TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel (Civil Appeal E365 of 2018) [2022] KECA 881 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KECA 881 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E365 OF 2018

AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA

JUNE 10, 2022

BETWEEN

TNT EXPRESS WORLDWIDE (KENYA) LIMITED ..... APPELLANT

AND

TIMOTHY GRAEME STEEL ..... RESPONDENT

(Appeal from the Ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (H. Wasilwa, J.) delivered on 18th May, 2018 in ELRC Civil Cause No. 562 of 2017)

JUDGMENT

1 In this appeal, the appellant, TNT Express Worldwide (Kenya) Limited, is challenging a ruling of the Employment and Labour Relations Court (ELRC) that ordered it to deposit US $100,000 into a joint interest earning account within 30 days.

2 The genesis of the appeal is a claim filed by the respondent, Timothy Graeme Steel, against the appellant in which he asserted that he had been the appellant's General Manager since 9th February, 2012; that, sometime in May, 2016, the appellant's holding company TNT Express N.V (TNT Express) was acquired by FedEx Corporation and FedEx Acquisition B.V. ("FedEx") and that, subsequently thereto, the appellant underwent a restructuring that affected the respondent's position and culminated in the issuance to him on 8th February, 2017 with a letter of relocation from his position in Kenya to the United Arab Emirates; that this actions rendered the respondent's position in Kenya redundant, and he was denied his redundancy dues as required by law.

3 It was further asserted that the appellant's actions were in breach of contract as he was denied the requisite 90 days' notice, and was wrongfully subjected to a new foreign service contract without his consent; that, as a result, he was constructively dismissed from employment, unlawfully declared redundant and ultimately subjected to unfair labour practices; that the appellant failed to pay him his

salary for the month of February 2017, and for 10 days worked in March, 2017. He stated that he was forced to resign by a letter dated 8th February 2017 and, therefore, sought orders for:

a. "A declaration that the termination of employment of the Claimant was unfair.

b. A declaration that the Claimant's termination constituted an unfair and unlawful redundancy.

c. Additionally, or in the alternative to prayer b) above, a declaration that the claimant's termination constituted constructive dismissal;

d. A declaration that the claimant was subjected to unfair labour practices in violation of his constitutional and statutory employment rights.

e. USD 17,000 being the sum of money due to the claimant as his gross salary for the month of February 2017.

f. USD 5,000 being the sum of money due to the claimant as his gross salary for the period 1st to 9th March, 2017.

g. USD 3,000 being the sum of money due to the claimant for 4.5 unpaid leave days.

h. USD 50,000 comprising the claimant's 3 months' salary in lieu of notice.

i. USD 261,000 being severance pay due to the claimant at the rate of 15 days for 19 years of completed service.

j. The claimant's unpaid bonus for the year 2016.

k. 12 month's compensation for unfair termination.

l. General damages for unfair labour practice.

m. Payment of any and all outstanding contractual employment benefits".

4 The appellant denied the respondent's claims and stated that the respondent's allegations were false, misleading and a misrepresentation of the facts as they had transpired. It denied having breached the contract with the respondent and, instead, contended that it had discussed the possibility of relocating the respondent to the United Arab Emirates to the same position and on the same terms, but that the respondent refused and instead had tendered his resignation, which the appellant accepted; that, further, the respondent's role was unrelated to the appellant's business; that TNT Express, the appellant's parent company, had four local offices in Africa, Egypt, Namibia, Kenya and South Africa, and the appellant was responsible for managing the businesses in the Associate countries; that relocating his position to Dubai would not have changed the character of his role.

5 The appellant further denied that the respondent was declared redundant or that his resignation resulted in a constructive dismissal. It asserted that he had resigned due to family obligations, and, therefore, the allegations of constructive dismissal were an afterthought and unfounded; that he was fully aware of the consequences of tendering his resignation on 10th March, 2017. The appellant also denied carrying out unfair labour practices and stated that it paid the respondent's housing, school fees and other employment benefits three months in advance, and that the appellant was entitled to recover these payments from the respondent upon his resignation.

