



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT NAIROBI

CAUSE NO. 831 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

YASH KARNIK.....CLAIMANT

VERSUS

KUKU FOODS LIMITED.....RESPONDENT

**RULING**

The Respondent filed a Notice to Strike out the Claimant's Statement of Claim dated 25<sup>th</sup> May 2018 on grounds that the Statement of Claim is in breach of Section 14(1) of the Employment and Labour Relations Court (Procedure) Rules 2016.

The Notice is supported by the Affidavit of Counsel James Kamau Njeri sworn on 24<sup>th</sup> January 2019. He avers that the statement of claim is defective as it is not in conformity with Rule 14(1) of the Employment and Labour Relations Court (Procedure) Rules for reason that it is not numbered and the paragraphs are not clearly marked. He avers that the claim cannot be properly referred to as it will hamper the delivery of justice.

The Claimant neither filed a reply nor submissions to the application.

**Respondent/Applicant's Submissions**

The Respondent submitted that the defective nature of the claim has prevented the Respondent from responding to the claim for fear of obstructing the court process.

It submitted that the respondent's failure to respond to any of the averments in the claim would amount to an admission by the Respondent. It submitted that such failure to file a good defence would be to the detriment of the Respondent. It relied on the decision in *Magunga General Stores v Pepco Distributors Limited [1987] eKLR*.

It submitted that since the claim cannot be properly referred to or responded to this shall hamper the delivery of justice. It relied on the decisions in *Nuru chemist Limited & another v National Bank Limited [2008] eKLR* and *D.T. Dobie & Company (Kenya) Limited -V- Joseph Mbaria Muchina and Another*.

In conclusion, it urged the Court to strike out the defective Claim taking into account that the Claimant failed to respond to the application.

**Determination**

Rule 14(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

**A pleading shall contain page numbers and shall be divided into paragraphs numbered consecutively with each allegation being so far as appropriate contained in a separate paragraph.**

As stated by the Respondent the Claimant's Statement of Claim is neither numbered nor paginated but it does have paragraphs. The question is therefore whether the failure to include page and paragraph numbers would necessitate the striking out of the claim. It has been held that the striking out of pleadings is draconian and the Court should exercise its discretion as a last option.

The Court of Appeal in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 6 Others [2013]*

**eKLR** held:

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. Yet the period prior to 2010, when the overriding objective principle and the Constitution were promulgated, striking out of pleadings, as demonstrated by the cases cited by the respondents, for reasons that were purely technical was the rule rather than the exception. And this Court perfected it. This is demonstrated by the brief (¼ page) decisions cited by the respondents in **Augustino Mwai V. Okumu Ndede, Nbi Civil Appeal No. 42 of 1995**, **Joseph Kinoti V. Aniceta Ndeti Nairobi Civil Appeal No. 130 of 1995** and **Samuel Wakaba V. Bamburi Portland Cement Civil Appeal No. 130 of 1995**, all decided between 1995 and 1997.

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

It is noteworthy that all authorities cited by the applicant as pre-2010 Constitution. After the promulgation of the Constitution want of form is no longer a ground for striking out pleadings, unless they cannot be salvaged through amendment.

Lack of numbering of the claim is a mere technicality as it is capable of being rectified. Though the Respondent may not be in a position to respond to the Claim as it is, it is not likely to suffer any harm should the claim be paginated and paragraphs numbered. Striking out the claim for a mere technicality would be contrary to Article 159(2)(d) of the Constitution and Section 20(1) of the Employment and Labour Relations Court Act which require that courts be guided by the principles which include administering justice without due regard to procedural technicalities. The Claimant did not respond to the Application to ascertain whether the failure to comply with procedure was deliberate. Further, the Claimant did not amend the claim as directed on 12<sup>th</sup> February 2019.

There is however another issue, whether counsel for the respondent/applicant is properly on record and whether it was on record at the time of filing the application for striking out. The application was filed on 24<sup>th</sup> January 2019 by Wangai Wanjohi Advocates. On record is a notice of appointment of Advocates of KNOW ADVOCATES LLP for respondents filed on 4<sup>th</sup> June 2018.

The firm of Wangai Wanjohi filed a notice of Change of Advocates which is not served upon the advocates on record for the respondents and which only gives its address for the service without stating it is coming on record for the respondent in place of KNOW ADVOCATES LLP. The firm which filed the striking out application is therefore not properly on record and was not at all on record at the time of filing the notice.

For the foregoing reasons the application for striking out is both unmerited as well as incompetent and is struck out with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF AUGUST 2019**

**MAUREEN ONYANGO**

**JUDGE**