

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

CAUSE NO. E714 OF 2025

(Before Hon. Lady Justice Agnes Kitiku Nzei)

TERRY KAU **CLAIMANT**

VERSUS

MOTA-ENGIL ENGENHARIA

E CONSTRUCAO AFRICA..... **RESPONDENT**

RULING

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 25th July, 2025 and sought the following reliefs:-
 - (a) *A declaration that the Claimant's termination was unfair, unlawful and amounted to constructive dismissal.*
 - (b) *An order for specific performance by the Respondent, on the basis that the Mozambique and Ethiopia contracts had been expressly extended to the Claimant, and that full payment of*

the contract sum of USD 58,606.31 be awarded as compensation, being the amount that would have been payable to her had either of the roles proceeded as promised.

(c) An order directing the Respondent to pay the Claimant the following sums:-

*(i) One month salary in lieu of notice
..... Kshs.708,976/=.*

*(ii) Twelve (12) months' gross salary as compensation for unfair dismissal
..... Kshs.8,507,712/=.*

(iii) Payment for 31 accrued and unpaid leave days Kshs.708,976/=.

*(iv) Reimbursement for school-related expenses and relocation costs incurred in anticipation of the expatriate assignment
Kshs.844,750/=.*

(v) General damages for emotional distress, mental anguish, reputational harm and loss of dignity.

(vi) Interest on (i), (ii), (iii), (iv) and (v) above at court rates.

(vii) Certificate of service.

(viii) Costs of the suit.

2. The Claimant has pleaded in her Memorandum of Claim,

inter-alia:-

(a) that she was first employed by the Respondent as a Supply Chain Manager on 2nd September, 2019 under a fixed-term contract initially set to expire on 2nd March, 2020, but which was subsequently renewed multiple times on 3rd September 2020, 3rd March 2021, 3rd September 2021, 3rd March 2022, 3rd September 2022, 3rd March 2023, 3rd March 2024, 3rd September 2024 and finally on 3rd March, 2025 for one month; to lapse on 2nd April, 2025.

(b) that **on 3rd October, 2024**, the Claimant was summoned by the Respondent's then Managing Director, one **Mr. Tiago Barbosa**, to his office whereat the said Managing Director **discussed an expatriate position in Ethiopia**, and indicated that the Respondent had secured a five-year contract in Ethiopia with **Allied Gold**, and that the Claimant had been selected to serve as the

Logistics Manager for that project upon the expiry of the Kenyan contract.

- (c) that the Respondent's said Managing Director assured the Claimant of job continuity under the new assignment and directed her to begin preparations, including dismantling of a laboratory in the Sagana Satellite Camp and coordination of containerization for shipment to Ethiopia.
- (d) that relying on the assurance, the Claimant undertook extensive preparatory assignment, including daily commutes from Nairobi to Sagana for two weeks from 15th October, 2024 using her personal vehicle, assignments in Bugoma **and logistics and procurement responsibilities for the Ethiopia project. That this involved liaising with Allied Gold, Komatsu and the Respondent's Portugal headquarters, among other local and international suppliers.**
- (e) that the Claimant also attended project meetings **and assumed responsibilities for the Ethiopia project while still under her Kenyan contract.**

- (f) that based on the Claimant's representation, the Claimant restructured her personal life, including transferring her minor child from day school to a boarding school, incurring double term fees, purchasing of new uniforms and exposing the child to academic disruption and emotional stress.
- (g) that **on 5th March, 2025**, the Claimant was unexpectedly instructed by the Respondent's Finance Director to proceed on **compulsory leave effective 6th March, 2025**; a directive that the Claimant protested on ground that she was entitled to monetary compensation for her 31 accrued leave days; rather than being compelled to take leave; and particularly because she had been assured of a new expatriate role in Ethiopia.
- (h) that the Claimant raised the issue with **Mr. Barbosa**, who reaffirmed that the Claimant was still employed by the Respondent and would be on-boarded to the Mota-Engil Ethiopia team from March 2025; **and instructed the Claimant to work remotely pending set-up of the**

Ethiopia pay-roll, assuring the Claimant that her leave days would be carried over.

- (i) that the Claimant **continued to work from home on the Ethiopia project assignments** using the company-issued laptop, awaiting a formal letter of offer which never materialized; and that in April 2025, she learned that another employee, **Mr. Daniel from Malawi**, had been deployed to the Ethiopia in her place and had assumed the role promised to her.
- (j) that on seeking clarification from **Mr. Barbosa**, the Claimant was informed that her position had been eliminated due to budget constraints; and that as a consolation, **the Respondent offered to reimburse the school fees incurred**, and instructed the Claimant to open a Euro account for that purpose. That the reimbursement has not been done to date.
- (k) that the Claimant was not issued with a letter terminating her contract, nor was her contract renewed.