6 In tandem with the defence, the appellant filed a counterclaim for Kshs. 573,160 (equivalent to USD 5,597) for breach of contract and for obtaining employment with Copia Global Inc. It sought orders for:

a. "*A permanent injunction be and is hereby issued to restrain the* claimant from entering into, or remaining in any employment or engagement with Copia Global Inc. or any other entity, person or persons in competition with the Respondent.

b. A permanent injunction be and is hereby issued to restrain the claimant from disclosing, giving, releasing, sharing with or in any manner whatsoever providing Copia Global Inc. or any other entity, person or persons in competition with the respondent with any confidential information including the Respondent's trade secrets, unique competitive and business strategies, and information in relation to financial and marketing operations, customer data bases(s), technical and information technology related information, the respondents terms, conditions and methods of conducting business and any proprietary information or any other information howsoever obtained by claimant in the course of his employment with the respondent.

c. USD 5,597 being the total recoverable balance of benefits paid in advance to the claimant.

d. Damages for breach of contract.

e. Costs of the claim and counterclaim and interest thereon at court rates with effect from the date of filing defence and counterclaim.

f. Interest on (c) (d) and (e) above at the court rates from 10th March, 2017 until payment in full.

g. Any other reliefs that this court may deem just and fit to grant."

7 Simultaneously with the above claim, the respondent filed a Notice of Motion dated 7th April, 2017, the subject of this appeal, together with an affidavit in support sworn by the respondent, where he sought orders that:

8. "Pending the hearing of this application inter parties this honourable Court do issue an ex parte order requiring the Respondent to provide sufficient security for US Dollars 336,000 (or the Kenya Shillings equivalent thereof) being the minimum aggregate amount claimed by the claimant against the Respondent in this cause;

9. As an alternative to prayer 2, pending the hearing of this application inter partes, this Honourable Court do issue an ex parte order requiring the Respondent to have and maintain in its bank accounts in Kenya an aggregate minimum balance of USD 336,000 (or the Kenya Shilling equivalent thereof) and demonstrate evidence thereof to the satisfaction of this Honourable Court.

10. Pending the hearing and determination of this cause, this Honourable Court do issue an order requiring the Respondent to provide sufficient security for US Dollars 336,000 (or the Kenya Shillings equivalent thereof), being the minimum aggregate amount claimed by the claimant against the respondent in this cause.

11. As an alternative to prayer 4, pending the hearing and determination of this cause, this Honourable Court do issue an order requiring the Respondent to have and maintain in its bank accounts in Kenya an aggregate minimum balance of US Dollars 336,000 (or the Kenya Shillings equivalent thereof) and demonstrate evidence thereof to the satisfaction of this Honourable Court."

12. The application was brought on the grounds that the appellant had announced to its customers and employees that it had appointed a third party company, Pan Africa Express, to take over and manage its operations in Kenya with effect from 1st April 2017; that the appellant had already terminated the employment of a number of employees and arranged for Pan Africa Express to employ them directly;

that the appellant was also in the course of terminating the employment of its other staff members, all of which actions were evidence of its impending closure; that the reorganization by FedEx Corporation and FedEx Acquisition B.V. had affected the subsidiaries within the TNT group; that there was an imminent risk that the appellant will transfer its entire business in Kenya in entirety or close its business altogether and, were this to happen, the respondent will be unable to recover such relief (if any) awarded by the court.

13. The respondent also filed a supplementary affidavit on 25th April, 2017 where he further deponed that the court has the requisite jurisdiction under section 12 of the *Employment and Labour Relations Court Act* and rule 17 of the Employment and Labour Relations (Procedure) Rules, 2016 to grant the orders sought in the application; that the acquisition of the appellant was intended to expand FedEx; that FedEx indirectly owns a majority stake in the appellant, and that the latter's head count has drastically reduced by 60%, which demonstrated the winding down of the appellant's business; and thereafter complete closure of the appellant before the respondent's claim is heard and determined.

