



Mtimaukanena v Bharti Airtel International Africa Limited (Cause E264 of 2021) [2022] KEELRC 3917 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3917 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E264 OF 2021
JK GAKERI, J
SEPTEMBER 20, 2022**

BETWEEN

JOHN MTIMAUKANENA CLAIMANT

AND

BHARTI AIRTEL INTERNATIONAL AFRICA LIMITED RESPONDENT

RULING

1. Before me for determination is a notice of motion application dated March 2, 2022 seeking orders that:
 - i. The claimant to deposit in a joint interest earning account in the names of Majanja Luceno & Co Advocates and counsel for the claimant the sum of Kshs 1,500,000/= or such other sum as the court may deem fit being the security for costs.
 - ii. Pending compliance with order 1 above, the proceedings herein be stayed.
 - iii. There be liberty to apply.
 - iv. Costs of this application be borne by the plaintiff.
2. The application is expressed under section 12 of the *Employment and Labour Relations Court Act, 2011*, rules 17 and 28 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all the inherent powers of this honourable court.
3. The application is supported by the affidavit of Georgina Ogalo dated March 2, 2022.
4. It is deponed that the claimant seeks *inter alia* close to USD 465,615 (Kshs 47,000,000/=) for alleged unfair termination of a contract of employment with the respondent.
5. That the respondent's memorandum of response avers that the claimant/respondent's employment was lawfully terminated and was paid and accepted terminal dues.



6. That the claimant is a Malawian national whose lawful stay in Kenya was based on the now terminated contract and work permit.
7. It is further deponed that the respondent is unaware of any attachable assets of the claimant in Kenya which would satisfy any award of party and party costs should the case be dismissed as it is not merited and there is need to secure such costs in the manner proposed.
8. That the sum of Kshs 1,500,000/= is a fair deposit to secure the respondent's costs.
9. It is deponed that unless the orders sought herein are granted, the claimant shall not voluntarily settle party and party costs in the event the respondent is successful.
10. That the claimant stands to suffer no prejudice if the orders sought are issued.
11. That it is in the interest of justice that the application be allowed.
12. In his replying affidavit dated March 22, 2022 in opposition of the application, the claimant depones that the application herein is unfounded and amounts to abuse of the judicial process.
13. That the application is not grounded on any provisions of the law and the cited provisions do not explicitly provide for payment of costs in the manner sought.
14. The claimant depones that the application is speculative as the respondent assumes that it will win the case yet the claimant has a strong case with a high probability of success.
15. That the application is a ploy to circumvent, delay and obstruct the hearing of the case.
16. The claimant affirms that he is residing in Kenya and is subject to the jurisdiction of the court and the legal system has an elaborate mechanism of enforcement of judgments, decrees and orders in the realm of international law.
17. That article 48 of the *Constitution* of Kenya, 2010 guarantees the right of access to justice to all persons and the application by the respondent seeks to place a barrier not supported by law.
18. That the application seeks to undermine articles of the *Constitution* which provides that disputes should be by the application of law and decided fairly by a court of law or competent body or tribunal.
19. The claimant further depones that the application is mischievous as it is intended to obstruct the quest for accountability.
20. Finally, the claimant depones that the application should be dismissed with punitive costs by the respondent.

Respondent/Applicant's Submissions

21. The respondent introduces its submissions with a recapitulation of the guiding principles in determining an application for security for costs as enunciated in *Y.G v Carnation Plants Ltd* (2016) eKLR which cited with approval of the decision in *Keary Development v Tarmac Construction* (1995) ALL ER 534.
22. The applicant identifies three issues for determination namely; jurisdiction of the court to grant the orders sought, entitlement to the reliefs and costs.
23. As regards jurisdiction, the applicant submits that the court has power to grant the orders sought by virtue of section 12 of the *Employment and Labour Relation Court Act*, 2011 and rule 28 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.



24. As to whether the respondent is entitled to orders sought, the decisions in [*Ocean View Beach Hotel Ltd v Salim Sultan Moolo & 5 others*](#) (2012) eKLR and [*Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others*](#) (2013) eKLR are relied upon to underscore the essence of the order for security for costs which is intended to balance the rights of the claimant to access justice vis-a-vis the respondent's right to have security for costs and not have vexatious proceedings.
25. The respondent submitted that since the claimant is a foreigner whose stay in Kenya was based on the work permit when he was in employment of the respondent which is no longer the case and has not demonstrated further evidence of residence or employment let alone assets in Kenya or Malawi, it is just that he provide security for costs in case he loses the case against the respondent.
26. The decisions in [*Timothy Graeme Steel v TNT Express Worldwide \(Kenya\) Ltd*](#) (2018) eKLR, [*Shah v Shah*](#) (1982) KLR and [*In re the Apollinaris Company's Trade Marks*](#) (1891) 1 Ch. 1 are relied upon to urge that the claimant should provide security for costs in case he leaves the court's jurisdiction and has no known assets in Kenya or proof of assets in Malawi, reciprocal agreement notwithstanding.
27. That the sum of Kshs 1,500,000/= would secure the respondent's costs as it has a *bonafide* defence as was held in [*Joab Kilach v National Media Group Ltd & 2 others*](#) (2015) eKLR.
28. It is further submitted that termination of the claimant's employment was lawful, he was paid terminal dues and cleared with the respondent voluntarily.
29. Finally, it has furnished sufficient evidence to warrant the orders sought.

Claimant's Submissions

30. The claimant identifies no specific issue for determination but addresses the rights to fair hearing and access to justice.
31. Reliance is made on article 50 of the [*Constitution*](#) of Kenya, 2010 to urge that the respondent by its application seeks to limit the claimant's right to be heard by the court by demanding security for costs. That the application herein is not founded on any provision of law and the law does not provide that a foreign national is required to provide security for costs.
32. It is the claimant's submission that the respondent's application is intended to stop the claimant from challenging the unfair termination through the court as ordained by the provisions of section 35(4) of the [*Employment Act*](#), 2007.
33. The decision in [*Saeed Maleki v Somehr Group Ltd*](#) (2018) eKLR is relied upon where the court relied on the holding in [*Sammy Murete Biketi v Insteel Ltd*](#) (2016) eKLR where it held that the court should be guided by the general principle of access to justice and fair hearing and a person should not be condemned or prevented from accessing the court service on account of inadequacies. The court is urged to adopt a similar reasoning.
34. As regards the right of access to justice, reliance is made on article 48 of the [*Constitution*](#) of Kenya, 2010 which safeguards the right of access to justice. It is urged that the respondent's application seeks to limit the claimant's access to justice. That the constitutional right of access to justice is unqualified by the [*constitution*](#) and applies to citizens and foreigners.
35. The decisions in [*Bernard Barongo and 116 others v Orbit Chemicals Ltd & another*](#) (2019) eKLR and [*David Ohana v Kenol Kobil PLC*](#) (2021) eKLR are relied upon to urge that court should not award the orders sought.



36. It is the claimant's submission that the claim against the respondent raises issues that require determination upon hearing the parties and none can be determined at this preliminary stage.
37. The decision in *David Ohana v Kenol Kobil PLC* (supra) is relied upon to reinforce the submission.

Determination

38. It have considered the application response and submissions by the parties.
39. The singular issue for determination is whether the respondent/applicant is entitled to the orders sought.
40. There is sufficient judicial authority on the issue at hand.
41. In *Peter Gatirau Munya v Dickson Mwenda Kitthinji and 2 others* (2014) eKLR, the court stated as follows:

“The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection of other party”.

42. Similar sentiments were expressed in *Noormohamed Abdulla V Ranchhodbbhal J Patel & another* (1962) EA 448 and *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others* (supra).
43. In *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* (supra), the Court of Appeal stated thus;

“It is therefore imperative in consideration of an application for security of costs for the court to balance the competing rights to access justice and the right to security for costs.”

