REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E127 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

FRANCIS NDWIGAH NYAGAH..CLAIMANT

VERSUS

TRANSCHEM PHARMACEUTICALS LIMITED...............................RESPONDENT

RULING

1. The Applicant/Claimant filed a notice of motion dated 13th July 2021. The motion is brought under Order 2 Rule 15 of the Civil Procedure Rules, 2010 which provides as follows –

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

(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. The Claimant seeks orders that –

(i) The Statement of Response dated 1st July, 2021 and filed in Court on 6th July, 2021 be and is hereby struck out.

(ii) Leave be and is hereby granted to the Claimant to set the Claim down for formal proof hearing.

(iii) The costs of this application be provided for.

3. The application was based on the following grounds and supported by the affidavit of FRANCIS NDWIGAH NYAGAH dated 13th July 2021 –

(i) The Claimant was employed by the Respondent on 1st February, 2007.

(ii) On 16th November, 2020, the Claimant filed **Milimani ELRC Petition No. E081 of 2020, Francis Ndwigah Nyagah v Transchem Pharmaceuticals Limited** against the Respondent seeking various reliefs against it.

(iii) By a letter dated 23rd December, 2020, the Respondent terminated the Claimant's employment purportedly on the ground that it was unable to meet his prayers in the Petition.

(iv) Indeed, at paragraph 9 of its Statement of response, the Respondent admits the averment at paragraph 9 of the Claim that it terminated the Claimant's employment because the Claimant had filed a Constitutional Petition against it.

(v) The Statement of Response is an assembly of mere denials hence a total sham.

(vi) The Statement of Response does not disclose any bonafide issue worth of trial.

(vii) The Claimant need not be delayed unnecessarily in realizing his Claim against the Respondent.

(viii) There is no hope of injecting life through the Statement of Response even through amendment.

(ix) It is in the interest of justice and fairness that the present applications should be allowed.

4. The Applicant deponed that –

(i) By a letter dated 23rd November 2020 the Respondent terminated his employment purportedly on the ground that it was unable to meet the prayers in the petition.

(ii) Paragraph 9 of the Respondent's statement of response admits the averment at paragraph 9 of the claim that it terminated the Claimant's/Applicant's employment because he had filed a constitutional petition against it.

(iii) The statement of response was an assembly of mere denials, and it was a sham and discloses no bonafide triable issue. That hearing the matter would unnecessary delay realisation of the Claimant's/Applicant's claim against the Respondent.

(iv) The statement of response cannot be amended by amendment

(v) Justice will be served if the Court granted the orders sought.

5. The Respondent opposed the notice of motion on the following grounds –

(i) The application is frivolous and without merit and the same is a waste of the courts precious time.

(ii) The defendant's supporting affidavit argues the merits of the case and it has no linkage or relevance to the application to strike out the Response to the Statement of Claim

(iii) This is highly prejudicial as the defendants are attempting to steal a match by presenting their version of the case before trial.

(iv) That the Response to the Statement of Claim is meritorious and raises serious triable issues.

(v) That the Applicant has chosen to read the Respondent's response selectively as opposed to holistically.

(vi) The Claimant's application is therefore frivolous, in bad faith and is an abuse of the court process and should be dismissed with costs to the Respondent.

6. The Respondent did not file a replying affidavit but filed submissions and list of authorities.

Submissions

7. The Applicant/Claimant submitted that the Respondent's statement of response dated 1st July 2021 should be struck out and leave to fix the matter for formal proof be grated in the following undisputed facts –

(i) The Claimant was employed by the Respondent on 1st February, 2007 as per the copy of the employment contract marked as exhibit – FNN.

(ii) The Claimant filed Constitutional Petition No. E081 of 2020 against the Respondent on 16th November, 2020. A copy of the Petition was attached in the Claimant's bundle of documents.

(iii) The Claimant's salary at the time of dismissal was Kshs.141,000.00. A copy of the Claimant's payslip for December, 2020 was attached in the Claimant's bundle of documents dated 17th February, 2021.

(iv) The Claimant was dismissed by the Respondent on 23rd December, 2020 for filing the Constitutional Petition. A copy of the letter of dismissal was annexed as exhibit FNN.

8. The issues for determination according to the Applicant/Claimant are whether Respondent's statement of response raises any triable issues and whether it should be struck out.

9. The Applicant/Claimant relied on a plethora of judicial decisions on the question of striking out of statement of response and/or defence and submitted that the law on this issue is now settled. This was embellished with the decision of Gikonyo J. in **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR**.

10. On disputed facts, the Applicant/Claimant relied on the decision in **Kenya Cooperative Creameries Limited v Davis E. Mwai [1995] eKLR** on the fact of admission of the contents of paragraph 9 of the statement of claim, the reason for termination of the Claimant.

