



Chikwanha v Alp Management Kenya Limited & another (Cause E866 of 2024) [2025] KEELRC 372 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E866 OF 2024
BOM MANANI, J
FEBRUARY 13, 2025**

BETWEEN

ASBURY MARUZA CHIKWANHA CLAIMANT

AND

ALP MANAGEMENT KENYA LIMITED 1ST RESPONDENT

AFRICA LOGISTICS PROPERTIES HOLDINGS LIMITED .. 2ND RESPONDENT

RULING

Background

1. The Claimant and the 1st Respondent had an employment relationship which came to a close on 26th September 2023 through a disputed redundancy process. As a result, the Claimant has filed the instant suit to challenge the aforesaid process and to recover benefits under the contract which the 1st Respondent has allegedly irregularly withheld.
2. Together with the Statement of Claim, the Claimant filed the application dated 4th October 2024. Through it, he seeks for interim orders of injunction to restrain the Respondents from disposing of ALP Limited, ALP North Two (Kenya) Limited, ALP North Three (Kenya) Limited and ALP West Three Limited or their (the Respondents') shares in the said companies to Lango Real Estate pending determination of the suit. Alternatively, he prays that the Respondents be compelled to deposit the sum of USD 2,798,326 in court as security for the performance of the decree which he anticipates through this action.
3. The basis for the application is that the Claimant has information that the Respondents are in the process of disposing of the aforesaid companies or the properties that the said companies hold on their (the Respondents') behalf with a view to divesting from Kenya. He fears that if this is allowed to happen, the Respondents will effectively defeat recovery of the amounts he has sued for since they will have liquidated their assets and left the court's jurisdiction by the time it (the court) decides the case.



4. The application is opposed. The Respondents contend that the companies whose properties the Claimant seeks to attach are distinct legal entities. As such, the orders sought against them cannot issue since they are neither the Claimant's employers nor is there privity of contract between them on the one hand and the Respondents and the Claimant on the other hand in respect of the Claimant's contract of employment.
5. In addition, the Respondents contend that the Claimant has not joined the aforesaid companies to the suit. In the premises and being non-parties to the action, the court cannot validly issue orders which will affect them.
6. The Respondents further deny that the 1st Respondent is in the process of liquidating its assets with a view to leaving the country in order to avoid the court's jurisdiction. They contend that the 1st Respondent has significant business interests in Kenya and is not about to leave the country any time soon.
7. The Respondents further contend that all property sales which the 1st Respondent is currently involved in are undertaken in the ordinary course of its (the 1st Respondent's) business with a view to making profit. As such, the sales should not be construed as a scheme by it (the 1st Respondent) to defeat enforcement of anticipated decrees against it.
8. The Respondents contend that the Claimant has not provided cogent evidence to back his assertion that the 1st Respondent is trying to abscond from the court's jurisdiction. As such, they posit that the instant application is speculative and should be disallowed.

Analysis

9. The instant application is in the nature of an application for security for performance of an anticipated decree. Through it, the Claimant seeks to freeze assets he believes belong to the Respondents through an order of interim injunction restraining them from disposing the assets pending resolution of the dispute.
10. Alternatively, the Claimant seeks an order to compel the Respondents to deposit into court an amount that is sufficient to satisfy the anticipated decree. To be specific, he asks that they deposit USD 2,798,326.
11. Though the Claimant has quoted a number of provisions from *the Constitution* and the *Employment Act*, none of them speak to the interim reliefs which he seeks. The only provision that is perhaps relevant to the motion is section 12 of the *Employment and Labour Relations Court Act* which donates jurisdiction to the court to entertain diverse employment and labour relation matters including the request in the motion.
12. A cursory look at the prayers in the application shows that they mirror what is contemplated under Part VIII of the Employment and Labour Relations Rules, 2024 as read with Order 39 of the Civil Procedure Rules. The foresaid notwithstanding, I consider the motion as competent on account of having invoked section 12 of the *Employment and Labour Relations Court Act*.
13. Since the application seeks, inter alia, an order for interim injunction, I am obligated to consider whether the Claimant has satisfied the requirements for the grant of such order. In this respect, the locus classicus decision of *Giella v Cassman Brown & Co* (1973) EA 358 becomes relevant.
14. For the court to grant an applicant orders of interim injunction, it is imperative for him to demonstrate that he has met the conditions prescribed in the aforesaid decision. He must demonstrate that he has



a prima facie case with a probability of success, that an award of damages will not adequately redress the injury he may suffer if the orders sought are not granted and if the court is in doubt, it should determine the matter on a balance of convenience.