44. It is trite law that the court has discretion to order security for costs to be furnished by either party on application by the other depending on the circumstances of the individual case. The relevant guiding principles were laid down in *Keary Development v Tarmac Construction* (supra) and principal among them is the need to balance between the claimant's right to access justice as provided by article 48 of the *Constitution* and the injustice likely to be occasioned to the respondent if it is unable to recover from the claimant the costs it has incurred in defence of the claim.
45. The court is also guided by the words of law JA in *Shah & 2 others v Shah & 2 others* (1982) eKLR.

“The general rule is that security is normally required from plaintiff's resident outside the jurisdiction but as was agreed in the court below, a court has a discretion to be exercised reasonably and judicially, to refuse to order that security be given . . .”

46. See *Kolecha v Bank of Baroda* (CA civil application No 43 of 1978, unreported).
47. The court is further guided by the general rule that the granting or refusal to grant an order of security for costs is discretionary and the same must be exercised judiciously. As observed in *Mohamed Ali Osman t/a Hanan Petroleum v Juanco Group Ltd* (2021) eKLR,

“Each court is unique and this power to grant security for costs must be exercised reasonably, taking into consideration the circumstances of each case . . . I agree that security for costs



takes different forms. However, in this case the applicant seeks specific amount for security costs. In this regard, it is my considered view that a reasonable amount that can adequate and protect the applicant . . . will suffice.”

48. Finally, in *Magiri Nguthari v Gideon Kimathi M'Nguthani* (2010) eKLR, the Court of Appeal declined to make an order for security for costs because the appellant had property within the jurisdiction of the court and it was a family dispute.
49. In the instant case, it is not in dispute that the claimant is a Malawian national and his residence in Kenya was dependent on his employment by the respondent and though currently within the court's jurisdiction, he has no known assets or work permit as the respondent/applicant submits.
50. It is also not contested that the claimant was an employee of the respondent until his employment was terminated and he has filed a claim against the respondent.
51. Be that as it may, although ownership of assets is a crucial issue in determining whether or not to grant security for costs as held in *Cosmos Holiday PLC V Dhanjal Investments Ltd* HCCC No 112 of 2012, articles 48 and 50 of the *Constitution* of Kenya, 2010 are emphatic on the right to fair hearing and access to justice. These rights are available to all persons and ought to be facilitated and enforced unless the restriction or limitation relied upon is reasonable and justifiable in an open and democratic society. This position is reinforced and buttressed by section 35(4) of the *Employment Act*, 2007.
52. In addition, the respondent has not demonstrated that the claimant's rights guaranteed by the *Constitution* of Kenya, 2010 and *Employment Act* 2007 will not be restricted or suppressed if the orders sought are granted.
53. The court is in agreement with the claimant's submissions that the issues raised by the claim ought to be ventilated in a hearing on merits, the bonafide defence of the respondent notwithstanding.
54. But more significantly, the respondent's application is based on the assumption that it is likely to be awarded costs after the hearing and seeks security.
55. However, unlike in other types of civil cases in employment disputes, award of security is regulated by section 12(4) of the *Employment and Labour Relations Court Act*, 2011 which provide:

In proceedings under this Act, the court may subject to the rules, make such orders as to costs as the court considers just.
56. It therefore follows that costs do not necessarily follow the event as is the case in ordinary civil cases.
57. The Court of Appeal decision in *Alfred Mutuku Muindi v Rift Valley Railways* (2015) eKLR explained the import of section 12(4) of the *Employment and Labour Relations Court Act*, to mean that the court has discretionary powers to award costs or not. Similarly, Court of Appeal decisions dating as far back as the 1980s have upheld this legal position.
58. For the above stated reasons, the court is satisfied that discretion in the circumstances of this case should be exercised disfavourably to the respondent/applicant.
59. Consequently, the application dated March 2, 2022 is disallowed and the suit shall be heard on the merit.
60. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2022



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

