



**Rotich & others v East African Portland Cement Company Ltd (Employment and Labour Relations Cause E732 of 2023) [2025] KEELRC 536 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 536 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E732 OF 2023**  
**BOM MANANI, J**  
**FEBRUARY 27, 2025**

**BETWEEN**

**LINUS ROTICH AND OTHERS ..... CLAIMANT**

**AND**

**EAST AFRICAN PORTLAND CEMENT COMPANY LTD ..... RESPONDENT**

**RULING**

1. The Claimants and Respondent had individual employment relationships that were anchored on individual contracts of service. They contend that the contracts were for an indefinite term.
2. The Claimants aver that these contracts were terminated in October 2020 after the Respondent decided to restructure its enterprise. They contend that the Respondent thereafter issued them with individual fixed term contracts which were to run for three years up to October 2023.
3. The Claimants contend that the aforesaid transition was negotiated by the parties resulting in the execution of individual Settlement and Release agreements. The agreements allegedly entitled the Claimants to certain terminal benefits which the Respondent was to pay.
4. The Claimants contend that they continued to serve the Respondent under the new contracts as they awaited the Respondent to pay the terminal dues under their discharged contracts. However, the Respondent failed to make good the payments. As a result, they (the Claimant) have moved the court through the instant suit seeking various orders as set out in the Memorandum of Claim.
5. Simultaneous with the suit, the Claimants filed the application dated 30<sup>th</sup> August 2023 seeking injunctive orders to restrain the Respondent from victimizing them or terminating their various contracts of service. It is to be noted that although the application is dated 30<sup>th</sup> August 2023, it was filed on 26<sup>th</sup> October 2023, just a few days before the Claimants' contracts were to expire at the close of October 2023.



6. The record shows that the file was not placed before the trial court until 14<sup>th</sup> March 2024. On that day, the court observed that although the suit was filed on 8<sup>th</sup> September 2023, there was no evidence that the Claimants had moved the court to either have the matter heard or for other directions. The court further noted that on that day, the Claimants' Advocates filed a bare certificate of urgency together with an affidavit asking that the application dated 30<sup>th</sup> August 2023 be certified as urgent. However, the application was not on the court's record.
7. The foregoing being the position, the court declined to certify the missing application as urgent. Instead, it directed the Claimants' Advocates to serve the Respondent with the Summons to Enter Appearance and to set down the suit for trial.
8. After the aforesaid directions were issued, the Claimants' Advocates availed to the court a copy of the application dated 30<sup>th</sup> August 2023. On the face of the application, it was filed on 26<sup>th</sup> October 2023.
9. The record shows that the parties appeared in court on 30<sup>th</sup> July 2024 when the court directed that the application be canvassed through written submissions. The parties were given a time frame within which to file and exchange submissions with a return date of 17<sup>th</sup> September 2024 for fixing a ruling date.
10. On 17<sup>th</sup> September 2024, the Claimants' Advocate informed the court that although the parties had filed their submissions, they wished to negotiate the matter. As such, they asked for time to try and resolve it out of court. The record shows that the matter was subsequently mentioned a couple of times as the parties attempted an out of court settlement.
11. On 20<sup>th</sup> January 2025, the Claimants' Advocate informed the court that the Respondent had changed its mind regarding an out of court settlement. As such, she asked the court to set down the pending application for ruling.
12. Meanwhile, as the negotiations were ongoing, the Claimants filed a further affidavit dated 11<sup>th</sup> September 2024. The record shows that the affidavit was uploaded on 11<sup>th</sup> September 2024 but there is no indication that court fees was paid on it.
13. According to the affidavit, although the Claimants' contracts were to have lapsed at the close of October 2023 on account of effluxion of time, the parties agreed to extend them for one year. As such, they (the contracts) were to now lapse at the close of October 2024.
14. From the aforesaid sequence of events, it is apparent that the parties agreed to hold the application dated 30<sup>th</sup> August 2023 in abeyance as they tried to seek an out of court settlement. Although the Claimants' contracts were to expire at the close of October 2024, they nevertheless agreed to pursue an out of court settlement beyond this date in the belief that the Respondent would agree to some settlement of sorts.
15. The record shows that the court fixed the matter for mention on 29<sup>th</sup> October 2024, three days before the expiry date of the Claimants' contracts to enable the parties to report on whether they had reached an amicable settlement. This date was fixed in the presence of counsel for all parties.
16. On 29<sup>th</sup> October 2024, the Claimants' Advocate did not attend court to indicate whether the ongoing negotiations had been concluded. The record shows that only the Respondent's lawyer attended court and indicated that the parties were finalizing the negotiations and required thirty (30) more days to record a consent. On this representation, the court relisted the cause for mention on 20<sup>th</sup> January 2025 for further directions when the parties unfortunately reported that the negotiations had collapsed and that the court should proceed to write and deliver its ruling on the pending application.



17. I have set out the above chronology of events for a reason. It is noteworthy that the Claimants' contracts were time bound. They were to lapse at the close of October 2024. As such, when the parties were negotiating a settlement, they ought to have kept this fact in their minds. The fact that they were engaged in negotiations did not stop time from running. It is for this reason that the court finds it strange that the Claimants' Advocate did not deem it necessary to attend court on 29<sup>th</sup> October 2024 to report on the status of the ongoing negotiations and seek appropriate directions despite the fact that her clients' contracts were only three days away from expiring.
18. The parties now ask the court to determine the pending application because the negotiations between them have collapsed. It is noteworthy that they ask the court to undertake this exercise after the Claimants' contracts have lapsed through effluxion of time.
19. The prayers in the application seek to prevent the Respondent from victimizing the Claimants whilst at work and from terminating their various contracts of service. These prayers presuppose that the Claimants' contracts of service are still in force. However, as deposed by the Claimants in the further affidavit by Linus Rotich dated 11<sup>th</sup> September 2024, the contracts were set to expire at the close of October 2024.
20. No evidence was placed before the court to demonstrate that the contracts were extended beyond October 2024. As such and absent such evidence, the court must assume that the contracts lapsed through effluxion of time at the close of October 2024.
21. The foregoing being the case, the court cannot issue an order to preserve non-existent contracts. Once the contracts closed at the close of October 2024, the employment relation between the parties came to a close. As such, the court cannot issue an order purporting to prevent the Respondent from terminating the impugned contracts as they have already terminated by effluxion of time. For this reason alone, the court declines to issue the orders sought in the application.
22. However, assuming that the Claimants were still in the employment of the Respondent, would the orders sought in the application have issued in their favour? Would the court have issued an order of injunction to bar the Respondent from allegedly victimizing the Claimants and terminating their respective contracts of service?
23. The answer to the above questions turns on whether the Claimants have met the conditions for the grant of temporary injunction as prescribed in the celebrated case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358. These are:-
  - a. Whether the Claimants have established a prima facie case with a probability of success.
  - b. Whether the Claimants have demonstrated that if the orders sought are not granted, they stand to suffer irreparable harm.
  - c. Whether the balance of convenience tilts in favour of issuing the orders.
24. I have considered the evidence before me against the above principles. The Claimants contend that the Respondent is in breach of the Release and Settlement Agreements between them. As such, they ask the court to make a declaration to that effect and to order that they revert to the indefinite contracts of service.
25. I have scrutinized the aforesaid agreements and have not seen any suggestion in them that the parties agreed that if the Respondent fails to pay the Claimants the settlement dues, they would revert to their previous indefinite employment status. As such, I think that the remedy that is available to the



Claimants for breach of the agreements is to compel the Respondent to make good the payments allegedly agreed upon.

26. In the premises, I do not think that the Claimants have a prima facie case for reinstatement to their indefinite term contracts. As such an order of injunction cannot issue in their favour.
27. The Claimants have the liberty to pursue payment of the dues allegedly agreed upon under the settlement agreements. Indeed, I note from the Memorandum of Claim that they have made alternative prayers in this regard.
28. The other matter relates to whether the Claimants have presented evidence to demonstrate that the Respondent has been harassing and or victimizing them at the work place to enable the court to issue restraining orders. No evidence was presented by the Claimants in this respect. As such, they have failed to present a prima facie case on this aspect as well.
29. The court notes that the suit between the parties is for enforcement of payment of amounts which have been specifically pleaded. As such, the claim has been quantified in monetary terms. In the premises, it is unlikely that the failure to issue the orders of injunction will occasion the Claimants irreparable harm since the amount in dispute is known and is recoverable.
30. Consequently, the court is not persuaded that the application dated 30<sup>th</sup> August 2023 is merited. As such, it issues the following orders:-
  - a. The application dated August 30, 2023 is dismissed.
  - b. Costs of the application shall abide the outcome of the cause.

**DATED, SIGNED AND DELIVERED ON THE 27<sup>TH</sup> DAY OF FEBRUARY, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimants

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