3. The suit was filed contemporaneously with the Claimant's Notice of Motion dated 25th July, 2025 and filed under a Certificate of Urgency. This is the application before me for determination.

4. **The Notice of Motion dated 25th July, 2025**

The application is expressed to be brought under Articles 41, 47 and 50 of the Constitution of Kenya 2010, Sections 3, 12 and 49 of the Employment Act, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules. The following Orders are sought:-

(a) *Spent.*

(b) *That the Court be pleased to direct that the main suit be set down for hearing on priority basis given the urgency and frustration of the Court's Jurisdiction.*

(c) *That pending hearing and determination of the main suit, the Court be pleased to issue a preservative order restraining the Respondent from repatriating or transferring its finances, personnel, equipment, or any part of its business*

operations to Ethiopia or elsewhere outside the Jurisdiction of the Court.

*(d) That the Court be pleased to order the Respondent to deposit in Court a reasonable sum of **USD58,606.31** being the net annual salary that had been offered to the Claimant as security for the due satisfaction of any Judgment that may be entered in favour of the Claimant.*

(e) That costs of the application be provided for.

5. The application sets out on its face the grounds on which it is brought, and is predicated on the Claimant's supporting affidavit sworn on 25th July, 2025. It is deponed in the said supporting affidavit, ***inter-alia***:-

*(a) that in February 2024, the Respondent's Managing Director, **Mr. Tiago Barbosa**, approached the Claimant with a formal proposal to transition to Transport and Logistics Manager role in Mozambique; to which the Claimant expressed interest, but indicated that she would need time to make family arrangements, particularly concerning her son's schooling. That the offer was*

subsequently withdrawn without official explanation.

(b) that thereafter, the Respondent expressly represented to the Claimant that she would be retained as part of the Respondent's team in Ethiopia following the award of a major infrastructure contract. That subsequently, those assurances were withdrawn, and the Claimant's employment was effectively terminated without notice.

*(c) that the Respondent's relocation is at an advanced stage, with **final** shipment schedules, staff deployment rosters and closure notices being internally circulated and implemented by the Respondent's management team.*

(d) that unless the Court urgently intervenes and issues the injunctive and preservative reliefs sought, the Respondent will fully relocate and render any future Judgment unenforceable.

6. The application is opposed by the Respondent vide a replying affidavit of **JOAO BARROS** sworn on 18th August,

2025. It is deponed in the said replying affidavit, **inter-alia:-**

- (a) that the application is misconceived, legally untenable, and is an abuse of the Court's process.
- (b) that the Respondent is a **duly registered foreign company** lawfully operating in Kenya, with an active presence and ongoing contractual obligations locally, and has no intention of evading the Court's Jurisdiction or rendering any decree nugatory.
- (c) that the Respondent continues to maintain operations in Kenya and retains an active office at Sanlam Tower, has ongoing contractual obligations with Kenyan clients and service providers, employees and assets within the jurisdiction.
- (d) that the allegations that the Respondent is in the final stages of exiting Kenya is factually incorrect, speculative and unsupported by credible evidence
- (e) that the Respondent is a reputable engineering company group that has developed engineering and construction projects in Europe, Africa and Latin America, and that its participation in foreign

projects is a normal aspect of its multi-jurisdictional operations; and does not amount to asset flight or corporate winding-up.

- (f) that the Claimant's apprehension is unfounded, and does not meet the threshold required.*
- (g) that the Employment and Labour Relations Court (Procedure) Rules and the Employment Act **do not** provide for pre-trial security in the nature sought.*
- (h) that the Claimant has not established a **prima facie** case with a probability of success.*
- (i) that the background leading to the separation between the parties herein involved legitimate managerial decisions, adherence to contractual terms and the law.*
- (j) that if granted, the orders sought will interfere with the Respondent's ongoing operations, damage the Respondent's commercial reputation and cause disproportionate prejudice compared to the speculative harm alleged by the Claimant.*

7. Parties filed written submissions on the application, with the Claimant/Applicant filing first, pursuant to the Court's

directions in that regard. Without leave of the Court, the Respondent filed a further affidavit together with its written submissions, annexing a copy of a lease agreement between itself and Sanlam Life Insurance Company Limited. The Claimant's Counsel objected to the said supplementary affidavit on ground that the same had been filed by the Respondent after reading the Claimant's written submissions. The Court admitted the said document on record, nevertheless.

8. It is to be noted that a company's continuing operations is **not** proved by the existence of a lease agreement, but by demonstrating legal continuity of the company's core operations within the areas and/or country of operation. The Respondent has not **articulately** demonstrated continuity of its core operations in Kenya, and the remaining period of such operations. It is a common ground that the Respondent is a foreign company registered in Kenya and with operations in different countries. Continuing shipment of the Respondent's assets from Kenya to Ethiopia since October 2024, as deponed by the Claimant, has **not** been denied by the Respondent.

9. The Respondent has **not** stated what assets it has in Kenya, and the period of time that such assets are likely to remain in Kenya.
10. Having considered the facts of the case herein and all the material placed before me, and without attempting to go into the merit or otherwise of the case at the present stage, I am convinced that the Claimant's claim against the Respondent **cannot** be said to be **entirely** frivolous or entirely without an iota of merit.
11. The legality and/or fairness of the alleged termination of the Claimant's fixed-term contract **before** the contractual date of termination is an issue that will go for trial and determination. The Claimant's allegation of having worked remotely on the Respondent's Ethiopia project on the Respondent's instructions and having incurred expenses in preparations to relocate to Ethiopia based on the Respondent's presentations to her are all issues that will be tested in a full trial, and determined on merit. It is to be noted that under **Section 8 of the Employment Act,**

contracts of service/employment may be oral or written. The issue of the Claimant's alleged accrued leave days will also be determined upon trial.

12. Based on the foregoing issues that can only be determined upon taking of evidence, the Claimant/Applicant's claim **cannot** be said to be speculative or entirely speculative.
13. Although the Claimant/Applicant has, in my view, established a **prima facie** case with **some** possibility of success, the Claimant has **not** demonstrated that she stands to suffer an irreparable injury/damage if the injunctive order sought is **not** granted. As stated at paragraph 1 of this Ruling, the Claimant seeks, among other reliefs, payment of general damages and specified amounts of money being, notice pay, compensation for unfair termination of employment and costs incurred in anticipation of an expatriate assignment. The balance of convenience tilts in favour of the Respondent as issuance of an injunctive order as sought is likely to paralyse and to ground whatever operations the Respondent has remaining in Kenya and those in Ethiopia. It is a common ground that the Respondent has operations in

different countries, including Ethiopia. The upshot of all the foregoing is that the prayer for an injunctive order fails to meet the threshold set in the celebrated case of **Giella - vs - Cassman Brown & Co. Ltd [1973] E.A. 358.**

14. On the prayer for furnishing of security by the Respondent by depositing **USD 58,606.31**, I have noted that the Claimant has **not** demonstrated how the said sum was arrived at and/or computed. As the fact of the Claimant having been employed by the Respondent is **not** in dispute, reasonable security to be deposited in Court pending hearing and determination of the suit, in the interest of justice, can be determined by the Court.
15. The Employment and Labour Relations Court (Procedure) Rules 2024 are silent on provision of security **before** Judgment. This does not, however, mean that a deserving applicant would be without remedy. This Court has, over the years, reverted to the Civil Procedure Rules in situations where its own Rules are silent on any particular procedural issue. Indeed, the Court had the following to say in the case

**of Francis Mutai Bii - vs - Kaisungu (K) Limited [2016]
eKLR (D.K. Njagi Marete, J.)**

“The application of the Civil Procedure Act in the practice of this Court is a grey area. It is not expressly provided for in any statute applicable in the practice of the Court, or even other law. There have been arguments for and against the application of the Civil Procedure Act in our practices. So what is the actual position on this in the practices of this Court. What has been the practice in the past.” Previous practice of the Employment and Labour Relations Court has borrowed from the High Court of Kenya by incorporating the Civil Procedure Act and Rules in its practice where necessary. This I believe is obviously to take care of any lacuna created by the lapses of the Industrial Court (Procedure) Rules 2010 and even statute. I agree with the submissions by the Respondent that the Industrial Court Act, 2011 and the Rules of this Court do not address the issue of stay of execution or even leave to appeal. I however do

not agree that in the absence of this provision, this Court would be left hanging on the subject. Nature abhors vacuum and therefore the establishment of precedent and a practice where these issues can be addressed as and when they arise and fall due like in the present case.”

16. Order 39 Rule 1 of the Civil Procedure Rules provides as follows:-

“1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of Section 12 of the Act, the Court is satisfied by affidavit or otherwise:-

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him -

(i) has absconded or left the local limits of the Jurisdiction of the Court; or

(ii) is about to abscond or leave the local limits of the Jurisdiction of the Court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and to bring him before the Court to show cause why he should not furnish security for his appearance.

Provided that the defendant shall not be arrested if he pays to the officer

entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court."

17. The foregoing provision demonstrates that provision of security **before** Judgment is **not** alien to the Kenyan law, and that, indeed, the issue of whether or not to furnish security before Judgment is one that can be determined by application of the law as provided in Article 50(1) of the Constitution of Kenya 2010.

18. Provision of security before Judgment, in deserving cases, is meant to preserve the integrity of Judicial process and to ensure that a successful party is not left without remedy. Although the amount of security may, in most cases, not be equivalent to the sum claimed by a Claimant/Plaintiff, it ought to be a reasonable sum capable of protecting the Claimant's potential award, particularly in cases where no

liquidated claim is made, or where the actual sum to be paid is to be assessed by the Court upon trial.

19. Matters to be considered in determining applications for provision of security **before** Judgment and provision of security for costs pursuant to Order 26 of the Civil Procedure Rules and Rule 70(6) of the Employment and Labour Relations Court (Procedure) Rules 2024 **may not** be quite different. The Court of Appeal stated as follows in **Westmont Holdings SDN. BHD - vs - Central Bank of Kenya [2017] eKLR:-**

“[10] The reason for seeking an order for security for costs was predicated on several grounds as summarised above. First, it was submitted Westmont, who is the Appellant was wound up and does not exist in law; secondly, its agent Jasmin See who purportedly holds a power of Attorney is a foreigner who is not resident in Kenya, has no fixed abode or known assets. The question to be answered is whether these are sufficient reasons to warrant the grant

of the orders sought to furnish further security for costs. This Court in the case of Mama Ngina Kenyatta And Another - vs - Mahira Housing Company, Civil Application No. Nai 256 of 2003 [2005] eKLR gave some guidelines to be taken into account when exercising discretionary power under Rule 107(3). The Court did so by appreciating and citing with approval some of the principles as set out in the English case of; Sir Lindsay Parkinson and Company Limited - vs - Triplan Ltd [1973] 2 WRR at P. 684: where Lord Denning M.R indicated the parameters that should guide the Court in determining whether to order security for costs as follows:-

- (i) Whether the Claimant's claim was bonafide and not a sham;
- (ii) Whether the Claimant had a reasonably good prospect or success;

- (iii) Whether there was admission by the defendant on the pleading or elsewhere that money was due;
- (iv) Whether there was a substantial payment into Court or an “open offer” of a substantial amount.
- (v) Whether the application for security was being used oppressively, for example to stifle a genuine claim.
- (vi) Whether the Claimant’s want of means had been brought about by the conduct of defendants, such as delay in payment or in doing their part of the work.
- (vii) Whether the application for security was made at a late stage in the proceedings.”

20. In the present suit, and as stated elsewhere in this Ruling, the Claimant’s claim herein cannot be said to be a sham or entirely frivolous. The Claimant’s claim has a prospect of success, **to some extent**. The application was filed

contemporaneously with the suit. The Claimant's employment is shown to have been terminated **earlier** this year; and it has not been denied that the Respondent, which is a foreign company, is in the process of relocating from Kenya to Ethiopia.

21. In view of all the foregoing, this Court can properly and justly exercise its discretion and order for provision of security before Judgment, not in the sum stated in the application but as the Court considers proper and fair.

22. Consequently, and having considered the rival submissions filed on behalf of both parties, the Notice of Motion dated 25th July, 2025 is hereby allowed in the following terms:-

(a) The Respondent shall, within twenty one (21) days of today, deposit in this Court an amount of money that is equivalent to the Claimant's twelve (12) months' gross salary as at the time of termination, to be held in deposit by the Court until the suit herein is heard and determined; or until further Orders of the Court.

- (b) The suit herein shall be fast-tracked, and shall be fixed for hearing.**
- (c) Costs of the application shall be in the main suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS
31ST DAY OF OCTOBER 2025**

AGNES KITIKU NZEI
JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI
JUDGE

Appearance:

Mr. Kiamba for the Claimant/Applicant

Miss Wekesa for the Respondent