

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC NO. E938 OF 2022

MUKKASA GIRIDHAR RAO.....CLAIMANT/RESPONDENT

-VERSUS-

SHREEJI CHEMICALS LIMITED.....RESPONDENT/APPLICANT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

ORIGINAL

RULING

1. The Respondent filed application by way of Notice of Motion dated 5th May 2025 brought under Order 2, rule 15. (1) (b), (c) and (d) and Order 51, rule 1 of the Civil Procedure Rules, 2010 seeking for Orders-
 - i. THAT the Statement of Claim filed herein be struck out on the grounds that it is scandalous, frivolous, vexatious and an abuse of the process of this Honourable Court:

- ii. THAT this cause be dismissed with costs;
- iii. THAT the costs of this application be provided for.

Grounds of the application

2. That the Claimant filed an application dated 30th April 2021 in Nairobi HCCOMM PET. No. E005 of 2021 Mukkasa Giridhar Rao -vs- Shreeji Chemicals Limited & 3 Others, where he sought (inter alia) an order restraining his removal as an employed director and, via a Ruling delivered by Lady Justice Okwany on 11th November 2021, she granted an order restraining the Respondent from removing the Claimant as such an employed director. The Claimant thereafter resigned as an employed director on 24th January 2022; the Claimant had no separate employment contract with the Respondent nor did he hold any position as an employee of the Respondent, the remuneration paid to him was in his capacity as an employed director of the Respondent; abuse of the court process and the Claimant has come to this Honourable Court with unclean hands by failing to disclose that in November 2021 he had obtained an order of the court as aforesaid and then resigned as a director of the Respondent on 24th January 2022 and yet he filed this cause in January 2023 claiming unfair and unlawful termination of his employment as an employed director of the Respondent and thus the trial of this cause would be a waste of precious judicial time and resources and also, the Respondent would incur unnecessary cost of this cause and that the determination embarrassing to this Honourable Court with potentially contradictory findings.

3. The application was supported by the affidavit of Umangkumar Haresh Soni Sworn on the 5th day of May 2025. The deponent annexed to the said affidavit Form No. 203 (particulars of the directors) filed with the Companies Registry, Ruling of the High Court

dated 11th November 2021 and the supporting affidavit of the claimant in another High Court case to the extent that he had resigned as a Director of the respondent on 24th January 2022.

4. The application was opposed by the claimant through his replying affidavit, sworn by Soni on 13th May 2025. The claimant, among other things, relied on the respondent's witness statement dated 23rd July 2024, which stated that he was employed as Operations Director of the company and managed the respondent's operations due to his technical knowledge and expertise. The claimant averred that he was an employee and was issued with a payslip identifying him as 'Emp: A001 Mukkasa Giridhar Rao' which he claims reflected his status as an employee. He stated that he received a monthly gross pay of Kshs. 310500, upon which the respondent deducted statutory taxes such as PAYE, NSSF, and NHF, and attached the said payslip and tax returns. The claimant further annexed a notice to show cause and suspension dated 30th March 2021, in which it was indicated, inter alia, that *'you will be paid your full salary during your suspension and all your other benefits and terms of employment remain unchanged.'*

Decision

5. The application was canvassed by way of written submissions. Both parties filed.
6. The respondent/applicant submitted the following as the issues for determination-
- a. Did the claimant have two different capacities as alleged?
 - b. Is the Claimant guilty of material non-disclosure, deliberately misleading this Honourable Court?
 - c. Should this claim be struck out and dismissed?

d. costs?

7. The claimant /respondent submitted on the following issues-

- a. Whether this suit should be struck out;
- b. Whether the Claimant is guilty of material non-disclosure;
- c. Whether the Respondent has admitted the Claimant was an employee; and
- d. Whether the Claimant's suit constitutes an abuse of court process.

8. The court finds that the application brought under Order 2 Rule 15 of the Civil Procedure Rules presents only one issue for determination, being whether the suit ought to be struck out.

9. Order 2 rule 15 of the Civil Procedure Rules states as follows:-

'15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court,*

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the

application shall state concisely the grounds on which it is made.’’

10. The Kenyan courts have pronounced themselves on the application of Order 2 Rule 15 of the Civil Procedure Rules in several cases. In Safaricom PLC v Kinuthia & 2 others [2025] KEHC 3789 (KLR), which reaffirmed the Court of Appeal decision of Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999, which stated that, ...”Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain is a matter of fact.” Similarly, in the case of Oryx Energies Kenya Limited v Mastermind Kenya Limited [2017] KEHC 5208 (KLR) (the Oryx Case), the Court, held that: “The power to strike out pleadings must be exercised sparingly, and only in clear, obvious and plain cases... The Defendant should not be denied the right to ventilate the defence. It is a constitutional right under Articles 48 and 50 of the Constitution of Kenya.” The case of **DT Dobie & Co (K) Ltd v Muchina [1982] KLR 1** is a landmark decision in this area. The Court of Appeal held that a suit should not be summarily dismissed unless it is so hopeless that it plainly and obviously discloses no reasonable cause of action and is beyond redemption by an amendment.

