



Timsales Limited v Kenya Building, Construction, Timber & Furniture Industries Employees' Union (Civil Appeal E009 of 2024) [2025] KECA 831 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 831 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E009 OF 2024
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
MAY 9, 2025**

BETWEEN

TIMSALES LIMITED APPELLANT

AND

**KENYA BUILDING, CONSTRUCTION, TIMBER & FURNITURE
INDUSTRIES EMPLOYEES' UNION RESPONDENT**

(An Appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nakuru (H. Wasilwa J.) dated 17th January 2023 in ELRC Cause No. E029 of 2021 consolidated with Cause No. E030 of 2021 & E031 of 2021)

JUDGMENT

1. This is an appeal against the judgment and decree rendered by Wasilwa J. on 17th January 2023 in Nakuru Employment and Labour Relations Court (ELRC) Cause No. E029 of 2021 consolidated with Cause Nos. E030 of 2021 and E031 of 2021. The said proceedings were instituted by the respondent herein on behalf of its members (hereinafter referred to as the grievants) against the appellant. The total number of the grievants in the three consolidated suits was 606.
2. In July 2018, the grievants began demanding payment of their salary which had been delayed since June 2018. On 25th July 2018, the grievants were locked out by the appellant on allegations that they had participated in an unprotected strike and/or absconded from duty. The appellant issued notices to show cause dated 1st August, 2018 to some grievants and those who responded to the notices to show cause were invited to attend disciplinary hearings vide letters of invitation dated 3rd and 9th August 2018. After the hearing, most of the grievants were absolved from any wrong doing.
3. Aggrieved by the lock-out, the respondent on behalf of the grievants instituted Nairobi ELRC Cause No. 1282 of 2018, Kenya Building, Construction, Timber & Furniture Industries Employees' Union vs Timsales Limited (herein after referred to as cause number 1282 of 2018) challenging the lockout.



In a ruling delivered on 21st June 2019, Onyango J. dismissed the respondent's suit and directed the appellant to proceed with the disciplinary hearings against the grievants.

4. Following the said ruling, the appellant issued notices dated 1st July 2019 to the grievants requiring them to show cause why they had absconded from duty and to answer allegations of malicious damage of the appellant's property. It was alleged that not all the grievants were served personally with the said notices. As a result, only a few of the grievants were subjected to the disciplinary process. Ultimately, the grievants were dismissed from employment via letters of dismissal dated 1st August, 2019.
5. Aggrieved by the said dismissal, the respondent acting on behalf of the 606 grievants instituted ELRC Cause No. E029 of 2021 (Consolidated with Cause Nos. E030 OF 2021 and E031 of 2021. The grievants prayed for: (a) a declaration that their dismissal was unlawful; (b) that they be reinstated or in the alternative, they be paid their terminal dues in terms of clause 19 of the Collective Bargaining Agreement (CBA), leave pay, retirement benefits under clause 19 of the CBA, days worked and not paid for, any other dues payable under the CBA, (c) a declaration that their rights under Articles 3, 28 and 41 had been violated; (d) compensation under Articles 23 (3) (e) of *the Constitution*; (e) 12 months' pay as provided under section 49 (1) (c) of *the Constitution*, (f) certificate of service for each grievant, (g) costs of the suit and interests on the amounts claimed, and, (h) any other relief the court may deem fit to grant.
6. After considering the parties' evidence and submissions, Wasilwa J. isolated three issues for determination, namely:
 - a. whether there existed valid reasons to terminate the grievants services; (b) whether the grievants were subjected to a fair disciplinary process; and, (c) whether the grievants were entitled to the remedies sought.
7. Regarding the first issue, the learned judge held that the existence of valid reasons was not established in cause numbers 30/2021 & 31/021 which was contrary to the provisions of section 43 of the *Employment Act*, 2007.
8. On the question whether the grievants were subjected to a fair disciplinary process, the learned judge held that there was no proof of service of the majority of grievants save for the handful who attended without proof of service of the grievants with a show cause letter and letter inviting them to be heard, therefore, it cannot be said that the grievants were subjected to a fair hearing, hence, they were condemned unheard. Accordingly, they were not subjected to a fair disciplinary process contrary to section 45(2) of the *Employment Act*, 2007.
9. Addressing the question whether the grievants were entitled to the remedies sought, the learned judge held that the remedy of reinstatement was not viable given the expiry of the three years provided under section 12 of the *Employment Act*. However, the grievants were awarded: (a) notice pay; (b) gratuity payment as per clause 19 of the CBA; (c) days worked and not paid for. They were also awarded compensation equivalent to 6 months' salary owing to their dismissal without due process; a certificate of service; costs of the suit plus interests at court rates with effect from the date of judgment; and, in view of the large number of grievants involved and bearing in mind that some grievants were deceased and no letters of administration had been taken out, the exact number of grievants as per the claim would be computed by the parties with the help of the County Labour Officer, Nakuru and the figures be submitted to Court for adoption as part of this judgment.
10. Aggrieved by the above verdict, vide Memorandum of Appeal dated 18th January 2024, the appellant raised 10 grounds of appeal mainly faulting the learned judge for: (a) holding that the grievants were unlawfully and unfairly dismissed contrary to the evidence tendered; (b) finding that the appellant