11. On triable issues, the Applicant/Claimant submitted that the Respondent did not file a replying affidavit in response to the motion to identify the triable issues but only filed grounds of opposition which raise specific points of law. That the Respondent was bound to demonstrate that there are bonafide triable issues for canvassing in a full trial. Reliance was made on the Court of Appeal decision in **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR**. Rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 was also invoked in support. The Claimant further submitted that the absence of a verifying affidavit rendered the grounds of opposition fatally defective and an optimal candidate for striking out. That the denial of paragraph 4 of the statement of claim is inconsequential since the Respondent had already admitted that the Claimant was its employee.

12. On whether the statement of response should be struck out, the Applicant/Claimant relied on the decisions in **Shadrack Mwendwa Mwinzi v Judicial Service Commission [2018] eKLR** and **Kenya County Government Workers' Union v Kisumu Water And Sewerage Company Limited [2020] eKLR**.

13. Finally the Applicant/Claimant submitted that the statement of response was frivolous, lacked substance and vexatious.

14. The motion was vehemently opposed by the Respondent who submitted that statement of response should not be struck out on the ground that it has been consistently held that courts of law should ordinarily aim at sustaining a suit rather than terminating it, unless it appeared hopeless and beyond redemption. The Respondent relied on the decision **in DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR**. A pleading, the Respondent argued should only be struck out as a final resort if nothing can be done to inject life into it. That the cardinal duty of courts of law is to serve substantive justice in any judicial proceedings before them, as provided by Article 159 of the Constitution and finally that the power to strike out pleadings is too draconian and should therefore be used sparingly.

15. The Respondent further submitted that a holistic reading of the response including paragraph 12 provides a clearer picture of the dispute. That the Claimant's/Applicant's submissions (paragraphs 10 and 11) are on merits of the case which are not for determination at this stage. That raising points of law did not preclude the Respondent from making reference to documents that were already on record and the same need not be pleaded in a replying affidavit.

16. On the replying affidavit, the Respondent submitted that the failure should not be construed that the Claimant's/Applicant's application was unopposed. The Respondent invoked Article 159(2)(d) of the Constitution of Kenya, 2010 which enjoins courts of law not to pay undue regard to procedural technicalities in decision making. In addition the Applicant/Claimant had not moved the Court to expunge or strike out the grounds of opposition filed by the Respondent.

17. The Respondent further submitted that the application was frivolous and without merit. That the Applicant/Claimant was attempting to steal the match before the game and that the application was in bad faith and an abuse of the Court process.

18. Finally, the Respondent submitted that the Court may on its own motion use the record to determine whether the statement of response raises any triable issues.

Determination

19. The issue for determination is whether the Respondent's statement of response should be struck for want of triable issues.

20. The principles that guide courts of law when considering an application seeking to strike out a pleading are undeniably well settled. In **Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR**. The Court of Appeal was categorical that –

> *"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of* ***D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1*** *discussed the issue at length and* ***Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR*** *although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-*
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>> *"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."*
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>> *We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of* ***Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506****, where the Lord Justice said:-*
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>>> *"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive*

and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

21. Similar articulations were made in **in DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR** as well as in **Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited, Civil Case No. 79 of 2013**.

22. Applying the above propositions in this case, the Court finds that although the Claimant's/Applicant's application was intended to ensure an early resolution of the dispute between the parties, the grounds of opposition, though not supported by a replying affidavit, raise issues that require canvassing at the hearing of the case. The statement of response contests the basis of the employer–employee relationship the parties had as well as the nature/character of the termination.

23. As courts have consistently held a triable issue need not be one which will succeed but one which raises a prime facie defence and which should go to trial for adjudication. Only sham defences qualify to be struck out before full hearing. This is borne by the fact that the cardinal obligation of courts of law is to dispense substantive justice (**Patel v E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76)**

24. On whether the absence of a replying affidavit is fatal to the Respondent' opposition to the motion, this Court finds that since the grounds of opposition are on record, they may be relied upon as the Respondent's defence to the motion. In addition Rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 is not mandatory. The Rule is couched in a manner that gives the Court discretionary power. Arguably, noncompliance could not have been intended to be fatal to the non-compliant party. The Court is not persuaded that the absence of the replying affidavit was fatal to the Respondent's opposition to the notice of motion.

25. Finally, in an application of this nature where the orders sought by the Applicant/Claimant are discretionary, it behoves the Court to strike a balance between the interest of the Claimant to access justice without undue delay and those of the Respondent to be afforded the opportunity to ventilate its case on the disputed facts. The balance is decipherable from the documents on record, grounds relied upon by the parties, submissions and the law. In the instant case, the balance is tilted in favour of hearing both parties and determining the cause on its merits.

26. Accordingly, the application dated 13th July 2021 is dismissed with no orders as to costs are in the cause.

27. The matter be listed before the Deputy Registrar for confirmation of compliance with pre-trial directions.

28. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER 2021

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE