



**Kenya Building Construction, Timber and Furniture Industries Employees Union v
Timsales Limited (Employment and Labour Relations Cause E029, E030 & E031 of 2021
(Consolidated)) [2023] KEELRC 2351 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2351 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE
E029, E030 & E031 OF 2021 (CONSOLIDATED)**

HS WASILWA, J

OCTOBER 5, 2023

BETWEEN

**KENYA BUILDING CONSTRUCTION, TIMBER AND FURNITURE
INDUSTRIES EMPLOYEES UNION CLAIMANT**

AND

TIMSALES LIMITED RESPONDENT

RULING

1. Pursuant to this court's ruling delivered on the June 20, 2023, the Labour officer-Nakuru region, was directed to prepare fresh calculation following the orders and directions given by this court in the said ruling.
2. The labour officer filed his report dated July 4, 2023 on even date, affirming that he followed the directions of the court. He however stated that the 11% salary increase had been considered in his earlier report, this is because the salary increase had been implemented in the July, 2018 salary.
3. On the leave pay, the labour officer stated that 117 grievants had nil leave as per records availed to them by the Respondents. On the days worked, he stated that all employees were paid their July, 2018 salaries as appearing in the payslips that were presented to their offices.
4. Direction were taken before this court for the parties to submit on this report. The claimant filed on the April 12, 2023 and the respondent on the July 25, 2023.

Claimant's Submissions.

5. The claimant submitted that the ruling of the Court with regard to 11% salary increment, compensation, notice pay and gratuity has been given effect. However, that the orders of the court as



captured in the ruling of June 20, 2023 at paragraph 25 was to effect that all the 117 grievants are to be paid leave, because, the alleged evidence that was presented before the labour office was not tabled before this court and in any event that it was done after Judgement, which cannot be used to alter the decision of this court. Based on the foregoing, the claimant, proposed the claimant be paid 27 leave days each as provided for under clause 8(a) of the CBA.

6. The claimant also submitted that the labour officer had not calculated the days worked for all the grievants, despite the clear direction given by this Court at paragraph 29 of its former Ruling. He added that the alleged payslips were presented after the judgement before the labour office. In any event that payslips are not conclusive evidence of payment of salary because they are prepared by the employer to show entitlements of an employee and not affirmation that an employee has been paid. In this they relied on the case of *Joseph Ouko Lwambe V Royal Garment Industries EPZ Limited* [2018] eklr.
7. The claimant in conclusion, urged this Court to find the labour officer's report erroneous with regard to the leave days worked and direct the same be corrected forthwith.

Respondent's Submissions.

8. The respondent submitted from the onset, that the claimant ought to have specifically pleaded its claim and tabulate the amounts owing to the grievants in its claim to avoid the adoption of the current figures and current calculations which are unknown to law and unfair in any event.
9. It was submitted that the claimant did not specifically plead the claim for leave and days worked in its claim to warrant the calculation being made at this point. Similarly, that this Court did not specify in the judgment the leave days in respect of which payments was to be made and the period of which salary is alleged not to have been paid.
10. Based on the foregoing, the respondent submitted on whether the reservations by the County labour officer on alleged payment in lieu of leave and days allegedly worked and not paid are justified.
11. On leave pay, it was submitted that from the report filed in Court, the grievants were employed on various dates and the annual leave was different for each employee. Therefore, that the report filed by the labour office contained the true reflection of the amount payable under this head. In any event that the claim for leave ought to have been specifically pleaded to enable the Respondent defend itself and avail records. In support of this position, they relied on the case of *Republic V Commissioner of Domestic Taxes Ex parte Sony Holdings Limited* [2019] eklr at paragraph 88 and 89 where the Court stated that;-

“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. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. 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.”