- did not prove the existence of reasons for dismissal: (c) holding that some grievants were not issued with show cause letters; (d) finding that the grievants were not accorded an opportunity to be heard; (e) sitting on appeal against a decision of a court of coordinate jurisdiction; (f) rendering an inchoate judgment without figures and directing a non-judicial officer to compute the figures effectively depriving the appellant the opportunity to challenge the said sum; (g) disregarding the appellant's evidence; (i) awarding notice pay, leave pay, gratuity and days worked equivalent to 6 months' pay contrary to evidence; (j) awarding leave which was subsequently reviewed and disallowed and salary for days worked which was not pleaded, and awarding costs against the appellant.
11. The appellant prays that this appeal be allowed with costs to the appellant and judgment be set aside in its entirety. Alternatively, the appellant prays that this Court reviews the quantum of damages awarded to the grievants as well as the reliefs for notice pay and or salary for days worked and or the gratuity awarded under clause 19 of the CBA. Lastly, the appellant prays for any other relief this Court may deem fit and just to grant.
 12. During the virtual hearing of this appeal on 11th February 2025, learned counsel Mr. Muli appeared for the appellant, while learned counsel Mr. Magata appeared for the respondent. Both parties had filed written submissions which they adopted and orally highlighted. The appellant's submissions are dated 11th December 2024 while the respondent's submissions and list of authorities are both dated 19th December 2024.
 13. In support of the appeal, Mr. Muli maintained that section 78
 - (1) (i) and (ii) of the *Labour Relations Act* (the LRA) provides that no person shall take part in a strike or lockout or in any conduct in contemplation of a strike or lock-out if the trade dispute was not referred for conciliation in terms of the Act or a collective agreement providing for conciliation, and according to section 80 (1) of the LRA, an employee who takes part in calls, instigates or takes part in a strike that is not in compliance with the Act is deemed to have breached the employment contract and is liable for disciplinary action. Counsel cited the ELRC decision in the Case of Ashton Mombasa Apparel (EPZ) Limited vs Tailors and Textile Workers Union (Cause E014 of 2024) [2024] KEELRC 1408 (KLR) (16 May 2024) (Ruling) in support of the position that participating in an unprotected strike is a violation of an employees' employment contract which is a fair reason for dismissal or imposition of a disciplinary penalty.
 14. Counsel also submitted that the appellant in support of the grievants' dismissal produced documents before the trial court to demonstrate that it had a valid reason for dismissing them and the validity and fairness of the reasons for dismissal. It was also his submission that the appellant produced sample invitation letters to attend disciplinary hearings, photos of destroyed perimeter walls and a report by the Nakuru County Labour Officer which report arose from the investigations by the said labour officer pursuant to orders issued in Cause No. 1282 of 2018.
 15. In his bid to demonstrate that the learned judge erred in holding that the appellant did not grant the grievants a fair hearing, Mr. Muli submitted that the appellant demonstrated before the trial court that the grievants who subjected themselves to the disciplinary process at the time had the issues resolved and some resumed duty. However, the grievants moved to court through their trade union and after a decision was rendered in Cause No. 1282 of 2018, the disciplinary process was restarted and the grievants were issued with show cause letters which they responded to and for the few employees who did not collect the show cause notices, the appellant dispatched the show cause notices to their last known address. After the appellant was not satisfied with the grievants explanations, the appellant issued them with notices to attend disciplinary hearing sessions on scheduled dates. The grievants were



