



**Solanki v Hard Tech Industrial Supplies Ltd (Cause E752 of 2021)
[2024] KEELRC 202 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 202 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E752 OF 2021
JK GAKERI, J
FEBRUARY 13, 2024**

BETWEEN

SUDHIR SOLANKI CLAIMANT

AND

HARD TECH INDUSTRIAL SUPPLIES LTD RESPONDENT

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 24th August, 2023 filed under Certificate of Urgency seeking Orders that:-
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of this cause, the Respondent be required to deposit the sum of Kshs.7,604,054/= being the minimum aggregate amount claimed by the Claimant in this cause.
 4. In the alternative to prayer No. 3 above, pending the hearing and determination of this cause, the Respondent be required to furnish the court within a time fixed by the court a bank guarantee for the payment of Kshs.7,604,054/= being the minimum aggregate amount claimed by the Claimant against the Respondent company in this cause.
 5. In the alternative to 3 and 4 above, the Respondent company be required to provide sufficient security for the sum of Kshs.7,604,054/= within a time fixed by the court.
 6. In the event of failure to comply with the Order (5) above, Mr. Jauyant Kumar Patel (alias J.V. Patel) be ordered to attend court and produce the Respondent's Books of accounts and Financial Statements and be examined on the same.



7. In default Mr. Jauyant Kumar Patel be committed to prison until the decision of the cause and the full satisfaction of the decree to be issued herein.
8. In the alternative to 3 and 7 above, in default of showing cause or furnish security within the time fixed by the court, Mr. Jauyant Kumar Patel, the Respondent's director be committed to prison until the decision of the cause and the full satisfaction of the decree to be issued herein.
9. The costs of this application be awarded to the Claimant/Application.
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit sworn by Sudhir Solanki on 24th August, 2023 who deposes that Mr. Jauyant Kumar V. Patel is a director of the Respondent company as per the copy of the CR12 on record and the proceedings herein proceeded as undefended despite service of the suit, hearings and all mention notices until it filed an application dated 19th May, 2023 to set aside ex-parte proceedings and leave to defend the suit and the request was granted.
3. It is the applicant's case that he has information from reliable sources, including former colleagues at the Respondent's that persons had been visiting the premises to view its assets and premises which the Respondent intends to dispose of by way of sale.
4. That some of the Respondent's assets and business goods have been taken away in lorry loads and the company has been trading and issuing invoices and receiving payments in the name of Camtech Engineering Ltd which is different from Hard Tech Industrial Suppliers Ltd.
5. Relatedly, invoices reveal that the physical address of Camtech Engineering Ltd is the same as that of the Respondent company i.e Lanet Road off Baricho Road, Industrial area.
6. That the CR12 shows that the Postal address of Camtech Ltd and Hard Tech Ltd and all its directors are the same.
7. The affiant deposes that the Respondent's actions or those of its directors are intended to avoid any process of the court or obstruct or delay execution of any decree made.
8. That if the Respondent disposes of its business and/or goods or assets, the Claimant had no knowledge of any other attachable assets of the Respondent.
9. That it is in the interest of justice that the orders sought be granted.
10. The Respondent filed grounds of opposition that the applicant had not provided evidence to show that the Respondent intended to defeat justice in this case.
11. That the applicant's averments had no supportive evidence.
12. That use of the same addressees was not evidence of ownership of the companies.

Response

13. In its Replying Affidavit sworn by Jauyant Kumar Patel on 18th January, 2024, the affiant deposes that he is a director of the Respondent company and opposes the application herein as it is incurably defective, incompetent, misconceived and lacked merit, is an abuse of the court process and does not disclose any reasonable grounds to warrant the prayers sought as it is based on falsehoods and misrepresentation of facts.



14. The affiant states that the Claimant/Applicant has not disclosed that the parties had a termination agreement, a mutual separation on what was owed and it was untrue that there was an unlawful redundancy or unfair termination.
15. That the alleged movement of goods and trading in the name of another company is untrue and hearsay and no evidence has been provided.
16. The affiant states that he has never been and is not a director of Camtech Ltd and the director of the company is Ishitiahq Shabbir Shaikh, a former employee who left employment and the affiant did not engage in any business with him but used the affiant's address for convenience of registering the company and none of the Respondent's property or goods have been sold.
17. That there was no intention to avoid this court process, obstruct or delay justice or any execution of a court decree and anticipates an expeditious determination of the suit.
18. That as a former senior employee of the Respondent company, the Claimant is aware of the impact of COVID-19 on the business and is yet to fully recover and was not in a position to have the amount of Kshs.7,604,054.00.
19. Counsels for the parties tendered oral submissions.

Applicant's submissions

20. Mr. Mageto for the applicant submitted that the applicant would rely on the Supporting Affidavit and in particular exhibit (1), the Respondent CR12 which showed that the physical and postal addresses of the directors of the two companies were similar and the same was repeated by copies of the invoice on record.
21. Counsel urged that the similarities showed that the Respondent was carrying on business in another name.
22. That in its response, the affiant admitted that the director of Camtech Ltd was a former employee of the Respondent, but the physical and postal addresses are the same as those of the Respondent.
23. Counsel urged that the Respondent had under paragraph 9 of the Replying Affidavit admitted that it is unable to provide security thereby confirming the applicant's apprehension of the likelihood of the judgement of the instant suit not being honoured or turning the proceedings into an academic exercise.
24. Finally, counsel invited the court to take into consideration the Respondent's conduct in this matter and in particular its failure to respond to the claim even after being accorded time to do so and should thus be ordered to provide security.

Respondent's submissions

25. Mr Gekonge submitted that although the companies had similar postal and physical addresses, they were different legal entities and Mr. Jauyant Kumar v Patel's affidavit lays it bare that Mr Ishitiahq Shabbir owned Camtech Ltd and formed it on his own accord and the invoices on record do not show that they belonged to the Respondent company or that the goods belonged to Camtech Ltd.
26. Counsel submitted that the Respondent had not moved goods in an attempt to avoid or obstruct justice and no evidence had been provided to establish the allegation.
27. Counsel submitted that although the applicant was seeking Kshs.7,604,054/=, he was aware that the parties had a separation agreement and was to be paid Kshs.2,220,912.00 as final dues.



28. Counsel prayed for dismissal of the application with costs.
29. In his response, Mr. Mageto submitted that the Respondent had not filed any annexure to the Replying Affidavit in support of its allegations and it ought to have filed an affidavit by Mr. Ishitiah Shabbir as evidence that the two companies were unrelated or financial statements of the Respondent to establish its ability to pay any amount awarded by the court and the Respondent was unable to satisfy any judgement from this suit.

Determination

30. The singular issue for determination is whether the applicant's Notice of Motion herein is merited.
31. It is common ground that the applicant herein was an employee of the Respondent from 2011 to 2020.
32. It is equally not in contest that the applicant filed the instant suit vide a Memorandum of Claim dated 1st September, 2021 seeking various reliefs including the sum of Kshs.5,518,195/= as compensation for unfair termination of employment and terminal dues.
33. The applicant is seeking security as he is apprehensive that the Respondent company may not be in a position to honour the judgement in this case.
34. The applicant relies on the premises that Respondent company was in the process, is disposing of its assets, was carrying on business under another company's name and had not demonstrated the wherewithal to honour the judgement of this court in this matter, an argument the Respondent discounts for want of supportive evidence.
35. The principles governing security of costs are well settled.
36. Order 26 of the *Civil Procedure Rules*, 2010 provides that;
 1. In any suit, the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.
 2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting of defence, the grounds of the defense together with a statement of the deponent's belief in the truth of the facts alleged.
 3. ...
 4. ...
 5. ...
 6. Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.
37. Case law is consistent that in an application for security for costs, it is the onus of the applicant to prove that the Respondent will not be in a position to pay the costs. The applicant must prove lack of good faith that would make an order for security reasonable.
38. (See *Gatirau Peter Munya v Dickson Muenda Githinji & 2 others* (2014) eKLR).
39. In *Shah v Shah* (1982) KLR 95, it was held that although security was generally required from Plaintiff's resident outside the court's jurisdiction, a court had discretion which must be exercised judicially and reasonably in determining whether or not to grant the order.



40. Finally, in *Kibiwott & 4 others v The Registered Trustees of Monastery of Victory* Nakuru HCCC No. 146 of 2004 cited in *Garsus Pasaulis Systemedia Technologies Ltd* (2022) eKLR, the court held that the party applying for security of costs is required to prove that the opposing party will not be in position to pay the costs to be awarded.
41. In the instant case, the burden of proof is borne by the applicant.
42. As regards similarity of physical and postal addresses of the Respondent and Camtech Ltd, it is true that the two companies were incorporated in 1980 and 2022 respectively and shared the physical and postal addresses.
43. Similarly, the directors and owners of the two companies, though different, share the same postal address.
44. Intriguingly, the Respondent tendered no evidence to demonstrate that the two companies carried on different activities but shared the physical location.
45. As argued by the applicant's counsel, an affidavit by Mr. Ishitiah, the sole shareholder and director of Camtech Ltd would have explained the relationship, if any, between the parties and the circumstances in which they share both physical and postal addresses.
46. Although it is trite law that a company is a legal person distinct and separate from its members and managers and with certain capacities, as exemplified by the House of Lords decision in the celebrated decision in *Salomon v Salomon & Co. Ltd* (1897) A.C. 22, there appears to be more as between the Respondent company and Camtech Ltd than the Respondent is willing to divulge.
47. The Respondent merely admits that Mr. Ishitiah Shabbir was its former employee and it assisted him with its addresses to facilitate the incorporation of the company in 2022 which shows that the parties have a more intimate relationship than disclosed.
48. The foregoing is further reinforced by the fact that the Respondent, as correctly submitted by the applicant's counsel has not bothered to respond to the Claimant's case as a copy of the response to the Memorandum attached to the application dated 19th May, 2023 is neither signed nor dated.
49. Puzzlingly, in its dealings with the applicant and the court, thus far, the Respondent has not filed a single exhibit or annexure to its documents.
50. As correctly submitted by the applicant's counsel, the Respondent's conduct in these proceedings is curious, no response but quick to contest court directions.
51. By a ruling rendered on 28th September, 2023, the court granted the Respondent leave to file its defence, list and bundle of documents and witness statement within 10 days but the Respondent did not comply and the court had to vacate its order to accord the Respondent an opportunity to defend its case but to no avail as no defense, list and bundle of documents nor a witness statement have been filed.
52. It cannot be gainsaid that the Respondent's conduct of these proceedings is intriguing and patently unsatisfactory which reinforces the applicant's case on the dealings and relationship between the Respondent and Camtech Ltd.
53. As regards the alleged disposal of its assets and business premises, the applicant has not tendered any credible evidence of any disposal of assets save for the fact that Camtech Ltd appears to be carrying on the same business as the Respondent company as evidenced by the Quotation dated 10th March, 2023 to Proplast Ltd.



54. Finally, as regards the Respondent's ability to make good any judgment entered into in the Claimant/Applicant's favour, the Respondent tendered no evidence to rebut the applicant's allegation that it had no wherewithal to do so.
55. Mr. Gekonge argued that the applicant was seeking Kshs.7,604,054/= while he had agreed to take Kshs.2,220,912/= as final dues.
56. Documents on record show that the amount was to be paid by December 2020, about 6 months after the agreement which would appear to suggest that payment was by instalments.
57. Counsel's submission make no reference to the Respondent's ability to make good any judgement entered into by the court in the applicant's favour.
58. Finally and more significantly, and as correctly submitted by the applicant's counsel, the Respondent has expressly admitted its inability to make good the sum of Kshs.7,604,054/=, if the same was the decretal sum.
59. Paragraph 9 of the Replying Affidavit is clear that owing to the COVID-19 Pandemic, the company is yet to fully recover and did not have funds in the sum of Kshs.7,604,054/=.
60. This admission establishes beyond per adventure that this is a proper case for the provision of security, otherwise the hearing and determination of the suit could become an academic exercise as submitted by the applicant's counsel.
61. Flowing from the foregoing, it is the finding of the court that the applicant's Notice of Motion dated 24th August, 2023 is merited and it is granted as follows;
 - a. Pending the hearing and determination of this suit, the Respondent company shall deposit the sum of Kshs.3.5 million into an interest earning bank account jointly in the names of the advocates on record for the parties, within 45 days.

Or

 - b. Pending the hearing and determination of this suit, the Respondent company shall provide a bank guarantee or other acceptable security to the applicant for the payment of Kshs.3.5 million, within 45 days.
 - c. For the avoidance of doubt, all other prayers are declined.
 - d. Costs of the application shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

