



**Kenya Concrete, Structural, Ceramic Tiles Woodplys and  
Interior Design Workers Union v Topline Traders Limited (Cause  
E351 of 2022) [2024] KEELRC 1257 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1257 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E351 OF 2022  
MA ONYANGO, J  
MAY 8, 2024**

**BETWEEN**

**KENYA CONCRETE, STRUCTURAL, CERAMIC TILES WOODPLYS AND  
INTERIOR DESIGN WORKERS UNION ..... CLAIMANT**

**AND**

**TOPLINE TRADERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claim herein was instituted by Kenya Concrete, Structural, Ceramic Tiles Woodplys and Interior Design Workers, a duly registered trade union. The Respondent is a limited Liability company duly registered under the *Companies Act*.
2. It is the Claimants case that one Mr. Jacob Oloo, herein after referred to as the Grievant, was employed by Topline Traders limited at a salary of Kshs 25,000. That he worked for 5 years before his services were terminated on 23<sup>rd</sup> July 2021.
3. It's the Claimant's case that Mr. Jacob Oloo was unfairly, wrongfully, unlawfully and illegally dismissed by the Respondent and was denied his dues.
4. The Claimant stated that as per the requirements of Section 62 of the *Labour Relations Act* the matter was reported to the Ministry of Labour vide a letter dated 11<sup>th</sup> August 2021.
5. That a report was prepared by the Conciliator recommending that Mr. Jacob Oloo be paid his terminal dues in accordance with the law vide a letter dated 21<sup>st</sup> April 2022.
6. The Claimant states that the Respondent has refused, declined and ignored to implement the recommendations of the conciliator as issued on 21<sup>st</sup> April 2022.



7. The Claimant avers that the Respondent's actions are contrary to the provisions of the law sections 2, 40,41,43 and 45 of the [Employment Act](#)
8. The Claimant prays for judgment and declaration against the Respondent and for orders that:
  - i. For a declaration to issue to the effect that the termination of the Claimant members contract of Employment herein was unprocedural, wrongful and unfair hence NULL and VOID.
  - ii. That the member of the Claimant herein be reinstated unconditionally to his occupations prior to termination/Redundancy
  - iii. That the Honourable Court issues an Oder adopting the recommendations of the conciliator as orders of the Court.
  - iv. That the cost of the suit be met by the Respondent
  - v. That in the alternative of prayers 2 &3 above the Respondent herein all the terminal dues inclusive of interests at court rates from date of filling the suit till payment in full.
  - vi. Any other further and better relief that this honourable court may deem just and fit to grant.
9. Together with the Memorandum of Claim, the Claimant filed a notice of motion under certificate of urgency seeking the following Orders: –
  - i. That this application herein this matter be certified assurgent and service be dispensed with at the first instance.
  - ii. That an order be and is hereby issued directing the Respondent by itself, agents, assigns, serving representative to compute, file and serve upon the Applicant a payment schedule payable to all the aggrieved members of the Claimant herein pending hearing and determination of this application.
  - iii. That this application and the main suit be merged and procced by way of documentation as provided for under Rule 21 of the Employment and Labour Relations Court Procedure Rules, 2016.
  - iv. That an order be and is hereby issued restraining the Respondent from any act of victimization including termination of existing appointments and dismissing the members of the Applicant herein on account of this suit.
  - v. That this court be pleased to grant any other Order that it deems fit and just to meet the ends of justice.
  - vi. That, cost of this application be provided for.
10. The application is supported by the affidavit of Dishon Angoya, the General Secretary of the Claimant/ Applicant and the grounds on the face thereof which are a reiteration of the facts pleaded in the Memorandum of Claim.

### **Respondents case**

11. In response to the application the Respondent filed grounds of opposition and a replying affidavit sworn on 12<sup>th</sup> July 2022 by John KIBE the Respondents Supervising Manager stationed at Industrial Area, Nakuru County.
12. The Respondent filed a response to the memorandum of Claim dated 14<sup>th</sup> October 2022.