- informed of their right to be accompanied by a representative of their choice and they were afforded an opportunity to be heard and their defences were considered and found to be unsatisfactory after which they were summarily dismissed from employment.
16. Mr. Muli maintained that the learned judge erred in finding that the show cause notices lacked postal addresses and therefore there was no prove that they were delivered to the grievants who were out of work. He asserted that the said finding was not based on the evidence on record and maintained that almost all the grievants responded to the show cause notices, therefore, the lack of postal address was inconsequential because the letters were collected from the appellant's premises and responded to by the employees and it is only the few employees who did not collect their invitations had their invitations to attend disciplinary hearings sent through post and the appellant availed certificates of posting to that effect. Therefore, the learned judge failed to appreciate that the fact that the grievants responded to the notices and attended the disciplinary hearings shows that the grievants were accorded a fair hearing.
 17. Addressing the ground that the judgment is inchoate, without figures and the complaint that the learned judge directed a non-judicial officer to compute the figures post Judgment, Mr. Muli maintained that the claim for special damages ought to have been specifically pleaded and proved. Counsel submitted that as was held by this court in *Kenya Revenue Authority vs Menginya Salim Murgani (Civil Appeal 108 of 2009) [2010] KECA 508 (KLR) (16 July 2010)* Judgment) computation of damages is a judicial function that should not be delegated.
 18. On whether the learned judge erred in awarding the grievants notice pay and leave pay (which the court dropped subsequently through a ruling delivered on 5th October 2023, and or gratuity and or days worked and compensation, costs and interest and whether the reliefs sought in the memorandum of appeal are merited and who should bear the costs of this appeal, Mr. Muli maintained that since the grievants were dismissed lawfully and fairly, they are not entitled to payment in lieu of termination notice, and, that, because they were dismissed for gross misconduct, they did not merit payment of gratuity under clause 18 of the CBA.
 19. In opposition to the appeal, the respondent's counsel Mr. Magata submitted on three issues, namely, whether the trial court erred in law and in fact in finding: (a) that the appellant had not established the existence of valid reasons to terminate the grievants' employment; (b) that the grievants were condemned without being given a chance to be heard and were not subjected to a fair disciplinary process contrary to section 45(2) of the *Employment Act*; and, (c) awarding the reliefs in the impugned ruling.
 20. Regarding the first issued, Mr. Magata maintained that the trial court was alive to Cause No. 1282 of 2018, and in fact at paragraph 69 of the impugned judgment, the trial judge declined to revisit the issue whether the workers participated in an unprotected strike because the matter was res judicata. However, it is also noteworthy that the above cause never made a finding in respect of the lock out that had been raised and that the court only observed that the orders the claimants sought were tantamount to interfering with the appellant's managerial prerogative and on that basis dismissed the respondent's application. Therefore, the fault levelled against the superior court is far-fetched and without any basis.
 21. On the question whether the reasons for the termination were valid, Mr. Magata submitted that it is not disputed that that the appellant had engaged the grievants in three shifts viz, the 1st shift (morning shift 7.00am to 3:00pm, the 2nd shift (3.00pm to 11.00pm) and finally the night shift (11.00pm to 7.00am) and that the appellant's assistant HR confirmed that the grievants were on 25th July 2018 removed from the company premises for being rowdy and it was also confirmed that the strike began at 6.00am to 3.00pm during the morning shift and the grievants were removed from the company premises at 3.00pm and there was no evidence that the grievants in the 2nd shift and the night shift were allowed



to access their workplace and there is also no evidence that the grievants came back to the company after being removed. Consequently, the learned judge correctly held that the workers in the 2nd and 3rd shifts were locked out due to the chaos that had ensued during the day (1st shift) and therefore, there was no valid reason to warrant the termination of the grievants in the 2nd and 3rd shifts as per section 43 of the *Employment Act*.