14. In a replying affidavit sworn by Jessicah Kaungu, the appellant's Country General Manager, on 18th April, 2017, it was deponed that the trial court lacked jurisdiction to grant an order for attachment before judgment under section 12 of the Employment and Labour Relations Court (ELRC) Act and rule 17 of the Employment and Labour Relations (Procedure) Rules 2016. That no evidence was provided to demonstrate that the appellant intends to avoid court processes or that it is about to leave or remove its property from the court's jurisdiction. It was deponed that the appellant is a limited liability company duly registered under the provisions of the *Companies Act*, Cap 486, and is engaged in providing road and air delivery services in Europe, the Middle East and Africa, Asia-Pacific and the Americas; that it is a distinct and separate legal entity registered and operating in Kenya and, as such, it was entitled to enter into an employment contract with the respondent; that it continues to operate in Kenya and has no intention of winding up its operations or absconding from the jurisdiction of the Court, or dissipating its assets so as to defeat the possible outcome of the suit; that the application is premature and essentially amounts to final orders before consideration of the case on its merits; that, to the contrary, the appellant has various ongoing contracts with customers in Kenya and in the region, and is still conducting its business within the country; that the respondent has failed to provide any evidence to show that the appellant intends to abscond and, therefore, that the respondent's allegations are false, alarmist, speculative and misleading; that the publication posted on the FedEx website of 25th May, 2016 was merely intended to informing its customers of the outsourcing of its business. The appellant complained that granting the orders sought would subject it to severe hardship as the sum to be deposited was substantial, and, in any event, the respondent owed the appellant monies advanced to him, which the appellant was entitled to deduct.

15. Having heard the parties' submissions on the motion, the trial court allowed the respondent's application, and ordered the appellant to deposit US $ 100,000 as security for costs in a joint interest bearing account within 30 days.

16. The appellant was aggrieved and filed the instant appeal on the following grounds:

    1. "The learned judge erred in law in failing to find and hold that the Court did not have jurisdiction to order for security as sought by the respondent.

    2. The learned judge erred in law in failing to appreciate that the Court lacked jurisdiction to make an order for attachment before judgment under section 12 of *Employment and labour relations Court Act* and Rule 17 of the employment and Labour Relations (Procedure) Rules 2016.

3. The Learned Judge erred in law and misdirected herself by pronouncing and substituting the prayers made by the respondent in its application with her own and ordering the appellant to deposit in a joint interest earning account held in the joint names of counsels on record an equivalent of USD 100,000.

4. The learned Judge erred in law and misdirected herself in ordering that in default of the appellant depositing the said sum of USD 100,000 executions should issue as the suit is yet to be heard and determined.

5. The learned Judge erred in law in failing to appreciate that parties are bound by their pleadings.

6. The learned Judge erred in law and in fact by ordering the appellant to deposit the sum of USD 100,000 based on hearsay and unsubstantiated allegation and not facts and evidence.

7. The learned judge erred in law by failing to appreciate that the respondent had not provided any evidence that the Appellant had intent to avoid any process of the court or that it was about to leave the jurisdiction or that it was about to remove any of its property for the jurisdiction of the Honourable Court as required by law.

8. The learned Judge erred in law in failing to appreciate that the acquisition of the appellant by the third party which happened in May 2016 did not constitute an intention to leave the jurisdiction with a view to defeat any judgment that may be passed upon it.

9. The learned Judge erred in law and in fact in failing to appreciate that the appellant is a going concern and continues to operate in Kenya despite the acquisition which took place in May 2016."

