



**Mwabili v Samruddha Resources (K) Limited (Cause E031 of 2023)
[2023] KEELRC 2274 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E031 OF 2023
M MBARŪ, J
SEPTEMBER 21, 2023**

BETWEEN

BENEDICT MTOTO MWABILI CLAIMANT

AND

SAMRUDDHA RESOURCES (K) LIMITED RESPONDENT

RULING

1. The claimant filed application dated 10 May 2023 under the provisions of Order 39(5) and (6) and Order 40 of the *Civil Procedure Rules* and seeking for orders that an order of injunction be issued against the respondent through its employees, servants or agents prohibiting them from removing any equipment and/or property from the Republic of Kenya and its jurisdiction pending the hearing and determination of the suit and further that the respondent be issued with an Order for Security to cushion a possible Court Decree issued herein.
2. The application is made on the grounds that the claimant has filed a Statement of Claim herein against the respondent for unfair termination of employment seeking for orders that a declaration be issued that there was unfair termination of employment, damages for payment of constitutional rights of fair expectation and fair labour practices, an order for payment of salary arrears, pecuniary damages and costs of the suit.
3. The application is supported by the claimant's affidavit and on the grounds that the respondent has shown signs and intention to close shop and relocate and or dispose of its property and the suit herein shall be frustrated if the respondent is not restrained and ordered to preserve the claimant's access to a fair judicial process.
4. In reply, the respondent filed the Replying Affidavit of Parag Pawar its site engineer and manager with authority to respond herein and avers that the claimant's claim has no merit based on the documents filed. The claimant is an opportunist out to make a speculative claim and is not being candid with



- the court. the claimant has no liquidated claim against the respondent and is simply attempting to paralyse the respondent's operations in the hope of pressuring t to accede to the claimant's unlawful and unreasonable demands to extort monies from the respondent.
5. Mr Pawar aver that the respondent is a company incorporated in Kenya and has operations on Kishushe, Voi and has no reasons or intention to remove its assets to India where there are no business interests and the orders sought should not issue.
 6. Both parties attended and agreed to file written submissions.
 7. The claimant submitted that the grant of an injunction is guided of *Giella v Cassman Brown & Co. Limited* [1973] E.A. that an applicant must establish a prima facie case with a probability of success and secondly, the applicant must demonstrate that they would suffer irreparable harm not capable of remedy by way of damages, if the injunction is not granted and the suit is eventually successful. Thirdly, if the court is in doubt, to be guided by the balance of convenience. The court is allowed to issue conservative orders under Section 12(3)(i) of the [Employment and Labour Relations Court Act](#).
 8. The claimant has filed a Memorandum of Claim and seeking various remedies with high chances of success and deserve the orders sought. to secure the judgment and final orders of the court, Order of Security should be issued. The claimant had a contract with the respondent to the effect that his salary would attract a 20% yearly increment for the first five years, 15% increment for the next five years and thereafter a constant 10% house allowance of Kshs. 40,000 per month and other allowances of Kshs. 20,000 per month. The subject employment contract was appointed 1st March 2018 but on 17 October 2022 the respondent terminated the same without due process or justified cause.
 9. The claimant has lodged a claim for underpayment of Kshs. 25,480,274 and a total of the special damages of Kshs. 27,980,274 and the court should direct the respondent to deposit security pending the hearing and determination of the suit as held on *Monica Imali Mulyango v Catherine Masaka* Cause No.989 of 2018.
 10. In response, the respondent submitted that it has no intention to remove its assets out of jurisdiction or to transfer its property elsewhere as alleged to allow the court to issue the orders sought. The principles of granting an interlocutory injunction are settled in the case of *Giella v Cassman Brown & Co. Limited* but the claimant has failed to establish a prima facie case as required in the case of [Pius Kipchirchir Kogo v Frank Kimeli Tena](#) [2018] eKLR. There is no demonstration of what irreparable loss and damage has been demonstrated by the claimant. The balance of convenience favours that respondent since the claimant has not demonstrated why a deposit of security is necessary since the company is running its operations in Kishushe, Voi and hence the orders sought should not issue as held in [International Air Transport Association & Another v Akarim Agencies Company Limited & 2 others](#) [2014] eKLR.
 11. Order 39 rule 5 of the Civil Procedure Rules is about giving security for satisfaction of a decree which may be passed against the Respondent. The Respondent may be called upon to show-cause why he should not give security for satisfaction of the decree which may be passed by the court. Rule 5 therefore deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court and should be invoked the serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the decree that may be issued against it.
 12. To enjoy an under premised under Order 39 rule 5, an applicant must establish a prima facie case as outlined in the case of *Giella v Cassman Brown & Co. Limited*, cited above.
 13. The claimant's case is that the respondent unfairly terminated his employment and is seeking various remedies in unfair termination of employment and constitutional violations and hence seeking



- compensation and general damages. That the respondent has the intention to relocate its operations out of the jurisdiction and shall frustrate the claim and should therefore be ordered to deposit security.
14. The respondent on the other hand asserts that it is registered in Kenya and has no intention of closing operations to relocate to India since it has ongoing operations at Kishushe, Voi. The claimant has no liquidated claim to justify an order of security and the orders sought should not issue.
 15. The claimant's claim is premised on the facts that on 17 October 2022 his employment was unfairly terminated by the respondent which was unfair and unlawful and in violation of his constitutional rights to legitimate expectations and suffered malice, discrimination, loss and damage. The case that the respondent is closing operations at its site in Kishushe, Voi is mentioned but there is no effort to demonstrate how such matter has arisen or what conduct of the respondent is directed at this intention.
 16. To balance rights and to secure the claimant's right to be heard on the merits and to allow the respondent a fair chance to urge its response, the court shall hear the claim on the merits and on priority basis. Both parties have filed responses and hearing directions shall issue for the court to hear the claim on the merit.
 17. Accordingly, orders sought shall not issue as pleaded save, the main claim shall be heard on the merits and on priority basis. Hearing directions shall issue upon delivery of this ruling. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