22. Mr. Magata also submitted that if the appellant never locked out the grievants, then why did they move to court on 3rd August 2018, (one week later) vide Cause No. 1282 of 2018 where they sought for a declaration that they had been locked out by the respondent and that the same was unfair and that the appellant unconditionally readmits its locked-out workers pending hearing and determination of the said application. Nevertheless, the respondent maintains that the learned judge in the said cause never made any observation as to whether there was actually a lockout or not, therefore the insistence by the appellant that the said court made such a finding is unfounded.
23. Regarding the allegations that the appellant's biometric register of the period 24th July 2018 to 30th July 2018 proves that there was no lock out, counsel submitted that the grievants could not have sought court intervention if there was no lock out and furthermore, it was the respondent's evidence that those who were allowed in the workplace were those who worked in the appellant's newly established department that was christened "new line" workers who were never involved in the case.
24. On whether the grievants participated in an unprotected strike, absconded duty and engaged in destruction of property, Mr. Magata maintained that the allegations of absenteeism from work without permission and destruction of property were raised in the show cause letter. Further, their defence was that they were locked out of the company premises. As for the alleged destruction of property, counsel maintained that there was no evidence that the company property was destroyed by any specific grievant as alleged.
25. Mr. Magata dismissed the accusation that the grievants were engaged in an unprotected strike as an afterthought conveniently created after the ruling in the Cause No. 1282 of 2018 almost one year later and maintained that the alleged unprotected strike was not one of the reasons stated in the show cause letters. To buttress this submission, Mr. Magata cited *Abigail Khasoa Simiyu vs Britam General Insurance Company Kenya Limited [2020] eKLR* where the ELRC held that the said allegation was not valid to warrant instant termination because it did not flow from the show cause letters and was also an afterthought.
26. Submitting on the contestation that the trial Court erred in law and fact in holding that the grievants were condemned without being given a chance to be heard and were not subjected to a fair disciplinary process contrary to section 45(2) of the *Employment Act*, Mr. Magata argued that it is not clear how workers who ostensibly underwent the disciplinary hearing in 2018 were exonerated and retained whilst the grievants herein were summarily dismissed, yet all of them were in the same circumstances when the cause of action arose, therefore the dismissal was impartial and unfair.
27. Regarding the lack of postal addresses on the show cause letters, Mr. Magata submitted that according to the letter dated 15th July 2019, concerns were raised regarding most of the grievants who had retreated to their rural homes because they could not sustain themselves without salaries. Therefore, if the grievants were not properly invited, then they would be denied the chance to participate in the disciplinary process and some grievants got the letter through their colleagues and did not have adequate time to make their defence. It is also the respondent's case that the appellant intentionally failed to inform the grievants the date of the disciplinary hearing and in the circumstances breached their right to be heard. Therefore, the superior court did not err in holding that the appellant never served the grievants with disciplinary hearing invitations since there was no proof of the same save for



- a handful who attended without proof of service of the show cause letters and disciplinary invitations. Mr. Magata also submitted that the appellant disregarded the conciliator's recommendation and instead conducted disciplinary hearings before summarily terminating the grievants employment.
28. Addressing the ground that the learned judge absconded from her duty and delegated a judicial function to a non-judicial officer, Mr. Magata maintained that a simple assessment of quantum having substantively decided the issue of liability does not amount to merit based decision, and until the orders or decree arising from a judgment are perfected, there is jurisdiction for a court to change its mind. In support of the said statement, counsel cited *Attorney General vs W.O.I Samuel Chege Gitau & 283 Others (Civil Appeal E093 of 2021) [2023] KECA 1386 (KLR) (24 November 2023) (Judgment)*.
29. Mr. Magata distinguished the decision in *Telkom Kenya Limited vs John Ochanda (Suing on his behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR* with the instant appeal by arguing that the computation in the Telkom case was done by one party unlike in this case where the computation was conducted by all the parties including a third party, a labour officer, and thereafter all the parties were given an opportunity to write submissions regarding the issue and subsequently the trial court delivered a ruling on the same, therefore, there was no element of surprise and/or ambush.
30. Regarding the submission that the special damages awarded were not pleaded and proved, Mr. Magata cited this Court's decision in *Kimakia Co-operative Society vs Green Hotel (Civil Appeal 38 of 1986)* and maintained that there was no legal requirement that the respondent had to specifically plead and prove the awards that the superior court awarded since the awards complied with section 49(1) of the *Employment Act, 2007*.
31. This being a first appeal, it is our duty to re-assess the evidence on record and arrive at our own independent conclusions. (See *Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2EA 212*). However, this Court will not lightly differ from the findings of fact of a trial judge who, unlike us, had the benefit of seeing and hearing the witnesses, and we will only interfere with such findings if they are based on no evidence, or the judge is demonstrably shown to have acted on wrong principles in arriving at the findings. (See *Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278*).
32. From our analysis of the evidence on record, the impugned judgment, the grounds of appeal, the parties submissions and the law, we are persuaded that this appeal will stand or fall on the following issues: (a) whether the grievants participated in an unprotected strike; (b) whether the grievants were afforded a fair disciplinary process; and (c) whether the trial judge abdicated her judicial function of computing the quantum of damages by directing the parties in conjunction with the labour officers to come up with computations on quantum. Closely tied to this last issue is the question whether the claims for special damages awarded were pleaded and proved.
33. In order to properly resolve the first issue, it is important first we grasp the definition of a strike in the context of labour disputes. Section 2 of the *Employment Act* defines a strike as follows:
- “strike” means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employer or an employers’ organisation of which their employer is a member to accede to any demand in respect of a trade dispute;
34. A reading of the above definition shows that there are three essential elements which constitute a strike. The first requirement is that there must be a refusal to perform work; secondly, the refusal must be undertaken by employees; and lastly, such a refusal of work must be purposed to resolve a matter of mutual interest as provided under the LRA. As was held by the Labour Appeals Court of South Africa in *SA Breweries Ltd vs Food & Allied Workers Union 1989 10 ILJ 844 (A)*, the term “work” should be