14 Learned counsel Ms. Onyango for the appellant filed written submissions, which were highlighted during a virtual hearing. It was submitted that, though the appellant was taken over in 2016, the respondent sought for security much later; that an order for security before judgment is not capable of being issued, particularly where judgment is yet to be rendered; that, further, before such order can be granted, order 39 of the *Civil Procedure rules* requires an applicant to satisfy the court that the defendant is about to, or has absconded from the court's jurisdiction, or is in the process of dissipating its assets; that the applicant did not demonstrate the presence of any of these factors so as to warrant such an order. See *Kemboi vs Lavington Security Guards* [1998] eKLR, for the preposition that various factors required to be proved before such order can be granted; that a final order was made, yet no special circumstances were demonstrated. In the case of *Olive Mwihaki Mugenda & another vs Okiya Omtata Okoiti & Others* [2016] eKLR, it was observed that final orders at the interlocutory stage should only be granted in exceptional circumstances.

15 It was further argued that the order for the deposit of USD 100,000 was not based on any specific prayer; and that the court ought not to have granted an order that was not prayed for.

16 Learned counsel for the respondent Mr. Ndungu opposed the appeal. Counsel submitted that the learned judge determined an issue in which the ELRC had jurisdiction; that section 12 (3) (iii) of the *Employment Act* specifies that, where appropriate, the court can assess the case and make such orders as it deems fit; that the provision empowers the court to make orders having regard to the circumstances of each case and would necessarily meet the ends of justice. Counsel cited the case of *Magothe Joseph Kiarie vs Eco Bank Kenya* [2015] eKLR and *Catherine Raini vs CMC Holdings Ltd* [2014] eKLR where it was held that, in a situation in which the ELRC rules of procedure are inadequate, the court can rely on other written law, including the Civil Procedure Code.

17 Counsel argued that the application was concerned with the ongoing process of transfer of the appellant's business to a third party following an announcement in May 2016 that FedEx would purchase the appellant's holding company; that 66. 95% of the appellant's business was transferred to FedExm and its core business, of pickup and delivery, transferred to Pan Africa Express; that more than half of the appellant's employees were declared redundant. It was contended that the appellant's actions made it clear to the respondent that it was dissipating its business in Kenya; and that the appellant had not in any way rebutted the claims. Counsel contended that the learned judge was right to grant the orders owing to the lack of clarification from the appellant and based on the clear evidence from the respondent that the appellant was winding down its business. It was argued that the learned judge's orders are not final since the monies were to be deposited in a joint fixed account and would not be paid to the respondent; that the money was capable of being refunded in the event that the appellant's defence is upheld.

18 We have considered the application, the parties' submissions, and the law. The question for consideration is whether the learned judge properly exercised her discretion in granting the orders sought. See *Mbogo vs Shah* [1968] EA 93.

19 In the instant case, the Court's decision turns on our findings as to whether the learned judge properly determined the following issues:

i. whether the ELRC had jurisdiction to grant the orders sought by the respondent;

ii. whether the respondent satisfied the threshold necessary for an order of security for the subject matter of the respondent's claim;

iii. whether the learned judge rightly issued the orders of 18th May, 2018; and

iv. whether the Court issued final orders at an interlocutory stage.

20 With regard to the issue of whether the ELRC had the requisite jurisdiction to issue orders for deposit of a security, for the reason that the ELRC Act and the rules do not have provisions that allow the court to make such orders, particularly since the Civil Procedure Rules were inapplicable to employment and labour cases, we begin by observing that over the years courts have reached differing opinions on whether the ELRC is permitted to apply the provisions of the Civil Procedure Code in circumstances where the ELRC Act and rules are silent. For instance, in the case of *Vincent Mwatsuma Nguma & 5 others vs Kilifi Mariakani Water & Sewerage Co Ltd (KIMAWASCO)* [2021] eKLR, Manani, J. observed that the Employment and

21 Labour Relations rules are not comprehensive and have left numerous issues unaddressed, and that many a time the courts has been left groping in the dark when confronted with questions of procedure to the extent that "... While some judges hold the view that the court can fall back to the provisions of the *Civil Procedure Act* to fill in the gaps others are of the firm view that this should not be the case".