13. The Respondent avers that it has no linkages to building and construction sector where the Claimant operates.
14. It stated that to aid its operations it employs personnel under term contracts to provide services including transport of LPG cylinders. That to exercise disciplinary control over its employees it has put in place elaborate procedures and processes and a code of regulations.
15. The Respondent stated that Jacob Oloo, the Grievant, was employed by the Respondent as a gas refiller at a monthly salary of Kshs 25,000.
16. That on 14<sup>th</sup> July 2021 Jacob Oloo allegedly aided and/or stole several gas cylinders which action amounted to gross misconduct that warranted summary dismissal.
17. That through a letter dated 10<sup>th</sup> August 2021 Jacob Oloo was invited to a disciplinary hearing to be held on the 13<sup>th</sup> August 2021 and was informed of his right to be accompanied by a fellow employee but Jacob Oloo failed to attend the disciplinary hearing.
18. That the Respondent thereafter received a letter from the Chief Industrial Relations Officer in the Ministry of the Labour and Social Protection Department confirming the acceptance of the report of dispute by the Claimant which letter the Respondent responded to through its advocates, stating that there was no recognition agreement between the Claimant and the Respondent as required under Section 54(1) and (3) of the *Labour Relations Act*.
19. The Respondent stated that the Claimant was incapable of referring the alleged dispute to the Minister under the *Labour Relations Act* and that the appointment of the conciliator was a self-denoted power, irregular and premature. That any orders given by the Claimant or the conciliator were void abnatio since the Claimant does not have mandate to represent the Respondent's employees.
20. The Respondent stated that the Sections of the *Employment Act* referred to by the Claimant were not only irrelevant but were inapplicable since the Claimant was never rendered redundant.
21. The Respondent stated that Jacob Oloo had been suspended from employment pending investigations and disciplinary hearing and that his employment was never terminated as alleged by the Claimant.
22. The Respondent stated that it was a stranger to the Redundancy notice alluded to by the Claimant
23. The Respondent urged the court to dismiss the Memorandum of Claim dated 26<sup>th</sup> May 2022 with costs.

#### **Claimant's Submissions**

24. The Claimant highlighted three issues for determination as hereunder;
  - i. Whether the Grievant was an employee of the Respondent,
  - ii. Whether the Grievant's services were unfairly, unprocedural and unlawfully terminated,
  - iii. What remedies are available for the Claimant in the circumstances.
25. On the first issue the Claimant submitted that the Grievant Jacob Oloo was an employee of the Respondent who had a legitimate expectation to earn his salary in full and therefore the Respondent's failure to comply with the conciliator's report was unfair and unlawful.



26. On the 2<sup>nd</sup> issue the Claimant submitted that the Respondent ought to have had formal disciplinary procedures in the workplace and should not apply strict requirements as those of criminal matters. Further, that the Respondent should refrain from effecting penalties that are not supported by the law.
27. It submitted that should the evidence in support of the charge against an employee be sufficient an employer should issue a termination letter setting out the reasons for termination.
28. The Claimant further submitted that employees should not be discriminated. It relied on the holding in *GMV v Bank of Africa Limited (2013) eKLR* where the court held that; “once an employee has established a prima facie case, the burden shifts to the employer to show, articulate, specific and non-discriminatory reasons for disparity.....”
29. On the third issue the Claimant submitted that the grievant be awarded remedies as prayed in the statement of claim.

### **Respondents Submissions**

30. The Respondent in its submissions set out four issues for determination being-
  - a. Whether the Claimant is competent to institute a Claim against the Respondent without any recognition agreement?
  - b. Whether the internal dispute resolution mechanisms have been concluded/exhausted?
  - c. Whether Jacob Oloo was unfairly, wrongfully and unlawfully terminated by the Respondent herein?
  - d. Whether the Claimant is entitled to prayers sought?
31. On the first issue the Respondent submitted that there is no recognition agreement between the Claimant and the Respondent capable of enforcement as required under Section 54 of the *Labour Relations Act*.
32. It was submitted that the Respondent is duly registered with the Energy & Petroleum Regulatory Authority to gainfully carry out business as dealers in storage, filling and distribution of Liquefied Petroleum Gas (LPG) and cylinder and allied business. That the company has no linkage to building and construction sector within which the Claimant operates.
33. The Respondent relied on the holding in *Kenya Plantation & Agricultural Workers Union vs Kenya Chemical & Allied Workers Union & 2 Others (2018) eKLR* where the court held: “the law provides for membership according to Sectors.  
  
.... from the foregoing I reach the conclusion that the 1<sup>st</sup> Respondent does not operate within the agricultural sector which is the preserve of the Claimant. I therefore find that the 1<sup>st</sup> Respondent’s constitution does not permit it to recruit employees from the 2<sup>nd</sup> Respondent into its membership. The corollary is that the employees of the 2<sup>nd</sup> Respondent are not eligible to join the membership of the 1<sup>st</sup> Respondent”
34. The Respondent further relied on the decision in *Transport Workers Union (K) v Ideal Logistics Limited (2012) eKLR* where the court in emphasizing the place of recognition agreement in labour relations stated as follows: “from the definition of a recognition agreement, it becomes obvious that it is the recognition agreement that gives the union the capacity to represent the interests of those employees it represents in their dealings with the employer.... Without any recognition agreement in



place a union lacks both contractual and legal capacity to commence any court proceedings on behalf of an employee against an employer”

