



**Ndungu v Robert Bosch East Africa (Cause 656 of 2019)  
[2022] KEELRC 12858 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12858 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 656 OF 2019  
JK GAKERI, J  
OCTOBER 11, 2022**

**BETWEEN**

**JOHN NGINYA NDUNGU ..... CLAIMANT**

**AND**

**ROBERT BOSCH EAST AFRICA ..... RESPONDENT**

**RULING**

1. Before the court for determination is a notice of motion application by the applicant/claimant dated May 26, 2022 seeking orders that;
  - i. The respondent be compelled to deposit security into a joint interest account in the names of the advocates for the applicant/claimant and the respondent within 14 days.
  - ii. The security for costs be assessed at Kshs 15,000,000/= (Kenya Shillings Fifteen Million only) since the value of the claim is Kshs 79,644,600.96.
  - iii. The costs of the application be borne by the respondent.
2. The application filed under certificate of urgency is expressed under order 26 rule 1, 5 and 6, order 51 rules (1) and (3) of the *Civil Procedure Rules, 2010* sections 1A, 1B, 3, 3A and 100 of the *Civil Procedure Act, 2010* and all other enabling provisions of the law is supported by the affidavit sworn by John Nginya Ndung'u, the claimant who depones that the respondent is a foreign company with headquarters in South Africa and whose financial position is dire.
3. That the respondent has downsized its economic activities in the country and has no known property that can be liquidated if the claim is successful.
4. The affiant further states that the respondent's statement of defence dated September 16, 2019 shows that the respondent has no other offices in Kenya other than Nairobi.



5. That it is only fair and just that the applicant/claimant be allowed to have insurance for the huge amount of money spent in prosecuting the matter and its incidentals.
6. The affiant states that the respondent stands to suffer no prejudice if the orders sought are granted.
7. That the application is made timely, diligently and without delay.
8. The respondent neither filed a replying affidavit nor submissions.

### **Claimant's/appliant's submissions**

9. The applicant identifies two issues for determination, namely;  

Whether or not the applicant/claimant should be granted the reliefs sought and who should bear the costs of this application.
10. On the 1<sup>st</sup> issue, the applicant submits that his termination from office was unprocedural.
11. The applicant relies on the sentiments of the court in *Elloy Molinero v Par Properties Ltd* ELC No 8 of 2014 on the jurisprudence on security of costs that the application turns on whether the respondent has demonstrated it has a bonafide defense.
12. That the respondent has not shown that it has capacity to pay the cost of the claim and the claimant is unaware of respondent's assets for attachment should the claim succeed.
13. It is submitted that under order 26 rule 1 of the *Civil Procedure Rules, 2010* gives the court unfettered discretion to order a party to furnish security for costs pending the hearing and determination of a suit.
14. Reliance is made on the decision in *Industrial Plant EA Ltd v Stanbic Bank & another* HCCC No 533 of 2006 where Kimaru J outlined the circumstances in which a court may order a party to pay security for costs.
15. The decision in *Joel Kibiwott & 4 others v The Registered Trustees of Our Lady of Victory* HCCC No 146 of 2004 is also relied upon to buttress the submission that the respondent should be ordered to provide security.
16. As regards costs, the applicant relies on the decision in *R v Rosemary Wairimu Munene ex parte Ibururu Dairy Farmers Co-operative Society Ltd* to urge that costs follow the event.

### **Determination**

17. After careful consideration of the application, supporting affidavit and the submissions on record, the singular issue for determination is whether the application before the court is merited.
18. The application herein is anchored on the premise that the respondent has its headquarters outside Kenya and has no known assets for attachment if the claim by the claimant is successful.
19. Order 26 rule 1 of the *Civil Procedure Rules* provides 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.”



20. In *Jayesh Hasmukh Shah v Navin Hira & another* (2015) eKLR, the court expressed itself as follows;
- “It is now settled law, the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafide of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.”
21. The court is further guided by the sentiments of L Njuguna J. in *Aggrey Shivona v Standard Group PLC* (2020) eKLR as follows;
- “In an application for security for costs the applicant ought to establish that the respondent, if unsuccessful in the proceedings would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. This was the holding in the case of Kenya Education Trust v Katherine SM Whitton Civil Appeal No 310 of 2009.
- It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest.” (See also *Keystone Bank Ltd & 4 others v I & M Holdings Ltd & another* (2017) eKLR).
22. The court is guided by these sentiments.
23. I will now proceed to apply the foregoing principles of law to the facts of the instant case.
24. In the present case, the claimant/appliant filed a his memorandum of claim on August 6, 2019 alleging unfair/unlawful termination of employment by the respondent praying for *inter alia* payment of salary for the remaining period of the contract, 16 years, Kshs 79,644,600.96, maximum compensation and general damages for psychological stress/anguish/suffering.
25. The respondent on the other hand filed a statement of defense on September 18, 2019 explaining the circumstances in which the alleged termination took place.
26. From the records, the claimant appear to have changed its advocate on record and a notice of change dated May 26, 2022 was filed and the application before the court was filed on May 31, 2022.
27. Intriguingly, there are no grounds annexed to the notice of motion application and the replying affidavit merely states that the respondent has its headquarters in South Africa, has down sized its economic activities in Kenya and has no known assets to satisfy an order for costs. However, these undoubtedly weighty allegations are not supported by any material evidence to demonstrate the status of the respondent.
28. Puzzlingly, the respondent has not responded to the application nor demonstrated in any way its objection to the application or its ability to make good any award made by the court.
29. As to whether the respondent has a bonafide defense, the court has perused the defense on record and its annexures. The respondent denies the facts in dispute as presented by the claimant/appliant and attaches communication in support of its assertions.
30. However, the true position can only be ascertained by testing the evidence of both parties in trial.



31. Finally, guided by the principles of law adverted to elsewhere in this judgment, it is evident that the applicant has not established any of the allegations made. He has provided no evidence of the respondent's financial position or its inability to pay any award made by the court, he has rendered no evidence of its current workforce after downsizing or evidence that it had offices outside Nairobi before.
32. It is not lost to the court that the suit herein was filed in August 2019 and the application herein was made on May 31, 2022, 2 years 9 months later. The urgency of the application at this time has not been demonstrated.
33. The foregoing notwithstanding, the application herein is unopposed and the court is persuaded that it opportune to grant orders (i) and (ii) of the notice of motion application in the following terms;
  - a. The security for costs is assessed at Kshs 1,500,000/= (Kenya shillings one million five hundred thousand).
  - b. The sum be deposited into a joint interest account in the names of the advocates for the applicant/claimant and the respondent within 30 days.
  - c. There shall be no orders as to costs.
34. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF OCTOBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