11. Order 2 Rule 15(2) of the Civil Procedure Rules is to the effect that the court should only consider the pleadings to establish if the suit discloses no reasonable cause of action or defence in law. The court is not to look into evidence to make such a finding. The instant application is to be decided by consideration of the statement of claim and the statement of defence filed.

12. To make a case for the suit to be struck out, the applicant relied on the supporting affidavit of Umangkumar Haresh Soni and submitted that, in the absence of the Claimant

substantiating even on a prima facie basis that he was terminated and did not resign as Operations Director, the Claim ought to be struck out and the suit dismissed. The applicant submitted that the attempted creation of a 'dual directors' relationship is only a red herring intended to deceive this Honourable Court - if this was indeed so as the Claimant now asserts, he would have adopted a consistent approach throughout unlike what he has done here. In the absence of any proof of termination and, given the Claimant's own concession on oath that he resigned as Operations Director, this claim ought to be struck out and the suit dismissed on the grounds invoked by the Respondent. The Respondent urged the Court to exercise its discretion in favour of the Respondent and allow the application as prayed as it is clearly plain from the Claimant's own evidence that he resigned rather than being terminated as Operations Director. A person cannot hold two directorship positions as the Claimant now, incongruously seeks to assert, and his shareholding has nothing to do with his appointment as Operations Director even when he held no shares.

13. Conversely, the claimant relied on his replying affidavit dated 13th May 2025. He submitted that- The Respondent has expressly and repeatedly admitted that the Claimant was its employee. At paragraph 2 of Mr. Umangkumar Soni's Witness Statement, he affirms that the Claimant was employed by the Respondent. Additionally, in paragraphs 5(c) and 6 of the Statement of Response, the Respondent acknowledges that the Claimant served in the capacity of Operations Director. In Joseph Ngii v Republic [2020] eKLR, the court held that: As a matter of principle the appellant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court and in the process use the appeal process as machinery to help him do so. It was the appellant himself who sought to have the charge read over to him and which

request was acceded to by the trial court. The doctrine of 'approbation and reprobation' has been elucidated in Halsbury's Laws of England, 4th Edn, Volume 16, at page 1012, paragraph 1507 thus: ...The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent... Further, such action also amounts to abuse of the court process and this court has every power to cull actions that it deems amount to abuse of the court process as well as to preserve the integrity of the judicial system.

14. The court, on perusal of the statement of response dated 16th August 2023, established that paragraphs 5 (c), 6, 17,18,19, 21 (c) and 22 disclosed an admission of an employer-employee relationship between the claimant and the respondent. This court has original jurisdiction to determine disputes emanating from the employer-employee relationship pursuant to the provisions of Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act. The claim is of unfair termination of employment and seeking compensation, among others. The issue of whether the claimant held a different arrangement from being a director to claim to be an employee is an issue for determination on merit after the hearing. The court, applying the provisions of Order 2 Rule 15 of the Civil Procedure Rules, taking into account the content of the statement of claim and the statement of response, and without considering any evidence, holds that the claimant had disclosed a reasonable cause of action against the respondent, which attracted a defence on merit and not mere denials. The court upheld the Court of Appeal decision in Kivanga Estates Limited v National Bank of Kenya Limited [2017] KECA 591 (KLR)

where the court summarised the jurisprudence on striking out pleadings and observed- ‘In **Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa** Civil Appeal No. 54 of 1999 the Court summarized the principles as follows;:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.” See **Yaya Towers Limited vs Trade Bank Limited (In Liquidation)** Civil Appeal No. 35 of 2000 and **DT Dobie & Company (Kenya) Ltd vs Muchina**(1982) KLR 1.’

15. Further in **DT Dobie & Co (K) Ltd v Muchina [1982] KLR 1** the Court of Appeal held that a suit should not be summarily dismissed unless it is so hopeless that it plainly and obviously discloses no reasonable cause of action and is beyond redemption by an amendment. The court must act very cautiously and carefully.
16. Having established the suit and defence disclosed existence of employee-employer relationship, and that the claimant is seeking compensation out of the said relationship, I find the application does not meet the threshold of striking out the suit according to Order 2 rule 15 of the Civil Procedure Rules and case law. The court finds it would be drastic and unfair to remove the claimant from the seat of justice in the circumstances.
17. In the upshot the application is held to be without merit and is dismissed with costs to the claimant/respondent.

18. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI
THIS 18TH DAY OF SEPTEMBER, 2025.**

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant/Respondent : absent

Respondent/Applicant : absent

ORIGINAL