35. Counsel submitted that the Claimant lacked the locus standi to institute any Claim against the Respondent on the basis that the parties have not entered into a recognition agreement.
36. Counsel submitted that the Respondent has established the existence of an internal dispute resolution mechanism whose rules of procedure are in line with Article 47 of *the Constitution* of Kenya. It was submitted that the Respondent had not exhausted the internal dispute resolution mechanism as the Grievant was invited to participate in the disciplinary hearing but failed to attend.
37. For emphasis the Respondent relied on the holding in *William Odhiambo Ramogi & 3 Others vs Attorney General & 4 others; Muslims for Human Rights & 2 Others (Interested Parties)2020* where the court held: “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts”
38. Counsel further submitted that the Claimant ought to have established termination before alleging unfair, unlawful and wrongful termination. That the Claimant has quoted various statutory and constitutional provisions on unfair termination but has not provided factual basis of it.
39. The Respondent submitted that the Claimant did not prove that the Grievant’s employment was unfairly terminated based on redundancy. It was submitted that the Claimant relied on an alleged notice of redundancy which the Respondent stated it was not aware of.
40. The Respondent relied on the holding in *Mangla Agot v Priscillar Nthoki Mutulili & Another (2022) eKLR* where the court held that; “anyone coming to court should be aware that courts decide cases on evidence and the law”.
41. The Respondent submitted that the Claimant’s pleadings are indiscernible, incoherent both in content and design but what is clear is that the pleadings lack any factual basis to support the Claimant’s cause of action.
42. The Respondent submitted that the Claimant’s case is defective, incompetent and bad in law for failure to disclose reasonable cause of action and want of locus standi and urged the court to dismiss the Claim with costs.

### **Issues for Determination**

43. Having considered the pleadings and submissions, the issues arising for determination are:
  1. Whether the Claimant union has locus to represent the Grievant,
  2. Whether the Grievant’s employment was unfairly terminated,
  3. Whether the orders sought are merited.
44. On the 1<sup>st</sup> issue the Respondent avers that in view of the fact that the Claimant does not have a recognition agreement with the Respondent, it has no locus standi to represent the Grievant. Further, that the Claimant does not have capacity to represent the Grievant as the Respondent does not operate in the building sector whose employees the Claimant is mandated to represent.



45. It is further the Respondent's position that the Labour Officer arrogated to itself authority in accepting the dispute and preparing a report as there is no recognition agreement between the Claimant and Respondent.
46. Representation of members and recognition of trade unions are separate and distinct. A union is entitled to represent its members even if there is no recognition agreement between it and the employer. It is negotiation of collective bargaining agreements that a trade union is not eligible for without a recognition agreement. Thus, membership is the only requirement for purposes of representation of an employee by a trade union.
47. Section 4 of the *Labour Relations Act* provide for membership while section 54 of the Act provides for recognition. Section 4 provide:

4.

- (1) Every employee has the right to –
  - (a) participate in forming a trade union or federation of trade unions;
  - (b) join a trade union; or
  - (c) leave a trade union.
- (2) Every member of a trade union has the right, subject to *the constitution* of that trade union to –
  - (a) participate in its lawful activities;
  - (b) participate in the election of its officials and representatives;
  - (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and The *Labour Relations Act*, 2007 11
  - (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to *the constitution* of that federation to –
  - (a) participate in its lawful activities;
  - (b) participate in the election of any of its office bearers or officials, and
  - (c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office. Protection of employees.

48. Section 54 (i) provides for recognition as follows-

54.

- (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.



- (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

49. The other issue worth considering is the role of a labour officer. The powers of Labour Officers are provided for in the [Labour Institutions Act](#). Labour Officers are responsible for monitoring of compliance with any labour laws. Under section 47 as read with sections 48 and 49 of the [Employment Act](#), Labour Officers are empowered to receive complaints of dismissal and unfair termination. Labour Officers are also recognized as conciliators under Part VIII of the [Labour Relations Act](#).

50. The Respondent's assertion that the Labour Officer acted without authority is therefore not correct as labour officers are recognized adjudicators in labour matters under the [Employment Act](#), the [Labour Relations Act](#) and [Labour Institutions Act](#).

51. In the instant case the Respondent was under obligation to respond to the invitation by the Labour Officer appointed as conciliator in this matter and to state its case before the conciliator so that the conciliator could reconcile the parties or prepare a report with full details of each party's position as required under section 67 of the [Labour Relations Act](#) which provides-

67.

