



Akrim v Mobile Consultations Africa Limited (Employment and Labour Relations Cause E055 of 2022) [2023] KEELRC 2432 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E055 OF 2022**

**AN MWAURE, J
OCTOBER 6, 2023**

BETWEEN

HANANE AKRIM CLAIMANT

AND

MOBILE CONSULTATIONS AFRICA LIMITED RESPONDENT

RULING

1. The respondent/applicant filed a notice of motion dated 17th March 2023 seeking the following orders:
 1. That the claimant furnishes security for costs of the respondent for the sum of Kshs 300,000
 2. That the claimant deposits the aforesaid security amount in escrow account to be opened in the joint names of its advocates m/s Victor Lee Advocates and that of the respondent's advocates m/s Muthoni Wanja & Partners Advocates within 30 days from the date of the court order.
 3. That upon failure to furnish such security as the claimant's cause shall stand dismissed.
 4. That the court be at liberty to make any further order and directions in the interest of justice.
 5. Costs of the application.

Respondent/ Applicant's Case

2. The Respondent's application was supported by an affidavit sworn by its chief executive officer, Jason Carmichael.
3. The respondent avers that the claimant was engaged by the respondent as an independent contractor and was later offered shares in the respondent. The transaction did not succeed due to differences between the parties and subsequently there was bad blood between them.



4. The respondent avers that the claimant's claim is a sham borne out of the fall out between the parties over shares in the respondent since the claimant was not its employee but an independent contractor.
5. The respondent avers that the claimant is not Kenyan and does not have permanent residence or any known assets in the country.
6. The respondent avers that the claimant has recently taken up employment in Abidjan, Ivory Coast.
7. The respondent avers that unless the orders sought are granted the respondent will suffer immensely because the claimant has no assets within the jurisdiction of the court sufficient to meet any cost order as may be awarded.

Claimant/Respondent's Case

8. The claimant opposed the application by filing a replying affidavit dated 27th March 2023.
9. The claimant avers that the respondent/applicant – has not adduced any evidence to support the respondent's allegations that she will be unable to meet an order for costs as may be awarded since she is a foreigner.
10. The claimant avers that by alleging her claim is aimed at settling personal scores the respondent's CEO has arrogated himself the judge and the claimant states her claim against the respondent is on the basis of unfair termination.
11. The claimant avers that the respondent/applicant has neither proved that her claim is devoid of reasonable probability of success and therefore the respondent/applicant does not stand any risk of being prejudiced should the substantive hearing of the suit proceed without an order for security of cost.
12. The claimant avers the application offends Article 48 of the *Constitution* to the extent that granting an order for security of costs sought would impend her fundamental right of access to justice.
13. The submissions of the respective parties dated 17th April 2023 (claimants' submissions) and 11th April 2023 (by the respondents)

Analysis and Determination

14. The respondent submitted that the claimant/respondent is a foreigner from Morocco and it will be hard and shall cause the respondent/applicant great inconvenience to execute any orders of costs against her as she is not physically in Kenya and has no assets in Kenya. It relied on the Court of Appeal in *Shah v Shah* [1982] KLR (Law, Miller JJA, and Kneller Ag JA).
15. The claimant submitted that the respondent/applicant has not proved that the claimant is unable to pay costs in the event her claim is unsuccessful and that it only places reliance on the fact that she is a foreigner. The claimant submits that the application must fail as the applicant failed to show that the claimant will be unable to meet an order for security for costs.
16. Order 26 Rule 1 of the *Civil Procedure Rules* states as follows;

“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.”



17. In the case of *Marco Tools & Explosives Ltd v Mamjee Brothers Ltd* [1988] KLR 730, it was held as follows;

“As the case show, the court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from Noor Mohamed’s case is that the final result must be reasonable and modest”
18. The discretion to grant an order for security for costs has to be balanced with the constitutional tenets in regard to access to justice and fair hearing. Article 48 of the *Constitution* of Kenya provides as follows;

“The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice.”
19. Article 50 of the *Constitution* provides as follows;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
20. The claimant filed a suit vide a memorandum of claim dated 21st January 2023 and prays inter alia for a declaration that she was unlawfully terminated from her employment.
21. The case of Marco Tools & explosives Ltd supra main suit provides that the grant of security is purely at the discretion of the court. This is an employment matter and the case has not been set down for hearing. It is mere speculation one that the applicant will be awarded costs and even if he will how did he arrive at a figure of kshs 300,000. The courts would not wish to make speculative orders.
22. The Court of Appeal in *Alfred Mutuku Muindi vs Rift Valley Railways Limited* (2015) eKLR held:

“the couching of provision of section 12(4) of *Employment and Labour Relations Court Act* gives the trial court discretionary powers to award costs or not. The costs in these kind of claims do not customarily follow the event unlike in civil matters.”
23. In other words in matters employment and labour even if where judgment is entered in favour of either party court can always make orders that each party meet their cots. In *David Obama vs Kenol Plc* (2021) the court held: “ultimately even where there is a bona fide defence, in employment and labour relations disputes section 35(4) of *Employment Act* 2007 must come to bear. The said section 35(4) of the *employment act* provides:

Nothing in this section affects the right—

 - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law
24. Just in this matter the prudent thing the parties would have done is to fix the case for hearing instead of filing multiple applications which continue to delay hearing of the main suit.
25. In any event the applicant has tendered no evidence to support his claim that the claimant is leaving the country and that she has no assets in Kenya. Again, the court regards these allegations simply as speculation.



26. The court is advised by various authorities that granting security of courts is purely at the court's discretion.
27. The evidence through the pleadings and submissions have been carefully considered by this court and ultimately find the application to deposit an amount of kshs 300,000 as security of costs in anticipation the same will be awarded to the applicant is merely speculative. The court is not satisfied that the applicant has proved its case to deserve this court granting security of costs. This application of 17th March 2023 is unmerited and is dismissed with costs to claimant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