15. The dispute between the parties centers on whether the impugned redundancy process was correctly done. It also centers on whether the 1st Respondent breached the contract between the parties by failing to pay the Claimant some benefits under the contract including a share of profits accruing from the 1st Respondent's business ventures.
16. The Claimant contends that the 1st Respondent did not comply with the requirements of section 40 of the *Employment Act* whilst declaring him redundant. He for instance asserts that the 1st Respondent did not: follow the seniority guide in selecting the employee(s) to be released on account of redundancy; conduct consultations with him on the process; pay him redundancy dues in accordance with the law.
17. On the other hand, the Respondents contend that they complied with the law on redundancy in releasing the Claimant from employment. To support their contention, they have provided the court with letters which they contend are the redundancy notices which they issued to the Claimant and the local labour office pursuant to section 40 of the *Employment Act*. They have also produced letters they contend demonstrate that the parties had consultations over the process. They contend that because the 1st Respondent had only one position of Development Director which was declared redundant, the legal requirement on selection of the employee to be released on account of redundancy did not apply. Finally, they contend (and have placed on record evidence suggesting this) that they paid the Claimant his redundancy dues.
18. The Claimant contests some of these assertions by the Respondents. For instance, he contends that they did not issue him with some of the letters which they rely on to argue that the Claimant and 1st Respondent had consultations on the process.
19. Similarly, the parties have taken contrasting positions regarding the circumstances surrounding the recruitment of the Claimant into the 1st Respondent's employment. For the Claimant, he contends that the Respondents headhunted and persuaded him to take up the impugned position on the promise that he will be entitled to participate in sharing of the profits made by the 1st Respondent. He alleges that the Respondents convinced him to sign the contract with a lower salary on the understanding that he will draw equity payment of between USD 1,000,000 and 2,000,000 which was to allegedly compensate him for the low salary he was to draw.
20. On the other hand, the Respondents deny this assertion and maintain that the contract signed between the Claimant and the 1st Respondent was clear that it constituted the entire agreement between the parties. As such, the Claimant is not entitled to rely on unsubstantiated figures to claim equity payments particularly on account of alleged promises which fall outside the contract between them.
21. Quite clearly, the issues raised in the suit are heavily contested by the parties. These include: whether the Claimant was induced by the 1st Respondent to enter into the contract of employment at a reduced salary against a promise to share in the 1st Respondent's equity; whether his contract was unfairly terminated by the 1st Respondent; or whether the purported redundancy process by the 1st Respondent was in fact and law, procedural.
22. Such matters will require resolution through full trial. At this point, all that the court is required to do, without wading into the merits of the respective positions expressed by the parties, is to examine whether the Claimant has presented a case which meets the threshold set in the case of *Giella v Cassman*



Brown (supra). It is this task that I propose to discharge in the section below with respect to some of the issues in controversy.

23. I begin with the alleged promise by the Respondents to the Claimant that he was to be paid equity of between USD 1,000,000 and 2,000,000 if he took up employment with the 1st Respondent. The Claimant posits that it was because of this promise that he signed the contract. As such, the Respondents are obligated to pay him the amount.
24. Sometimes, parties to a contract may make representations and promises to each other at the pre-contract stage which are intended to induce one to conclude the contract. However, some of the promises and representations may not find their way into the contract.
25. Whilst a cause of action may be maintained on the basis of such representations, the general position in law is that this is in very limited instances. For the representation to be enforceable, it must be one which the law recognizes as giving rise to liability. It should be unambiguous and must have been relied on by the representee to enter into the contract. As such, the law does not recognize mere puffs as providing a basis for a cause of action. Similarly representations as to the future are generally unenforceable if they are not in the nature of a binding contract (see Treitel Law of Contract, Eighth Edition, pages 295 to 296).
26. Whilst the Claimant contends that the Respondents induced him into accepting the impugned contract on the promise that he will be paid equity of between USD 1,000,000 and 2,000,000, the Respondents contest this assertion. They contend that there was no such agreement between the parties and that the contract between the Claimant and the 1st Respondent has no such term. They further contend that the contract between the two expressly states that it is the entire contract between them. As such, they aver that the Claimant cannot rely on matters which are not expressly included in the contract to sustain his claim.
27. Regarding the impugned redundancy, whilst the Claimant challenges the validity of the process on the various grounds highlighted earlier in this decision, the Respondents have tabled preliminary data which they rely on to contend that it (the process) was validly undertaken. As such, the court cannot impugn it (the process) at this preliminary stage.
28. Whether the promises and representations which the Respondents allegedly made to the Claimant regarding payment of equity in order to induce him to sign the contract are legally enforceable is a matter which requires full trial to determine. The court can only pronounce itself on the issue after examining the full import of the evidence by the parties to the action. Similarly and in view of preliminary evidence presented by the parties on the impugned redundancy process either challenging or affirming its validity, the court will only be able to justify pronounce itself on the subject after interrogating it (the process) through full trial.
29. As such and having regard to the material before me, it is not possible, at this preliminary stage of the case, to determine whether the Claimant has established a prima facie case with a probability of success. This is because both parties have presented material which appear, from a preliminary viewpoint, to support their contrasting positions.
30. The foregoing being the case, the court has to resort to the balance of convenience to resolve the application. Where the balance of convenience tilts towards will be determined at the tail end of the ruling after considering the other issues in the application.



31. Several decisions underscore the fact that courts must not exercise the power to order attachment before judgment lightly. The power should be exercised in the clearest of cases where there is evidence that the defendant, with intent to defeat a court order or decree he anticipates will be against him:-
 - a. Is about to dispose the whole or any part of his property; or
 - b. Is about to remove the whole or any part thereof from the local limits of the jurisdiction of the court.
32. As such, it is not sufficient for an applicant to merely demonstrate that the defendant is disposing of his assets. In addition, he must present cogent evidence to demonstrate that the defendant's actions are motivated by the desire to defeat enforcement of the anticipated court order or decree (*Freight Forwarders Kenya Limited v Aya Investment Uganda Limited* [2013] eKLR).
33. I have looked through the Claimant's affidavit in support of his application and I am not satisfied that he has met this threshold. He alleges that the 1st Respondent is in the process of disposing off its assets in a bid to defeat the anticipated decree in the cause. Yet, he offers no cogent basis for entertaining this belief.
34. The 1st Respondent has explained that it is a real estate company whose main function is to acquire and dispose of property for profit. This fact is not contested by the Claimant. As such, the mere fact that the 1st Respondent proposes to sell some of its assets, without more, cannot be a good reason to allege that it is doing so in a bid to avoid its obligations or defeat an anticipated court decree.
35. It is noteworthy that the COMESA document which the Claimant relies on to anchor his argument that the Respondents are selling their assets to defeat his claim is dated 26th June 2023. Yet, his contract of service was terminated on 26th September 2023, several months after the COMESA approval had issued. In my view, the COMESA approval which predates termination of the Claimant's contract of service cannot be said to be evidence that the Respondents were selling their assets in a bid to defeat a futuristic claim by the Claimant.
36. I also note that the properties which the Claimant accuses the Respondents of attempting to sell in a bid to defeat his claim are held by companies which are not parties to the instant action. In his application, the Claimant suggests that the impugned property sells involve ALP Limited, ALP North Two (Kenya) Limited, ALP North Three (Kenya) Limited and ALP West Three Limited and Lango Real Estate. Whilst all these entities are not parties to the instant action, the order sought will, if issued, affect them.
37. The above companies may be subsidiaries of the Respondents. However, that does not subsume them into the Respondents. They remain distinct entities with a life of their own. As such and unless there is evidence to the contrary, they have no obligation to carry the Respondents' liabilities (see *Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited* [2016] eKLR, *Chai Trading Co. Limited v Muli Mwanzia & 2 others* [2019] eKLR and *Mosi v National Bank of Kenya Limited* [2001] eKLR).
38. Importantly, as corporate entities with a life of their own, they are entitled to be heard before any adverse orders can issue against them. As such, the orders in the application cannot legitimately and justly issue in their absence.
39. For the foregoing reasons, the balance of convenience does not tilt in favour of issuing the orders that are sought in the application. Rather, it tilts in favour of not granting them.



40. The Claimant's counsel has challenged the validity of the replying affidavit sworn by Raghav Gandhi. He contends that the said affidavit is defective because the affiant does not disclose on whose behalf between the two Respondents he swore it.
41. However a reading of the affidavit discloses that the said Raghav Gandhi is the Chief Executive Officer of the 1st Respondent. The affiant contends that he swore the affidavit on matters that are within his knowledge regarding the issues that are in dispute. He further contends that he is aware of the contested matters by reason of his position as the 1st Respondent's Chief Executive Officer.
42. The affiant to the impugned affidavit is a witness in the matter in terms of Order 19 of the Civil Procedure Rules. By virtue of Order 19 rule 3(1) of the aforesaid rules, the affiant has deponed to matters which he says are within his knowledge in his capacity as the 1st Respondent's Chief Executive Officer. As such, the statement he has made on oath is admissible.
43. Importantly, the court is entitled to receive an affidavit regardless of any defects that it may have in order to justly determine a dispute that is before it. This point was made in *Peter Onyango Onyiego vs Kenya Ports Authority* [2004] eKLR when the court observed as follows:-

“.....an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest therefore that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by order 3 Rule 2(c) is in my view not correct. In the circumstances I hold that other than verifying affidavits which as I have stated must be sworn by plaintiffs themselves or their authorized agents all other affidavits filed and used in courts are not among the acts covered by Order 3 Rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he depones on, that in the rules of evidence, would be admissible. Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity which courts, can under Order 18 Rule 7 of the Civil Procedure Rules, ignore.”

44. The Claimant does not contend that the impugned replying affidavit is either scandalous or irrelevant or oppressive. He does not point out the prejudice he will suffer should the affidavit be admitted in evidence. As such, the affidavit is receivable in evidence regardless of the procedural defects which his counsel has alluded to. This is particularly so in view of the constitutional edict under article 159 (2) (d) which requires courts of law to administer justice without undue regard to technicalities.
45. The affiant to the replying affidavit is not a party in the suit. He only appears in the matter as a witness. As such, he does not require the authority of the Respondents which the Claimant's counsel alludes to under Order 1 rule 13 (1) and (2) of the Civil Procedure Rules to swear the affidavit. That rule relates to situations where one of several plaintiffs or defendants in a cause (not a witness) decides to plead on behalf of the rest. In such case, he must obtain and exhibit the authority of his co-litigants to plead on their behalf.

Determination

46. The upshot is that I arrive at the conclusion that the instant application is not merited.
47. As such, I dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF FEBRUARY, 2025



B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondents

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

