



**Kenya Concrete, Structural, Ceramic Tiles Wood Plys and Interior Design Workers Union v
Timsales Limited (Cause E350 of 2022) [2022] KEELRC 12939 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12939 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E350 OF 2022
L NDOLO, J
OCTOBER 27, 2022**

BETWEEN
**KENYA CONCRETE, STRUCTURAL, CERAMIC TILES WOOD PLYS AND
INTERIOR DESIGN WORKERS UNION CLAIMANT**
AND
TIMSALES LIMITED RESPONDENT

RULING

1. The claimant filed a statement of claim dated May 26, 2022 alongside a notice of motion under certificate of urgency of the same date. This ruling relates to the notice of motion by which the claimant seeks the following orders:
 - a. An order directing the respondent to compute, file and serve upon the claimant a payment schedule with respect to all the aggrieved members of the claimant;
 - b. That the application and main suit be merged and proceed by way of documentation as provided under rule 21 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#);
 - c. An order restraining the respondent from any act of victimisation, including termination of existing appointments and dismissing members of the claimant on account of this suit.
2. The application is supported by an affidavit sworn by the claimant's general secretary, Dishon Angoya and is based on the following grounds:
 - a. The respondent has unlawfully and unfairly dismissed the claimant's members, Ezekiel Gwala and Isaac Mwangi on account of redundancy and has failed, ignored and/or refused to pay final dues as per the law;



- b. The respondent's action is largely aimed at frustrating the claimant's efforts towards achieving a recognition agreement, which action is contrary to the law;
 - c. It is not the role of the respondent to regulate unionisation; the right to unionise is secured under article 41 of the Constitution and cannot be taken away under any form of contract of employment where the subject employee is unionisable;
 - d. The aggrieved members of the claimant are now in financial distress and have had their lives put on hold due to the unlawful and unfair actions of the respondent;
 - e. The respondent has refused, declined and ignored the findings and recommendations of the appointed conciliator issued on March 3, 2022;
 - f. The respondent has ignored, neglected and refused to pay the aggrieved members of the claimant their terminal dues as required under the law;
 - g. The claimant has established a prima facie case with probability of success because the redundancy did not comply with the provisions of section 40 of the Employment Act;
 - h. The claimant is apprehensive that the respondent shall continue to unlawfully and illegally neglect to pay the sums it has admitted unless compelled by the court;
 - i. The respondent stands to suffer no prejudice if the application is allowed;
 - j. It is in the interest of justice that this application is allowed.
3. The respondent opposes the claimant's application by a replying affidavit sworn by its human resource assistant, Solomon Macharia on June 6, 2022.
 4. Macharia depones that the named grievants, Ezekiel Gwala Odhiambo and Isaac Mwangi were employees of the respondent, engaged as carpenter and driver respectively. He adds that the grievants separated with the respondent under different circumstances.
 5. Macharia states that whereas Odhiambo's employment was terminated on 3 August 1, 2021 on account of redundancy, Mwangi was dismissed on grounds of misconduct.
 6. The respondent maintains that in both instances, due process was followed. It is deponed that requisite redundancy notices were issued and consultative meetings held before Odhiambo's termination. With respect to Mwangi, it is deponed that he was issued with a show cause notice to which he responded after which a disciplinary hearing was held.
 7. Macharia further depones that the grievants were advised to clear and collect their final dues and certificates of service. He states that the grievants refused, neglected and/or failed to clear and collect their dues compelling the respondent to forward cheques in respect thereof to the labour office.
 8. Macharia further states that the claimant reported separate trade disputes in respect of the grievants and points out that the conciliation process with respect to Mwangi was still underway.
 9. The respondent takes the position that this matter ought to proceed by way of viva voce evidence and asserts that proceeding by way of documents will be prejudicial to it since the facts of the matter are highly contested. The Respondent states that it desires to cross examine the claimant's witnesses.
 10. By its application, the claimant seeks a mixed bag of orders; ranging from an order for tabulation of dues, a restraining order against alleged victimisation, to directions on disposal of the claim.



11. Looking at the pleadings and submissions filed by the parties, it emerges that there are many issues of fact that are sharply contested. Such issues do not lend themselves for determination at the interlocutory stage.
12. What is more, the respondent has expressed its wish to have the dispute determined by way of viva voce evidence. In this respect, the respondent relies on the decision in *Gerald Macharia Njogu v Samuel Macharia Murimi [2016] eKLR* where it was held that viva voce evidence may be avoided only in situations where the facts are uncontroverted.
13. In the circumstances of this case, I am satisfied that viva voce evidence is necessary. The claimant's notice of motion dated May 26, 2022 is therefore declined with costs in the cause.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Angoya (Union Representative) for the Claimant

Mr. Muli for the Respondent

