO THE
MONTH OF FEBRUARY.

IN LINE WITH THE AGREEMENT WITH THE PROVINCIAL
LABOUR OFFICER SIGNED ON 19th DECEMBER 2003 ALL
EMPLOYEES ARE REQUESTED TO REPORT ON 1st MARCH 2004

YOURS FAITHFULLY,


N. J. RAJANI
(ALT. DIRECTOR)

DIRECTORS. J. G. RAJANI, M. P. CHANDARIA (BRITISH), S. J. RAJANI, S. M. CHANDARIA (BRITISH), D.F.C.K. LTD.



KITUO CHA SHERIA

The Centre For Legal Empowerment

NAIROBI: Oie Odume Rd., Off Argwings Kodhek Rd
PO Box 7488 - 00500 Ronald Ngala Nairobi, Kenya
Tel: 3874191, 3874220, 3876290, Fax: 3876295
Mobile: 0734-874221, 0727-773991
Email: info@kituochasheria.or.ke
Website: www.kituochasheria.or.ke

MOMBASA: Fidelity House
PO Box 89065 Mombasa, Kenya
Tel: 2230282 Fax: 2230283
Cell: 0731 129739 / 0700 638379
Email: msa@kituochasheria.or.ke

EASTLEIGH: Section 2, 6th Street
Amco Plaza / Complex 4th Floor
PO Box 7488 00300, Nairobi, Kenya
Tel: +254-20-2451631 Fax: 254 20 3876
Cell: 0736 867241 / 0720 806531
Email: info@kituochasheria.or.ke

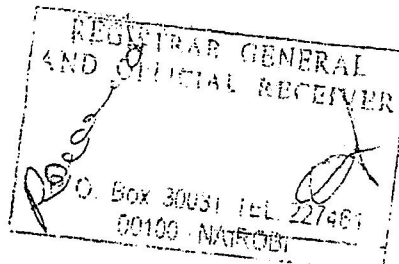
19th June 2015

The Company Registrar

Sheria House

Harambee Avenue

NAIROBI



Dear Sir,

RE: COMPANY SEARCH OF KENYA UNITED STEEL COMPANY (2006)
LIMITED AND KENYA UNITED STEEL COMPANY LIMITED 6962

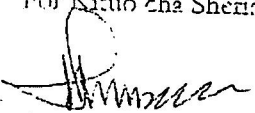
We refer to the above matter.

Kindly furnish us with a search of the above named companies for purposes of conduct of a suit before the Industrial Court of Kenya.

We undertake to pay your reasonable charges.

Yours faithfully,

For Kituo cha Sheria


Annette Mbogoh, Advocate

Coordinator (Msa)

Telegrams: "INTESTATE", Nairobi
Telephone: Nairobi 227461
Please address all communications to:
THE REGISTRAR - GENERAL.



DEPARTMENT OF
THE REGISTRAR GENERAL
P.O. Box 30031- 00 100
NAIROBI

Our Ref : CR 13- GENERAL C. 6962
Your Ref : TBA

11th July 2013

KITUO CHA SHERIA
P.O.BOX 7483
NAIROBI.

ATTN: A.MBOGO

Dear Sir,

REF: KENYA UNITED STEEL COMPANY LIMITED

We refer to your letter dated 19TH June 2013.

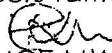
The above company was registered as a private company on 12th July 1965 as registration number C. 6962.

According to the latest annual return filed in 2002 the details of its directors/shareholders are as follows:

<u>Director/shareholder</u>	<u>Address</u>	<u>Shares</u>
East Africa wire industries limited	P.O.Box 90494 Mombasa	11,279,219
Development bank of Kenya limited	P.O.BOX 30483 Nairobi	2,717,156
Shailesh Jayantilal Rajani	P.O.BOX 90550 Mombasa	Nil
Hirji Shah	P.O.BOX 46934 Nairobi	Nil
Nitin Jayantilal Rajani	P.O.BOX 90550 Mombasa	Nil
		<u>TOTAL 13,996,375</u>

The registered office is
PLOT NO. 884/VI MN MIRITINI
P.O.BOX 90550
MOMBASA

Yours faithfully,


ALICE MWENDWA
STATE COUNSEL
FOR: REGISTRAR OF COMPANIES.

ograms: "INTESTATE", Nairobi
Telephone: Nairobi 227461
Please address all communications to:
THE REGISTRAR -GENERAL.



DEPARTMENT OF
THE REGISTRAR GENERAL
P.O. Box 30031- 00 100
NAIROBI

Our Ref : CR 13- GENERAL
Your Ref : TBA

11th July 2013

KITUO CHA SHERIA
P.O.BOX 7483
NAIROBI.

ATTN: A.MBOGO

Dear Sir,

REF: KENYA UNITED STEEL COMPANY 2006 LIMITED

We refer to your letter dated 19th June 2013.

This company/ business name does not appear in our data base of registered companies/businesses. If you have its registration number, kindly pass it on to us for purposes of cross-checking and confirmation.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'A.M.' with a flourish.

ALICE MWENDWA
STATE COUNSEL
FOR: REGISTRAR OF COMPANIES.



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

JUDGMENT IN

CAUSE NO. 10 OF 2012

[Formerly Cause Number 703 of 2011 IC at Nairobi]

BETWEEN

JOSEPH ASHIOYA & 171 OTHERS

VERSUS

KENYA UNITED STEEL COMPANY [2006] LIMITED

DELIVERED BY

JAMES RUKA

JUDGE

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 MBWIKI
104. MULWA KIMINZI
105. GEORGE ANYUL
105. 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

172
110
62

KENYA UNITED STEEL COMPANY [2006] LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Dr. Annette Mbogoh, Advocate instructed by Kituo Cha Sheria, Advocates for the Claimants

Moses Mwakisha & Company Advocates for the Respondent

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.

33. 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-XLR*, 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