22 In the case of *Benedict Ojou Juma & 10 others vs A. J. Pereira & Sons Limited* [2016] eKLR, the court observed that the Civil Procedure Rules will only apply where the ELRC Rules permit and that, outside of this, the *Civil Procedure Act* and Rules do not apply to proceedings before the ELRC.

23 In the case of *Prisca Jepngétich vs Generation Career Readiness Social Initiative Limited* [2021] eKLR, Rika, J. held that:

> "12. Parties must avoid citing the *Civil Procedure Act* on all procedural matters before the E&LRC. These are different jurisdictions, as established in Supreme

Court of Kenya decision, Republic v. Karisa Chengo & 2 Others [2017] e-KLR.

13. The *Civil Procedure Act* applies to proceedings of the E&LRC only as a may be specifically allowed, under the E&LRC [Procedure] Rules 2016, such as applies in Rule 32 [2], which states, ''Rules on execution of an order or decree, shall be enforceable in accordance with the Civil Procedure Rules.''

Matters before Employment and Labour Relations Court both at the Chief Magistrates' Court and the Employment and Labour Relations Court are both regulated by the *Employment and Labour Relations Court Act* and the Employment and Labour Relations Court (Procedure) Rules, 2016."

24 When faced with an application brought under order 36 of the Civil Procedure Rules in the case of *Lily Andayi Amakobe vs Sheria Co-operative Savings & Credit Society Limited* [2018] eKLR, Mbaru, J held that:

> " The application is based on the provisions of the *Civil Procedure Act*, 2010 and the rules thereto. Such provisions and rules only apply to this court where the Employment and Labour Relations Court (Procedure) Rules, 2016 have not addressed the particular issue(s) a party wishes to have the court address.
>
> Under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 this court has the jurisdiction to address applications and issue interlocutory orders in the nature sought by the claimant on the merits."

25 For his part, Marete, J. in in the case of *Francis Kimutai Bii v Kaisugu (K) Ltd* [2016] eKLR took the view that lacunas extant in the ELRC Rules can be resolved by borrowing from the relevant provisions of the *Civil Procedure Act* and Rules. The learned judge observed that:

> ''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 statutes 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 practice of this court? What has been the practice in the past? Previous practice of the Employment & Labour Relations Court has borrowed from the High Court of Kenya by incorporating the *Civil Procedure Act* and Rules in its practice where necessary.''

26 It is not in dispute that the Employment and Labour Relations Court Procedure Rules are silent on provisions governing cases of summary judgement as prescribed under order 36 and security under order 39 of the *Civil Procedure Rules*. But this notwithstanding, in the cases of *Alex Musyoka Kimanzi vs Alidi Kenya Limited* [2017] eKLR and *Joel Nduruhu Kinuthia vs Barefoot Power Africa Limited* [2019] eKLR, Ongaya, J. allowed an application for security brought under order 39 of the Civil Procedure rules. Similarly, Onyango, J. in *Robert Khamala Situma vs Afrikon Limited* [2022] eKLR, in allowing the application for the orders sought, relied on order 39 of the *Civil Procedure Rules*. Also see the judgement of Makau, J. in *Julius Waweru vs Engen Kenya Limited* [2019] eKLR and Wasilwa, J. in *Anthony Ndung'u Gakuo vs Baker Hughes Eho Limited (Kenya Branch)* [2015] eKLR where the learned Judge applied the Civil Procedure Rules to the applications in question.

27 It is noteworthy that this Court has not made any direct pronouncements on the applicability of the Civil Procedure Rules in Employment and Labour Relation cases, especially in respect of orders 36 and

28. However, in the case of Dock Workers Union Kenya vs Kenya Ports Authority (Civil Appeal No. 112 of 2019) [2021] KECA 87 (KLR) on an issue concerning res judicata on which the Employment and Labour Relations' Court rules are silent, this Court did not hesitate to adopt the provisions of section 7 of the *Civil Procedure Act* to uphold a preliminary objection.

