



**Nyamu v Teachers Service Commission (Cause E170 of 2023)  
[2024] KEELRC 2409 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2409 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E170 OF 2023  
L NDOLO, J  
OCTOBER 3, 2024**

**BETWEEN**

**JAPHET RAMSON NYAMU ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. On March 1, 2023, the Claimant filed a Statement of Claim contesting his dismissal from the Respondent's employment. The Respondent filed a Statement of Defence on 5<sup>th</sup> July 2023 to which the Claimant responded on 11<sup>th</sup> July 2023.
2. Subsequently, the Claimant filed a Notice of Motion dated 3<sup>rd</sup> May 2024, by which he asks that the Respondent's Statement of Defence dated 26<sup>th</sup> June 2023 and filed on 5<sup>th</sup> July 2023, be expunged from the court record. The Claimant further seeks directions that the matter proceeds to formal proof as an undefended claim.
3. The Motion is supported by the Claimant's own affidavit and is premised on the following grounds:
  - a. That the claim and summons to enter appearance were served on the Respondent on 11<sup>th</sup> April 2023, with a requirement to enter appearance, file and serve response to the suit within 21 days;
  - b. That the Respondent filed and/or served its Defence on 5<sup>th</sup> July 2023, some 85 days after service of summons and way beyond the prescribed period of 21 days for filing and serving a response to the suit;
  - c. That despite numerous occasions and opportunities that the Respondent had, it has not made any effort to regularise its pleadings. The delay in doing so is not excusable and is only meant to derail the just and expeditious hearing of the claim;



- d. That the Respondent has been shrewdly and strategically delaying the determination of the claim to defeat the course of justice by ensuring that the Claimant, who is now 59 years of age, either reaches retirement age before determination of his claim and/or his prayer for reinstatement is defeated by passage of time;
  - e. That the Claimant was dismissed by the Respondent's letter dated 25<sup>th</sup> November 2021 and has sought reinstatement in his Statement of Claim. The prayer for reinstatement will be extinguished by operation of the law on 25<sup>th</sup> November 2024, by dint of Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, which limits an order of reinstatement to only 3 years after the date of dismissal;
  - f. That the Respondent's intended Defence is scandalous, frivolous, vexatious and an abuse of the court process and is only meant to delay the fair trial of this suit, as it is not properly before the Court. In addition, the Respondent's Defence is comprised of mere denials and simply regurgitates the facts and evidence contained in the Claimant's pleadings;
  - g. That striking out the Defence will not occasion greater prejudice to the Respondent than has been or is likely to be occasioned on the Claimant. Secondly, the Respondent's Defence seeks to rely on documents already filed by the Claimant, and thirdly, the Respondent will be at liberty to cross examine the Claimant during the formal proof hearing;
  - h. That unless the Court intervenes and grants the orders sought, the Claimant's prayer for reinstatement will be extinguished by operation of law on 25<sup>th</sup> November 2014 and further by the Claimant's retirement in 2025;
  - i. That it is in the interest of justice that the Court grants all the orders sought in the application.
4. In its Grounds of Opposition dated May 20, 2024, the Respondent states that:
- a. The application is an abuse of the court process, devoid of merit, deficient in law and misconceived;
  - b. The Claimant has failed to adduce sufficient, compelling and reasonable grounds to support his application;
  - c. The Claimant has deliberately withheld material facts pertinent to issues of law and fact in the application, particularly that:
    - i. The Respondent's Memorandum of Defence is duly filed and correctly on the court record;
    - ii. The delay in filing and serving the Memorandum of Defence, if at all, will not prejudice the Claimant;
    - iii. The parties have been before the Court several times for pre-trial directions and the issue encapsulated in the application as a fundamental pre-trial issue, has never come to the fore;
    - iv. The orders sought cannot apply retrospectively as the Court, vide directions made on 30<sup>th</sup> October 2023, 20<sup>th</sup> February 2024, 12<sup>th</sup> March 2024 and 30<sup>th</sup> April 2024, issued pre-trial directions to the parties, which have neither been varied nor set aside.
  - d. The Respondent will suffer irreparable loss, damage and injustice should the application be allowed.



5. By his application, the Claimant seeks to lock out the Respondent's defence to his claim. According to the record however, the Respondent not only responded to the Respondent's Statement of Defence but also participated in inter partes pre-trial proceedings with no objection to the propriety of the Respondent's Statement of Defence.
6. By his conduct therefore, the Claimant subjected himself to an inter partes contest and he cannot at this stage ask to be allowed to proceed ex parte. If the Court agrees with the Claimant, his pleadings and evidence will go untested to the detriment of the Respondent.
7. As affirmed in *BIO Food Products Limited v Neoteric Chartered Limited (Commercial Case E092 of 2023)* [2024] KEHC 4222 (KLR) (Commercial and Tax) (19 April 2024) (Judgment), striking out of a party's pleadings is a draconian action that ought to be taken only in the clearest of cases.
8. In the present case and for the stated reasons, I find no reason to exercise this extreme power against the Respondent.
9. The Claimant's application dated 3<sup>rd</sup> May 2024 is therefore declined with costs in the cause.
10. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mbaka for the Claimant

Mr. Sitima for the Respondent