12. The respondent also relied on the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR where the court relied on Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSA 3 and the decisions of the Nigerian Supreme Court in *Adetoun Oladeji (nig) Ltd Vs. Nigeria Breweries PLC S.C. 91/2002*, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Judge Christopher Mitchell J.S.C. rendering himself thus;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

13. To emphasize on their argument, the respondent relied further on the case of *Elizabeth O Odhiambo v South Nyanza Sugar Co. Limited* [2019] eKLR where the Court held that:-

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

14. On the days worked and not paid for, the respondent submitted that the labour office has indicated in his report that all the grievants were paid for the worked done and to order for another payment would amount to unfair enrichment. He added that the claimant did not plead with specificity the period which the grievants allegedly worked and were not paid. Therefore, that the claim was amorphous and the respondent were unable to defend themselves under this claim. Further that no evidence was lead to support this claim, besides that this court did not specify the period in which the said grievants were not paid until in the ruling of July 20, 2018, without stating where the said information was received from.

15. The Respondent restated that the courts, just like the parties, are bound by the pleadings of the parties as was held in *Kenya Power & Lighting Company Limited V County Government of Nairobi & Attorney General* [2017] eKLR where the Court held that:-

“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.”



16. In conclusion, the respondent submitted that it disagrees with the procedure adopted in this matter in computing figures after judgement has been delivered because the court is functus officio. However, on a without prejudice basis, it was submitted that the labour officer report is a reflection of what grievants could have been paid had they been unfairly terminated.
17. I have examined all the averments and submissions of the parties herein.
18. What is at stake is the report of the labour officer dated July 4, 2023 made pursuant to this court's order on June 20, 2023.
19. The order was made in the court's ruling on 20/6/2023 following another tabulation made by the labour officer dated March 20, 2023 which calculated the terminal dues payable to the grievants and as awarded by this court in the judgment of January 17, 2023.
20. The respondents herein argued that in the claim before court, the claimants never sought to be paid for leave and days worked in its claim to warrant calculation being made.
21. In relation to this matter, I wish to refer the parties to this court's judgment delivered on 17/1/2023.
22. In paragraph 2 of the judgment the court set out prayers being sought by the claimants as per their pleading.
23. Indeed leave pay and days worked and not paid for were part and parcel of the prayers sought and which this court awarded accordingly only indicating that these figures were to be computed by the labour officer.
24. The submission by the respondent that these prayers were never sought nor awarded is therefore erroneous because these court's decisions have been based on the pleadings before court.
25. That having come out of the way, in the ruling of this court on 20/6/2023, this court gave guidelines on how the prayers granted were to be calculated.
26. The calculations were finally made but the court observed that there were some omissions in the report and directed the labour officer to do calculations for leave pay for 117 grievants and also pay for days worked which had not been factored in the report.
27. The labour officer has now resubmitted his report and indicated that the claimants have nill leave days and that they were all paid for days worked.
28. The onus of proving days worked and not pad lies with the claimant.
29. The onus however of proving payment for the days worked lies upon the respondent.
30. The respondent produced payslips to show payment but in my view a payslip is not proof of payment. What the respondent should have produced would have been either bank statements or vouchers signed by the claimant as proof of payment.
31. The claimant's position is that they had not been paid and this is what led to the closure of the respondent's company and lock out of employees.
32. The pay not paid at the time was for June 2018 and now for July as at 26/7/2018.
33. This is money that the respondents should pay and I direct that the same should be paid as part of the claim before me.



34. On the issue of leave, the claimants were not explicit on the period during which they didn't go for leave.
35. They gave no indication that they applied for leave within a particular period and were denied the same.
36. That issue therefore was pleaded but not proved and I will find the employees are not entitled to the leave pay for the periods not indicated.
37. The upshot of the ruling is that the claimants in addition to what was calculated by the labour officer are entitled to payments of their salaries with effect from June 2018 to July 27, 2018 to be agreed upon by the parties or if not agreed upon the parties to submit to this court for adoption their calculation for consideration.
38. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 5TH DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Magata for Claimant – present

Muli for Respondent – present

Court Assistant – Fred

