



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2449 OF 2017

MUTWIRI TITUS ERASTUS.....CLAIMANT

VERSUS

ZHONGMEI ENGINEERING GROUP LIMITED.....1ST RESPONDENT

RULING

1. The application before me is the claimant's Notice of Motion dated 4.4.2019. It is brought under section 1A,1B & 3A of the Civil Procedure Act and Order 15(1)(b) (c) & (d) of the Civil Procedure Rules and it seeks for the following orders:

(a) The Respondents' defence herein be struck out.

(b) Judgment be entered against the respondents and in favour of the claimant for the sum of Kshs. 800,000 pending further orders of the court.

(c) Respondents be ordered to pay costs of the application.

2. The application is premised on the grounds set out on the body of the motion and it is supported by the signed by the claimants uncommissioned affidavit.

3. The Respondent did not file any response to the application.

4. The application was, by consent disposed of by written submissions. The claimant submitted that the application was not opposed and as such it should be allowed as prayed; that the defence is a mere denial and raised no triable issues; that the defence is frivolous, vexatious, embarrassing and an abuse of the court process; that the defence is a waste of precious judicial time; and finally, the defence contains admission of the claim including the fact that the claimant was their employee earning Kshs. 40,000 per month. He relied on **Ecobank Kenya Limited v. Bobbin Limited & 20 Others [2019]eKLR** for emphasis.

5. The Respondents have however, opposed the application through their written submissions filed on 20.9.2019. They urged that the defence does not admit the claim but it has denied all the allegations by the claimant; that the claim for Kshs. 800,000/- has not been admitted either directly or indirectly; that the ingredients for an admission is that it has to be clear and/or straight forward; that the main issue in the suit upon which an award can be granted is whether the claimants services were unlawfully terminated; that the defence denies the alleged unlawful termination and the respondent intends to adduce evidence to prove that the claimant was not dismissed unlawfully; and finally the defence raised triable issues which ought to go for trial. They relied on **Choitram v Nazari[1984]KLR 327, Cassman v Sachania[1982]KLR 191, Blue Shield Insurance Co. Ltd v. Joseph Mboya Oguttu[2009]eKLR** and **Wenlock v. Moloney[1965]2 All E.R 871 at page 874** to support their case.

Issues and Analysis

6. The issues for determination are:

(a) Whether the application is incompetent

(b) Whether the application meets the threshold for striking out pleadings.

(c) Whether judgment should be entered as prayed in the application.

Incompetent application

7. As observed herein above, the Affidavit in support of the motion was not sworn before a Commissioner for Oaths as required by the oaths and Statutory Declaration Act. It bears no signature for any Commissioner of Oaths or any date and the place where it was sworn as required by section 5 of the Act. It is therefore not an affidavit for purpose of Rule 17 of ELRC Procedure Rules which require that any interlocutory application shall be by Notice of Motion supported by an affidavit. Accordingly, I find and hold that the application is incompetent and it is rejected.

Threshold for striking out pleadings.

8. The threshold for striking out pleadings is set out under Order 2 rule 15 as follows:

“(i). . .the court may order to be struck out or amend any pleadings on the ground that-

(a) It disclosed 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 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 entered accordingly as the case may be.”

9. The Respondent did not file any Replying Affidavit or Grounds of Opposition to oppose the application but filed Submissions denying the alleged admission of the claim and contending that the defence raised triable issues. Those are legal issues which require no affidavit by the defendant but just an analysis of the pleadings.

10. I have carefully considered the pleadings and I agree with the respondents that the defence filed does not admit the alleged unlawful termination of the claimant’s contract of service. It does not also admit any monetary claims either directly or indirectly.

11. All the authorities cited by both parties indicate that the power to strike out pleadings should be exercised sparingly and in cases where the defence raises no triable issues. In this case I am satisfied that even if the application was not incompetent the same would still fail because the defence raised triable issues including whether the dismissal of the claimant was unlawful; Whether his salary was Kshs. 155,000/- per month or Kshs. 40,000/- or Kshs. 47,500/-; and finally whether the claimant is entitled to the reliefs sought.

12. As correctly submitted by the respondent any award of damages is depended on the determination of the issues whether the claimant was unlawfully dismissed. Under section 47(5) of the Employment Act, the burden of proving unfair termination of employment rests with the employee. Such burden can only be discharged by evidence upon trial. It follows that a trial is necessary in this case for the claimant to discharge that legal burden of proof.

13. In the end the application, dated 4.4.2019 is dismissed with no costs.

Dated, signed and delivered in Nairobi this 9th day of July, 2020.

ONESMUS N.MAKAU

JUDGE