29 In effect, the inference that can be drawn from the above cases is that courts have not shied away from applying relevant provisions of the *Civil Procedure Act* and rules, where necessary, to employment disputes, which is in line with their duty to ensure that the ends of justice is served, and to prevent the making of orders in vain. So that, where it is established that the ELRC rules and regulations have come up short of provisions that would aid in the making of such orders, nothing precludes the ELRC from relying on available Civil Procedure provisions to address the extant gaps. Furthermore, since ***section 12 (3) (iii)*** of the ***Employment Act*** specifies that, where appropriate, the court can assess the case and make such orders as it deems fit, and ***rule 17*** of the ***Employment and Labour Relations Court (Procedure) Rules*** empowers the court with jurisdiction to address applications and issue interlocutory orders, it goes without saying that these provisions, when coupled with relevant provisions of the Civil Procedure rules, grant the court the necessary leeway to make orders that would ensure that the ends of justice are served.

30 In view of our foregoing conclusion, we turn to consider whether the learned judge rightly ordered the deposit of the security. In this regard, the appellant's complaint is twofold: that the learned judge granted an application brought under, ***order 36*** of the ***Civil Procedure rules*** by relying on ***order 39*** of the ***Civil Procedure rules*** that was neither pleaded nor proved; and that parties are bound by their pleadings, and that with the respondent having cited the wrong provision, the court ought to have dismissed the application. The second complaint was that the respondent had not proved that the requirements of ***order 39*** were met so as to warrant the orders being granted.

31 To begin with, whether the respondent ought to be penalised for citing the wrong provision is a matter that was addressed by the Supreme Court in **case of *Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone [2013] eKLR*** where the Court was explicit. It stated:

> *The question then is, whether this omission is fatal to the* applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of *the Constitution*, as stipulated in Article 259 of *the Constitution*. Consequently, the failure to cite (the relevant provision) *will not be fatal to the applicant's cause."*

32 Relying on this guidance, we find that the failure to cite or indeed citing the wrong provision would amount to a procedural technicality, as envisioned by ***Article 159*** of the ***Constitution***, and was not fatal so as to render it liable to be dismissed.

33 Having so ascertained, we turn to the issue as to whether the learned judge rightly exercised her discretion to order the deposit of a security. In determining this issue, a consideration of the prerequisites necessary to warrant a grant of such an order is worthwhile. In particular, under ***order 39 rule 1,*** an applicant has to satisfy the court of the following:

a) That the Defendant with intent to delay the Plaintiff, or to avoid the 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 maybe passed against the Defendant in the suit."

34 **And *order 39 rules 5 (1)* provides:**

> *Where at any stage of a suit the court is satisfied, by affidavit or* otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—
>
> a. is about to dispose of the whole or any part of his property; or
>
> b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, wither to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security".

35 In the case of ***Kuria Kanyoro T/A Amigos Bar & Restaurant vs Francis Kinuthia Nderu & Others [1985] 2 K.L.R. 126,*** this Court, citing the case of ***John Kipkemboi Sum vs Lavington Security Guards Limited (supra),*** cautioned that; that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by orders 38 rule 5 of the Civil Procedure Rules, namely, that the Defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."

36 In the case of ***Bayusuf Grain Millers vs Bread Kenya Limited (2005) eKLR,*** it was held that:

> *What is the Plaintiff required to establish under the provisions of* Order XXXVIII of the Civil Procedure Rules? The Plaintiff is required to prove that the Defendant with the intent to delay the Plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him has either disposed off or removed from the local limits of the jurisdiction of the Court his property or is about to abscond or leave the local jurisdiction of the Court. In **Savings & Loan Kenya Ltd versus Eustace Mwangi Mungai Nairobi HCCC No.75 of 2001 (Milimani) unreported, Ringera J (**as he was then**) stated at page 5 when a similar application for attachment before judgment was made:**
>
> > "*Be that as it may, I think that howsoever well-grounded the Plaintiff's apprehension might appear to be, it remains just that; well-grounded apprehension. Without evidence that the Defendant intends to do what is feared, the Court cannot grant the Order of pretrial attachment of the Defendants property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the Defendant intends to dispose of his assets. Such positive facts might have included the fact that the Defendant either negotiating the sale of his properties or entering into an agreement to sell the same."*

37 The provisions and ensuing decisions are clear that what an applicant must prove are that:

i. the Defendant with the intent to delay the Plaintiff or

ii. to avoid the process of the Court or

iii. to obstruct or delay the execution of any decree that may be passed against him or

iv. has either disposed off or

v. removed from the local limits of the jurisdiction of the Court his property or

vi. is about to abscond or leave the local jurisdiction of the Court.

38 In finding that the respondent had demonstrated that the appellant was disposing of its business, the learned judge stated thus:

> *The Applicant has indeed demonstrated that the respondent has* the stand now or a pale shadow of the former self. Exhibits TGS 23 and 4 are proof of this development in Respondents (sic) standing. It is my finding that with also the termination by the Respondent of other employees as defined by the Applicant there is a real likelihood of the Applicant suffering and failing to reap the fruits of his judgement if he gets one."

39 As to whether the learned judge took into account matters that ought to have been taken into account, and arrived at the right conclusion that there was indeed a risk of the respondent's dues being placed beyond the reach of the court, for the reason that his former employer would be subsumed or ceased to exist altogether, requires a re-evaluation the factors that were before the lower court. We observe at this early stage that the requirements necessary to be demonstrated are disjunctive and not conjunctive. This would indicate that an applicant need demonstrate one of the specified factors.

40 In his affidavits, the respondent averred that, against the backdrop of an acquisition of TNT Express N.V, the appellant's holding company by FedEx, by way of a joint press release of 25th May 2016, the two companies stated that:

> *Now that FedEx has acquired TNT Express the integration* process will begin immediately..."

41 It was later announced that FedEx had acquired more than 95% shares in the holding company. The respondent further averred that, as a result of the integration, his duties and responsibilities changed, and that many were taken away, which led to his having to be offered a new role outside the country; that as a result of the changes, his position as General Manager, Kenya was effectively declared redundant.

42 Further demonstration of the whittling away of the appellant's operations is to be found in a Customer Communication of 26th March 2017 entitled, *"TNT pick-up and delivery operations as of April 1, 2017,"* which confirmed the transfer of the appellant's handling, pickup and delivery operations in Kenya to Pan Africa Express as at 1st April 2017. And with reference to staff redundancies, in an internal Q&A entitled**"Frequently** *Asked Questions" **in answer to the question "... Will there be redundancies as a result of this change?"**

> **TNT responded that:**
>
> TNT is committed to minimising the impact on our team members as a result of this business change the team members handling pick- up and delivery operations will either be

hired by Pan Africa express in light of the new business requirements or offered a severance package affair selection process will be done."

43 The above makes it quite evident that a process of acquisition of the appellant was ongoing and was likely to affect its continued existence, and ultimately deter or obstruct or defeat the course of justice and deny the respondent execution of an award, if any, upon determination of the suit. It is also worthy of note that the appellant's response does not provide any measure of comfort that the ongoing acquisition would not result in the disposal of the whole of the appellant's business. No indication was provided as to whether any part of the appellant's business was to be retained, or whether it would be in existence when the suit was determined, or by the time the integration with FedEx was completed.

44 Ultimately, given the facts as presented, as was the trial court, we too are satisfied that there is every possibility that the respondent will be unable to execute against a decree, if any, due to the uncertainty of the appellant's existence by the time the suit is heard and determined. We therefore find that the learned judge properly exercised her discretion in granting the order for deposit of USD 100,000 as security. We have no reason to interfere with that decision.

As such, the appeal is dismissed with costs to the respondent.

It is so ordered.

DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

A.K. MURGOR

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

DR. K.I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR