



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2238 OF 2014

Y G.....CLAIMANT

VERSUS

CARNATION PLANTS LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion dated 31st August, 2015 the respondent seeks an order for security for costs against the claimant in the sum of Kshs.1,500,000 in default the claim herein be struck out or stayed until security is provided.
2. The application is based on the ground among others that the claimant was an expatriate on work permit issued upon application by the respondent and further that there was no evidence that the claimant had any assets or employed in Kenya sufficient to satisfy any judgment for costs that may be entered against him.
3. The application was supported by the affidavit of Evi Feldman who deponed on the main that:-
 - a. That he the Chief Executive Officer of the Respondent/Applicant duly authorized hence competent to swear this affidavit.
 - b. That he was informed by his advocates on record which information he verily believed to be true that the claimant/respondent did not have maintainable claim against the Respondent/Applicant and that the Applicant had a very good defence to that claim.
 - c. That he was informed by his advocates on record which information he verily believed to be true that the party and party costs for defending that cause would amount to approximately Kshs.1,500,000/= which worked out under schedule VI of the Advocates Remuneration Order as follows:-

Instruction fee on the 1st Million.....Kshs.120,000.00

2% of the amount exceeding one (1) million

but not exceeding Kshs.20 million..... 380,000.00

1.5% of the balance up to Kshs.46.107.874.....313,294.50

Subtotal.....	813.294.50
Add 1/3 getting up for trial fees.....	271,098.20
Total.....	<u>1,084,392.70</u>

To that amount would be added Court attendances, drafting, services of process which will most likely enhance the costs of an estimate of Kshs,1,500,000/=

d. That the Claimant was an expatriate on a work permit issued to him on application by the Respondent for the entire period of his employment he failed to apply and/or furnish a PIN Certificate thereby providing a reliable contact address/information to the Government and his employer, the respondent.

e. That the Respondent verily believed that the Claimant did not have any assets or any financial resources within the Republic of Kenya that could satisfy any judgment on costs against him that we knew of.

4. The claimant opposed the application and swore a Replying Affidavit in which he deponed on the main that:-

a. That he worked for the respondent/applicant company, which was located and carried on business at Nairobi, from the year 2014 during which time he worked for gain and resided at Nairobi.

b. That upon termination of his employment at the respondent/applicant company he obtained new employment at another company known as Amiran Kenya Limited which was also located and carried on business in Nairobi within the Republic of Kenya.

c. That he had continued to reside in Nairobi since the time he encountered the respondent herein, to wit the time he obtained employment at the company, and he still resided in the same city.

d. That the respondent/applicant herein was well aware of the aforesaid facts, and the express statement in the Application to the effect that there was no evidence that he resided in the Republic of Kenya is blatantly false and misleading to this honourable Court.

e. That the respondent/applicant was well aware that he had stable employment with a company known as Amiran Kenya Limited, which company had been operating its business in Kenya and East Africa at large since the year 1963, and that he held a senior position therein.

f. That indeed the respondent/applicant, in consultation with its advocates on record, had contacted the Chief Executive Officer at Amiran Kenya Limited, his current employer, in an attempt to obtain an out of Court settlement of the suit herein.

g. That in the said proposed settlement plan, the respondent/applicant was undertaking to pay him a sum of USD30,000,000 in full and final settlement of all damages and/or financial claims that he had against them, which clearly demonstrates their belief that he had a valid and sustainable claim against them.

h. That the averment to the effect that they believed that he had no maintainable claim against the respondent/applicant is completely false and contrary to their own above mentioned acts; the respondent/applicant were clearly apprehensive about the suit herein and wished to settle his claim outside Court, which proposition had not obtained favour with him.

i. That further, he married a Kenya citizen called L A O, with whom he lived. They contracted their marriage under Kenyan Law, being the marriage Act, 2014, and consequently it was registered

in accordance with the said.

j. That he was advised by his advocates on record, advice he verily believed to be true, that an application such as this, the respondent/applicant was required to demonstrate that he is unable to or that he lacks good will to pay costs in the event that he is required to. However, in its applicant the respondent/applicant herein did not demonstrate such inability or lack of good will on his part.

5. The principles which guide the Court in deciding whether to make an order for security for costs pending trial were well set out in the English case of **Keary Development v. Tarmac Construction (1995) ALL ER 534. These principles were summarized by the Kenya Court of Appeal in Civil Appeal No. 9 of 2005 Messina & Another v. Stallion Insurance Co. Ltd** as follows:-

a. The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

b. The possibility or probability that the Plaintiff Company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.

c. The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the Plaintiff's claim fails and the defendant finds himself unable to recover from the Plaintiff the costs which had been incurred by him in his defense of the claim.

d. In considering all the circumstance, the Court will have regard to the Plaintiff Company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

e. The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of substantial amount.

f. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

g. The lateness of the application for security is a circumstance which can properly be taken into account.

6. These principles are not exhaustive but they comprise broad and largely the reasonable parameters that should guide a Court confronted with an application of this nature.

7. The first question the Court needs to decide is whether the credible material laid before it in support of the instant application. Evi Fieldman in support of the application bases his apprehension over the ability of the claimant to meet his costs if unsuccessful on the fact that the claimant is a foreigner and that the claim as filed is not maintainable against the respondent. Fieldman further deposed that the respondent verily believes that the claimant does not have any assets or any financial resources within the Country that could satisfy any judgment on costs against him.

8. In refuting these claims the claimant contended that since the termination of his services he obtained alternative employment at Amiran Kenya and that he has continued to reside in Nairobi. He further states that he is married to one L A O with whom they have a child. The claimant further contended that the fact that the respondent has reached out to his lawyer with proposal to settle the claim at USD30,000/= which offer he has refused, shows that the respondent acknowledged that he had a sustainable claim against the respondent.

9. In the claim, the claimant avers that the respondent terminated his services in breach of his employment contract in that he was not furnished with the requisite six months' notice or payment in lieu thereof and further that no fair procedure was followed when terminating his services.

10. The claimant's termination letter dated 16th January, 2014 refers to a meeting between him and the CEO Mr. Evi Fieldman in which several accusations detailed in the letter were allegedly presented to the claimant and was required to respond to on the spot but according to Mr. Fieldman the claimant failed to provide any reasonable excuse over his conduct. The letter further proceeds to advise the claimant to collect his terminal dues. The details of the terminal dues were not disclosed in the letter.

11. There would appear to have been serious misunderstanding and frosty relationship between the claimant and the respondent Chief Executive Officer Mr. Feldman. It is the two who apparently met on 16th January, 2014 and the Chief Executive Officer confronted the claimant with a raft of accusations which he was required to respond to on spot. It is the same Chief Executive Officer who issued the termination letter and the deponent to the affidavit in support of the instant application. This could be case of conflict of interest and person becoming a Judge in his own cause.

12. One of the considerations before an order for security for costs is made is that the Court must carry out a balancing exercise and on one hand weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered. The order must not be used to unfairly stifle a valid claim. The Court has reviewed and considered the claim vis a vis the response thereto and is persuaded that the claimant has a valid claim. Further the nationality of the claimant cannot be used to stifle his access to the Court unless it is ably demonstrated that he is about to relocate outside the jurisdiction of the Court. In any event our civil process has provision for execution of foreign judgments which can be invoked if needed.

13. In conclusion the Court will decline to grant the orders sought.

14. Costs in the cause.

15. It is so ordered.

Dated at Nairobi this 23rd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge