



**Ndubi v Utumoja Technologies Ltd (Cause E427 of 2024)
[2024] KEELRC 2553 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2553 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E427 OF 2024
SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

SHARON FELISTE NDUBI APPLICANT

AND

UTUMOJA TECHNOLOGIES LTD RESPONDENT

RULING

1. What is before this Court for determination is a Notice of Motion Application dated 10th June 2024, through which the Claimant/Applicant seeks the following orders;
 1. Spent
 2. Spent
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 4. That the Honourable Court be pleased and does hereby issue an order directing the sole director/shareholder of the Respondent Jason Robert Eisen to deposit his passport with the court pending hearing and determination of the suit.
 5. That the Honourable Court be pleased and does hereby issue an order directing that the Respondent herein does deposit to this court an amount equal to the sum sought in the amended Memorandum of Claim dated 7th June 2024 pending hearing and determination of the suit.
 6. In alternative to (5) above that the sum sought in the amended Memorandum of Claim dated 7th June 2024 be held in a joint interest earning account, held jointly by the advocates for the parties herein pending hearing and determination of the suit.



7. That the Honourable Court be pleased to issue any further orders it deems fit and just to issue in the circumstances.
8. That the costs of the instant Application be provided for.
2. The Application is grounded on the annexed Affidavit of the Applicant, Ms. Sharon Feliste Bundi sworn on 10th June 2024. Grounds in support of the Application are that Respondent illegally, unlawfully and unilaterally cut, and or deducted the Applicant's salary from the sum of sum of Kshs. 350,000.00/= to the sum of Kshs. 140,000.00/= . This continued for eight months hence making the total sum owed from the Respondent as unpaid salary the sum of KShs.2,599,767.68.
3. That the Respondent herein proceeded to terminate the contract with the Applicant and never issued her with any notice to terminate the said contract.
4. That the Applicant has come to the knowledge that the Respondent is fully owned by foreign entities and foreign individuals and that she has genuine fear and concern that should this Honourable court reach any judgment, decree and/or order in her favour, she will not have any individual to effect the said judgment upon.
5. That the Applicant's fears were confirmed upon undertaking a search of the said Respondent company and finding that no shareholding is held by any of the directors that were in constant communication with her and her fellow employees.
6. It is the Applicant's deposition that she has learnt that the Respondent has no known assets or properties that she can attach to effect any judgment, order and or decree of this Honourable court. That this is not only a fear but a confirmed communication from the Respondent that they do not have the funds to pay the entirety of any judgment that this court may issue in her favour and in favour of the Claimant in ELRCC E443/2024.
7. She further avers that one of the Respondent's Directors contacted her colleague Leah Njuguna (Claimant in ELRCC E443/2024) through her WhatsApp intimating that the Respondent company does not have funds to pay her in case she wins her intended suit against the Respondent.
8. Upon being served with the Application, the Respondent filed a Replying Affidavit sworn on 17th July 2024 by Jason Robert Eisen, who describes himself as a Director and Shareholder at the Respondent company.
9. Mr. Jason avers that he is advised by his Advocates on record that the Application as set out under prayers 5&6 seeks to condemn the Respondent to pay imagined decretal amounts without granting it the right to be heard.
10. He further deposes that to require the Respondent to deposit to this court an amount equal to the sum sought in the Memorandum of Claim pending the hearing and determination of the suit as sought under prayer 5 of the Notice of Motion Application, would amount to determining the merits of the suit at an interlocutory stage without giving the Respondent an opportunity to ventilate its position in the case.
11. According to Mr. Jason, the Application is premised on a total fabrication of facts and failure to disclose material information to this Honourable Court. That the averment by the Applicant that the Respondent is fully owned by foreign entities and foreign individuals is not correct. He avers that the Respondent company's CR12 clearly shows that the Respondent has two (2) Directors who are Kenyan Citizens.



12. He further avers that the Respondent Company is still a going concern considering that it has ongoing projects in the country and whereas the company has had to cut down on its costs at the moment, the new project with Aspen is a promising project for the company which would get it back to its feet.
13. He further denies that the Respondent ever dismissed the Applicant and that on the contrary, she deserted duty and opted to resign on her own volition without notifying the Respondent.
14. That further, the Applicant's assertion that the Respondent has no known assets has not been substantiated. Mr. Jason claims that the Respondent has a registered physical office at Diamond Plaza, Parklands Avenue in Westlands, Nairobi City County which it has operated for more than five (5) years.
15. In response to the Respondent's Replying Affidavit, the Claimant filed a Supplementary Affidavit dated 17th July 2024 in which she deposes that the Respondent has failed to provide any evidence of its liquidity and or owning any assets which could act as security.
16. In her view, the Respondent has outrightly misled and committed perjury to this Honourable Court. She contends that the Respondent has no known address and or location.
17. The Applicant further denies ever authoring and or signing any resignation letter from the Respondent company.

