



Ndung'u v Catholic University of Eastern Africa (Citation Cause E054 of 2021) [2022] KEELRC 13012 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 13012 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CITATION CAUSE E054 OF 2021
MN NDUMA, J
OCTOBER 27, 2022

BETWEEN

JOHN GITAU NDUNG'U CLAIMANT

AND

CATHOLIC UNIVERSITY OF EASTERN AFRICA RESPONDENT

RULING

1. The claimant filed suit on January 22, 2021 seeking reliefs quantified at Kshs 6,359,4250,58. The suit was followed by an application dated July 20, 2021 in which the claimant/applicant prays the court to direct the respondent to deposit the claimed sum of Kshs 6,359,425.58 in respect of damages for constructive, unfair and unlawful termination of the claimant's employment as security pending hearing and determination of the claim. That the said amount be deposited in a joint interest earning bank account in the name of the respective advocates for the claimant and respondent.
2. The application is opposed vide a replying affidavit of Lorine Atsieno Muchogoni dated February 16, 2022. The parties filed written submissions.
3. The issue to be determined is whether the applicant has disclosed any justifiable cause for the court to order deposit of security pending the hearing and determination of the suit. It is not in dispute that the respondent is a university domiciled in Kenya.
4. The applicant relies on local newspaper reports that allege that the respondent is undergoing financial difficulties. The respondent disputes that allegation stating that the said allegations are not true, constitute hearsay evidence with no probative value.



5. The court has considered the case of *Gitobu Imanyara and 2 Others -vs- Attorney General [2016] eKLR* in which the court states: -

' In *Wamwere -vs- The Attorney General and Randu Nzai Ruwa & 2 Others -vs- Internal Security Minister and Another [2012] eKLR*; If we may borrow the words of the court in *Ruwa Case*, with tremendous respect to the appellants, these media articles taken alone, are of no probative value and do not demonstrate any effort on the part of the 2nd appellant to demonstrate losses he suffered.

6. Similarly, the court held in *Independent Electoral and Boundaries Commission (IEBC) & National Supper Alliance (NASA) Kenya & Others [2017] eKLR* that: -

' On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence.....a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported'

7. The present application is supported by a deposition of the applicant in paragraph 11, 12, 13 and 14 of the supporting affidavit through which he has attached daily newspaper cuttings in which was reported that the respondent is encountering severe financial difficulties and that the university has since received a notice from the higher education regulator that if the respondent fails to restructure its operations and get on a sound financial footing, its charter may be revoked. The dailies are also cited to have reported that the Vice Chancellor of the respondent, Justus Gitari Mbae has admitted that the respondent is experiencing financial woos and is in the process of implementing a turn around strategy that involves restructuring and prudent financial management. That the financial loss of the respondent was reported to be in excess of Kshs 400,000,000. That the alleged restructuring may prejudice and defeat the claim herein hence the need to have the court grant the application for deposit of the security.

8. The applicant cited the case of *Erick Oyier Omondi and 3 Others -vs- Catholic University of Eastern Africa (2019) eKLR*, and states that the respondent had failed to pay the salaries of the claimants in 2015 and 2016. That the respondent recorded a consent and agreed to pay the salaries owing to the claimants in full. The applicant states that the respondent admitted that failure to pay the said salaries was for reasons beyond their control due to dwindling number of students at the Kisumu campus of the respondent.

9. The applicant further cited the case of *Catholic University of Eastern Africa -vs- Kenya Private University Workers Union [2020] eKLR* in which the issue in dispute is failure by the respondent herein to remit union dues deducted from its employees to the union.

10. These cases were cited as evidence of the frail financial position of the respondent hence the need to get the orders sought. The applicant relies on section 63(b) of the *Civil Procedure Act* which provides that: -

' 63 supplementary proceedings in order to prevent ends of justice from being defeated, the court may, if it is so, prescribe; -

- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property.'



11. The applicant further relies on order 39, rule 5(1) of Civil Procedure Rules which provides: -
- ' Where at any stage of a suit the court is satisfied by affidavit or otherwise that the defendant, with the intent to obstruct or delay the execution of any decree that may be passed against him: -
- a. is about to dispose of the whole or any part of his property;
 - b. is about to remove the whole or any part of his property, from the local limit 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 a sum as may be specified in the order.....'
12. With respect to the applicant, the provision cited do not support in any way the application before court there being no evidence adduced by the applicant that the respondent has in any way moved to obstruct ends of justice; is about to dispose of the whole or any part of its property and/or that it is about to remove the whole or any part of its property from the limit of the jurisdiction of this court.
13. The hearsay evidence adduced by the applicant other than being irrelevant to the matters for consideration under section 63(b) and order 39, rule 5(1) is also inadmissible for being hearsay evidence that cannot be relied upon to prove the facts it purports to disclose unless the author of the newspaper articles cited has deposed an affidavit in support of the facts set out in the newspaper cuttings attached to the supporting affidavit.
14. Accordingly, the application lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27TH DAY OF OCTOBER, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Wamuyu for Claimant/Applicant

Mr. Situma for Respondent

Ekale – Court Assistant