given a narrow interpretation pertaining only to those actions which an employee is obliged to perform in terms of an employment contract. The court mentioned three significant constituents of a protected strike. Firstly, there must be a failure, retardation or obstruction of work. Secondly, the action must be undertaken as a collective. And thirdly, the action must be initiated to compel the employer to submit to the demands of the employees.

35. The statutory definition of a strike reproduced above confers the right on employees to withdraw their economic powers from the employer by downing their tools in the event of an unresolved labour conflict between the parties. However, even though strikes have been described as a fundamental, basic, and human right, they should be exercised within certain limitations that are substantive and procedural in nature. For example, Section 75 of the LRA prohibits strike if- (a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute; (b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute; (c) the parties have agreed to refer the trade dispute to the ELRC or to arbitration; (d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the ELRC; (e) the trade dispute was not referred for conciliation in terms of—(i) this Act; or (ii) a collective agreement providing for conciliation; (f) the employer and employees are engaged in an essential service;
- (g) the strike or lock-out is not in furtherance of a trade dispute; or (h) the strike or lock-out constitutes a sympathetic strike or lock-out.

36. On the other hand, Section 76 of the LRA provides for protected strikes and lock-outs in the following terms:

A person may participate in a strike or lock-out if—(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union; (b) the trade dispute is unresolved after conciliation—(i) under this Act; or (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and

- (c) seven days written notice of the strike or lock-out has been given to the other parties and to the Cabinet Secretary by the authorised representative of—(i) the trade union, in the case of a strike; (ii) the employer, group of employers of employers' organisation, in the case of a lock-out.

37. A strike that does not adhere to the procedural and substantive requirements outlined in the LRA such as failing to provide proper notice or participating in an unlawful strike, which can lead to disciplinary action, including dismissal is considered unprotected. An employee's participation in an unprotected strike amounts to a violation of his/her contract of employment and constitutes fair reason for dismissal or imposition of a disciplinary penalty. Whereas employees have a right to go on strike, a strike that violates the law would cease to be legally protected. Determining the issue whether the grievants participated in an illegal and unprotected strike on 25th July 2018 that led to the destruction of the appellant's property, Wasilwa J. made two pertinent pronouncements as follows:

“68. The court determined that the employees participated in an unprotected strike by staging a sit-in at the respondent's premises.

69. I will not revisit the issue of whether the workers participated in an unprotected strike or not because the matter is now res judicata.”



38. In support of the appeal, Mr. Muli maintained that the holding by Onyango J. in Cause No. 1282 of 2018 which made a definitive finding that the grievants had engaged in unprotective and unlawful strike has never been set-aside and or appealed against. In its rejoinder, the respondent maintained that Wasilwa J. based on the evidence before her found that the workers in the 2nd and 3rd shifts were actually locked out due to the chaos. In the ruling delivered on 21st June 2019 referred to by Mr. Muli, Onyango J. had the following to say:

“...This is a shorter notice period than envisaged under the law and thus the strike was unprotected and illegal. An employer is by virtue of Section 80(1) entitled to discipline an employee who takes part in an unprotected strike.”