Submissions

18. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

19. Flowing from the pleadings and submissions on record, it is evident that the main issue for determination is whether the Application is merited in that the Court should issue an order directing that the Respondent deposits an amount equal to the sum sought in the Memorandum of Claim pending hearing and determination of the suit.
20. Evidently, what the Claimant is seeking at this juncture is an order of attachment before judgment.
21. In this regard, Order 39 Rule 5 (1) of the Civil Procedure Rules is relevant and is couched as follows:

“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 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, the Court may direct the Defendant within a time to be fixed by it, either 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.
- (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.



SUBPARA (3)

The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified”.

22. In essence, Rule 5 (1) (a) and (b) of Order 39 aforementioned requires the applicant to show that the Respondent is about to dispose of the whole or any part of his property or to remove it from the local limits of jurisdiction, and that the purpose or intent of doing so is to obstruct or delay the execution of any decree passed against the defendant. If the applicant shows those requirements are present, the Court may direct the defendant to provide security within a time to be fixed by the Court or order the Defendant to show cause why he should not furnish such security, or the Court may also order the conditional attachment of the property or a portion of it.
23. Addressing a similar matter, the Court of Appeal in the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & others* [1988] 2KAR 126 had this to say:

“The power to attach before Judgment must not be exercised lightly and only upon clear proof of mischief aimed at by order 38 rule 5, namely that the Defendant was 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”.
24. In *Saving and Loan Kenya Limited vs Erustus Mwangi Mungai* Nairobi High Court Civil Case No. 775 of 2000, the Court observed that before a Court can either order a defendant to furnish security or attach his property conditionally before judgment, it must be satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is either about to dispose of the whole of his property or is about to remove his property from the jurisdiction of the court and that mere apprehension however well-grounded without evidence that the defendant intends to do what is feared does not suffice.
25. And further, in *Afrofreight Forwarders (K) Ltd vs Kenya Railways Corporation and another Mombasa High Court Civil Case No. 229 of 2005*, Maraga J, (as he then was) held that in an application under Order XXXVIII, Rule 5 (former Rules) is to prevent the decree that may be passed from being infructuous and like the order for attachment before judgment, an order for security under this rule is draconian remedy and the court called upon to grant it must act with utmost circumspection. The learned judge observed further that the applicant for such an order must satisfy the court that the defendant is about to dispose of his property or is about to remove the property from the jurisdiction of the court and that the defendant is intending to do so with a view to causing obstruction to, or delaying the execution of any decree that may be passed against the defendant and the essential requirement for an order of security is therefore the malafide intention of the defendant in disposing of or about to dispose of is property.
26. In this case, the Applicant has argued that the Respondent company is fully owned by foreign entities and foreign individuals. She further avers that the Respondent has no known assets or properties that she can attach to effect any judgment or decree of this Honourable Court.
27. The Applicant further avers that one of the Respondent’s Directors confirmed that the Respondent does not have the funds to pay the entirety of any judgment that this Court may issue in her favour. In this regard, the Applicant placed reliance on WhatsApp communication in which one Bastian informed her counterpart, Ms. Leah Njuguna that the company has next to no money.



- 28. On its part, the Respondent has refuted this position and avers that two of its Directors are Kenyans and that it has a registered office at Diamond Plaza, Parklands Avenue in Westlands which it has operated for more than five years.
- 29. The Respondent also maintains that it is a going concern and that it has ongoing projects in the country.
- 30. Applying the provisions of Order 39 Rule 5 to the instant case, there is no evidence on record that the Respondent has intent to obstruct and delay the trial of the Applicant’s Claim or has disposed or is about to dispose of its property or about to remove it from the local limits of jurisdiction.
- 31. The mere fact that the Respondent has not disclosed any of its assets or has no shareholders who are Kenyan citizens is not sufficient ground for ordering attachment before Judgment. This is unless it is further established that there is intent by the Respondent to defeat or delay execution of the decree that may be passed against the Respondent.
- 32. Besides, the record bears that two of the Directors of the Respondent are Kenyan nationals hence in the event judgment is passed against the Respondent, there are legal mechanisms to hold its directors liable.
- 33. Further to the foregoing, it is clear that the power to attach before judgment must not be exercised lightly and only upon clear proof of mischief that the Defendant was 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. Indeed, I agree with the decision in *Saving and Loan Kenya Limited vs Erustus Mwangi Mungai* (supra) that mere apprehension however well grounded without evidence that the defendant intends to do what is feared does not suffice.
- 34. In light of the foregoing and bearing in mind that the order for attachment before judgment and an order for security under Rule 39 Rule 5, is a draconian remedy, I will decline to grant the orders sought in the instant Application and direct that parties fast-track the hearing of the main suit.
- 35. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024.

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STELLA RUTTO
JUDGE

Appearance:
Mr. Omwanza for the Claimant/Applicant
Mr. Situma for the Respondent
Millicent Kibet Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

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