- (1) The conciliator or conciliation committee appointed under section 66 shall attempt to resolve the trade dispute referred to in section 65 (1) within-
  - (a) thirty days of the appointment; or
  - (b) any extended period agreed to by parties to the trade dispute.
- (2) For the purposes of resolving any trade dispute, the conciliator or conciliation committee may –
  - (a) mediate between the parties;
  - (b) conduct a fact-finding exercise; and
  - (c) make recommendations or proposals to the parties for settling the dispute.
- (3) For the purposes of resolving any trade dispute, the conciliator or conciliation committee may –
  - (a) summon any person to attend a conciliation;
  - (b) summon any person who is in possession or control of any information, book, document or object relevant to resolving the trade dispute to appear at the conciliation; or
  - (c) question any person present at a conciliation.
- (4) The Minister shall pay the prescribed witness fee to any person who appears before a conciliator or conciliation committee in response to a summons issued under subsection (3).
- (5) No person shall without good cause fail to –



- (a) comply with a summons issued under subsection (3);
- (b) produce any book, document or item specified in a summons issued under subsection (3); or
- (c) answer any relevant question asked by a conciliator or conciliation commission under subsection (3).

52. In the instant suit the Respondent failed to attend the conciliation meeting at which the issue of representation of the Grievant by the Claimant union would have been raised.
53. Further, the Claimant did not submit a copy of its registered constitution which would have guided the court on whether or not it has capacity to represent the Grievant. The Respondent has also not submitted any proof to support its averment that the Claimant has no locus to represent the Grievant.
54. In the circumstances the court is unable to determine whether or not the Claimant has locus standi to represent the Grievant in this suit.
55. The court will therefore move to consider the more substantive issue whether the Claimant's employment was unfairly terminated.
56. The Claimant avers that the Grievant's employment was terminated unfairly while it is the Respondent's position that the Grievant was issued with a letter inviting him to attend a disciplinary hearing which he failed to attend. That prior to that the Grievant had been asked to account for the loss of various gas cylinders that got lost under his custody but failed to do so. That after the Grievant failed to attend the disciplinary hearing the Respondent received a letter from the Minister accepting the report of the instant dispute reported by the Claimant.
57. The Respondent submitted a copy of the letter inviting the Grievant for disciplinary hearing which is reproduced below:

10<sup>th</sup> August 2021

Jacob Oloo Jim

NAKURU

Dear Sir

RE: NOTICE OF DISCIPLINARY HEARING

I write with reference to the recent disciplinary investigation carried out into an allegation that sometime before and on 14<sup>th</sup> July, 2023 you allegedly aided and/or stole a number of gas cylinders of assorted brands.

In light of the above the company feels that there may be a disciplinary case for you to answer, therefore, you are requested to attend a Disciplinary Hearing at Topline Traders Limited's physical location within industrial Area on the 13<sup>th</sup> day of August 2021 at 10.00am in the Boardroom where you will have an opportunity to provide a response to the above allegation.

We are obliged to inform you that your actions if substantiated may constitute gross Misconduct (normally warranting summary Dismissal)



Any breach of confidentiality or fidelity in relation to the Company's business. Deliberate breach of the Company's policy

Should you be deemed guilty of any of these offences you may render yourself liable to disciplinary action up to and including summary Dismissal (ie dismissal without notice to pay in lieu of notice).

Please be assured however that any explanation given by you will be given full consideration prior to any decision being made.

You may, if you wish, be accompanied at the above meeting by a fellow employee or an accredited trade union representative. However, it is your responsibility to make the necessary arrangements for their attendance on the stated date and time and you should let me know in advance as to the identity of your proposed accompaniment i.e by 10.00 am on 13<sup>th</sup> August, 2021.

If for good reason the above date or time is unsuitable, you are required to contact me immediately upon receipt of this letter so that a suitable alternative may be arranged.

Yours faithfully

Signed

John Kibor

For: Topline Traders Limited

58. The averments by the Claimant that the Grievant was dismissed from employment by the Respondent on 14<sup>th</sup> July 2021 is not supported by the evidence on record. It is evident from the letter dated 10<sup>th</sup> August, 2021 that by that date the Grievant was still in employment contrary to his averment that he was dismissed on 14<sup>th</sup> July 2021.
59. It is evident that the averments in the Claim by both the Claimant and Grievant are based on unsubstantiated allegations.
60. From the foregoing I find no merit in the suit herein and dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 8<sup>TH</sup> DAY OF MAY, 2024**

**MAUREEN ONYANGO**

**JUDGE**