39. The question now narrows to whether Wasilwa J. overturned the above finding in the impugned judgment. In *Wambui vs Wambui (Civil Appeal 272 of 2019)* [2024] KECA 474 (KLR) (9 May 2024) (Judgment) this Court differently constituted on a similar issue held:

“10...In our view, a court of equal and concurrent jurisdiction cannot overrule or overturn another, because it believes the earlier court did not consider material and pertinent issues.

11. In *Bellevue Development Company Ltd vs. Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018)* [2018] KECA 330 (KLR) (21 September 2018), Kiage J. expressed himself on the issue of Jurisdiction as follows: This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals.”

12. Simply put, Muchelule J. had no power and authority to purport to interfere with the earlier decision of Musyoka J, no matter what the Court thinks or believes. If such a scenario is allowed, parties and their Advocates will move from one court to another in a bid to achieve a desired goal or result. And of course and indeed, this Court will stamp out or sanction an abuse of the court process and an endless litigation circle. In our view, such a route will endanger the administration of justice, in particular courts of equal and concurrent jurisdiction competing in upsetting one another, resulting in disharmony and bad blood between judicial officers. Consequently, the appeal is allowed with costs.”

40. The ruling by Onyango J. is not the subject of this appeal, nor has it been appealed against, as is evident from the material before us. Therefore, it is not our duty in this appeal to determine whether Onyango J. was right or wrong. It will suffice for us to mention that there is a finding by Onyango J. to the effect that the strike was unprotected which has never been appealed against or reviewed. We say no more.

41. The other important point to note is that a literal reading of the Onyango J.’s ruling shows that all the employees/grievants were never pigeonholed into three different shifts to determine those who participated in the strike and those who did not. Onyango J. only preferred a blanket reference to all the employees. That decision might have been right or wrong, but as mentioned above, the appeal before us does not concern the said decision. What is evidently clear as we have repeatedly said is that the said verdict was never reviewed, set-aside and/or appealed against. Consequently, Wasilwa J. by distinguishing the grievants who participated in the unprotected strike according to shifts and by



concluding that the workers in the 2nd and 3rd shifts were actually locked out due to chaos that had ensued during the day at the time of the 1st shift amounted to sitting on an appeal against the decision of a judge of concurrent jurisdiction. It is important to mention that Onyango J's ruling was to the effect that all the grievants who were represented by the respondent were only to be allowed back to work after undertaking the disciplinary processes as contained in the parties CBA and the Employment Act. Therefore, Wasilwa J. could not set-aside, review and /or sit on an appeal against the ruling by Onyango J., a judge of concurrent jurisdiction which could only be set aside by an appellate court.

42. We also note that beyond proving the existence of reasons to justify termination of employment, an employer is required to prove that the reasons are fair, valid and related to the employee's conduct. There is no dispute that the grievants through the respondent engaged in an unprotected strike. Under Section 80(1) (a) of the LRA, an employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employee's contract and is liable to disciplinary action. This being the law, we find nothing to suggest that the reason for the termination was illegal. We find that the appellant had a valid reason to subject the grievants to a disciplinary process as contained in the CBA and the Employment Act. Consequently, ground 5 of the memorandum of appeal succeeds which is, the learned judge erred by sitting on appeal against a decision of a court of coordinate jurisdiction.
43. Before addressing the issues whether the termination was procedurally unfair, we shall first address the question whether the learned judge abdicated her judicial function by referring the claim to the labour officer for calculation of the figures.
44. On this issue, the appellant argued that the learned judge rendered an inchoate judgment without figures and by directing a non-judicial officer to participate in computing figures post judgment, the court denied the appellant an opportunity to challenge the figures. The learned judge stated:
 - “88. The grievants are however entitled to payment of their terminal dues as follows: 1. a) Notice pay, b) Leave pay, c) Gratuity payment as per Clause 19 of the CBA; d) Days worked and not paid for. 2. The grievants are also entitled to compensation equivalent to 6 months salary given their dismissal without due process. 3. Each grievant should also be issued with a certificate of service. 4. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment. 5. In view of the big number of grievants involved and in view of the fact that some grievants are deceased and no letters of administration was taken out, the exact number of grievants as per the claims will be computed by the parties with the help of the County Labour Office Nakuru and the figures submitted to Court for adoption as part of this Judgment.”
45. The appellant maintained that the respondents did not plead figures in the reliefs sought in the memoranda of claim in the consolidated matters, therefore any attempt to cure that defect by introducing figures post judgment violated the grievants right to a fair hearing. On the other hand, the respondent maintained that a simple assessment of quantum, the court having already substantively decided on the issue of liability does not amount to a merit based decisional determination of the case. Mr. Magata cited the case of Attorney General vs W.O.I Samuel Chege Gitau & 283 Others (Civil Appeal E 093 of 2021 [2023] KECA1386 (KLR) (24 November 2024) (Judgment) in support of the said assertion.
46. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are



necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary. (See *SMEC Australia Pty Ltd vs Connell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-

(6) cited in *Ndishu & another v Muriungi (Civil Appeal 3 of 2020)* [2022] KEHC 2 (KLR) (21 January 2022) (Judgment).

47. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness), and, further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.

48. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. Underscoring this principle, this Court in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited* [2015] eKLR referred to a passage in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) which reads:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

49. Rule 9 of The Employment and Labour Relations Court (Procedure) Rules, *Legal Notice 146 of 2016* provides as follows:

9. Suits by several persons

1. A suit may be instituted by one party on behalf of other parties with a similar cause of action.
2. Where a suit is instituted by one person, that person shall, in addition to the statement of claim,

file a letter of authority signed by all the other parties: Provided that in appropriate circumstances, the Court may dispense with this requirement. (3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.

50. To address the accusation that the learned judge rendered an inchoate judgment, without figures, and, that the grievants did not plead any figures, we have carefully read the above rule and the pleadings filed before the ELRC. To start with, the word “shall” which appears in Rule 9(3) when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The Longman Dictionary of the English Language states that “shall” is used to express a command or exhortation or what is legally mandatory. The above rule mandatorily requires the statement of claim to



be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.

51. We have read the Memorandum of Claims filed in respect of the three consolidated suits. To be precise, the Memorandum of Claim for Cause Number 29 of 2021, instituted on behalf of 712 grievants, appears at paragraph 3 (volume 1 pages 257-
260. The Memorandum of Claim for Cause Number 30 of 2012, filed on behalf of 30 grievants appears at Volume 3 pages 1139-1140. The Memorandum of Claim for cause number 31 of 2021, filed on behalf of 505 grievants appears in Volume 4, at pages 1645- 1666. The above rule requires the Memorandum of Claim to be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.
52. Remuneration as defined in Section 2 of the *Employment Act* means the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee. The Black's Law Dictionary, 11th Edition defines wages to include every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses including advantages received from the employer. A comprehensive Statement of Claim filed in strict adherence to the above rule assists the court in computing the amounts claimed.
53. The three Statements of Claim only listed the gross pay for only some of the claimants without providing details. Importantly, the column for gross pay for some claimants was left blank. Also, some names have been repeated more than once in the three suits. For example, in cause number E029 OF 3021, the names appearing as numbers 2, 8, 15 and 25 have been repeated at numbers 71, 56, 31 and 60 respectively. In its Memorandum of Response to cause number E029 of 2021, at paragraph 3 (ii) (a)-(c), the appellant listed three claimants who appear in more than one suit. In cause number E030 of 2021, the appellants listed 4 grievants whose names appear in more than one suit while in cause number 31 of 2021, the appellants cited 11 grievants whose names appear twice. The appellant also named 2 claimants who were still employed by the appellanr. The appellants also listed names of claimants who were deceased as at the time the suits were filed.
54. The omissions cited above cannot be ignored because they raise serious issues of law and fact which ought to have been resolved in the impugned judgment so as to ensure that any amount awarded is lawfully payable. The competence of the claims by the alleged deceased claimants ought to have addressed and conclusively determined during the trial. This is not an issue that could be resolved by the labour officers. Similarly, whether the details of wages provided by the claimants was complete and or complied with Rule 9 (3) is a critical point of law which could only have been resolved by the trial court. Much as the law provides that the employer has an obligation to keep records of its employees, where a list of employees and the amounts claimed are questioned, as in this case, the court is obligated to determine the contested issues of fact and law before remitting the calculation of amounts payable to the labour officer. This is because determining of questions of law and fact is a judicial function which ought to be performed by the trial court. Therefore, forwarding the matter to the labour officer to calculate wages premised on unpleaded figures and a contested list of grievants was a grave misdirection. The trial court ought to have interrogated the claims, and satisfy itself that they are lawfully due and payable and leave the issue of computation of the figures to the labour officer instead of taking the risk of leaving room for the labour officer to make findings on contested issues of law and fact, which is a judicial function. This approach assumes that the labour officer is required to hear evidence and make a finding on disputed issues of fact and law and ultimately determine the amounts payable as opposed to calculating the amounts payable. If he does that, then he will be performing a judicial function. A judicial function is a distinct responsibility of the judge to interpret laws, resolve disputes and ensure



that the rule of law is upheld. It involves exercising judicial authority to deliver justice, protect rights and uphold *the Constitution*. See *Judicial Review of Administrative Action*. By S. A. De Smith, m.a., ph.d., Professor of Public Law in the University of London. [London: Stevens & Sons, Ltd. 1959 where it is stated that Judicial functions are typically characterized by the exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes.

55. It may be argued that the labour officer only calculated the figures following the guidelines provided by the court. This argument is attractive, but that is how far it goes. This is because it translates to ignoring the glaring contested issues of fact and law and proceeding to determine the amounts payable without establishing the grounds upon which the amounts are payable.
56. Having found that the claim before the judge had fatal defects in terms namely: some names appeared twice; some grievants were deceased and no substitution was done; and the statement of claims missed important details contrary to rule 9 (3), such defects could not be cured by referring the claim to the labour office. This Court has said many times that pleadings are everything and parties are bound by their pleadings. If a claim is defective or deficient, it is not the duty of the court to breathe life into it.
57. This Claim was therefore not sustainable as filed and therefore it is not necessary to address the question of procedural fairness as this appeal has been disposed by the two grounds that we have already addressed.
58. In the result, flowing from our discussion of the issues discussed herein above and the conclusions arrived at, we find that this appeal partially succeeds. Accordingly, we set aside the judgement delivered by Wasilwa J. on 17th January, 2023 in Nakuru ELRC and all the consequential orders and substitute it with the following orders:
59. Flowing from our analysis of the facts, the issues for determination, the law, the authorities and the conclusions arrived at herein above, we hereby summarize our findings as follows: (a) that we agree with the learned judge that the grievants engaged in an unlawful strike, hence, the appellant had a valid reason to subject the grievants to disciplinary proceedings, (b) the learned judge erred by overturning the decision rendered by Hon. Maureen Onyango, a judge of coordinate jurisdiction in Nairobi ELRC Cause No. 1282 of 2018 on 21st June, 2019, (c) that the respondent's Statements of Claim offended Rule 9 (3) of The Employment and Labour Relations Court (Procedure) Rules, 2016, (d) the learned judge erred by failing to determine glaring issues of law and fact which were raised in the appellant's responses to the claims and whose determination was crucial for a fair and just determination of the amounts claimed by the grievants, (e) that by failing to determine the issues of fact and law raised by the appellants highlighted earlier, the learned judge abdicated her judicial duty by forwarding the computation of terminal dues to the labour officer in conjunction with the parties.
60. Arising from our conclusions herein above, we find that the appropriate orders that comment themselves, and which we hereby issue are:
 - a. In view of our finding that the respondent's Statements of Claim did not specifically plead special damages and that their Statements of Claim did not comply with the mandatory provisions of Rule 9 (3), and considering that the trial judge referred the matter to the Labour Officer to calculate the amounts payable prior to determining contested issues of law and fact highlighted earlier, the figures calculated by the Labour Officer cannot be allowed to stand and therefore the said award is hereby set aside.



- b. This is an appropriate appeal in which each party shall bear its costs for this appeal and the court below.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIARB, FCIARB.

.....

JUDGE OF APPEAL

I certify that this is
a true copy of the original.

Signed.

DEPUTY REGISTRAR.

