



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. E128 OF 2021

MARK KIPRUTO ARAP KUTO.....CLAIMANT

VERSUS

ANAALI KENYA LIMITED.....RESPONDENT

R U L I N G

1. The application before me is the Claimant's Notice of Motion dated 17.2.2021 which seeks the following orders:

(a) **THAT the Honourable Court be pleased to certify this matter urgent.**

(b) **THAT a temporary injunction be and is hereby granted to prevent the Respondent's Director, Ramchandani Chandru Ishwardas of Passport No. [Z.....] and Special Pass File No. [R] from travelling outside jurisdiction of this court without express permission of the court, pending the hearing and determination of this application.**

(c) **THAT an order be granted directing the Director of Immigration to prevent the Respondent, Ramchandani Chandru Ishwardas of Passport No. [Z.....] and Special Pass File No. [R] from travelling outside jurisdiction of this court without express permission of the Court.**

(d) **THAT an Order be granted freezing all the proceeds in the Respondent's Account No. 0103[.....], Kilimani Branch, Sidian Bank unless it pays the claimant a sum of Kshs. 1,320,000/- forthwith through his bank Account No. 1251[.....], Kilimani Branch, KCB hereon.**

(e) **THAT summary judgment be entered against the Respondent as prayed in the claim hereon.**

(f) **THAT the costs of this application be in the cause**

2. The application is premised on the grounds set out in the body of the motion and the supporting affidavit sworn by the Claimant on even date. The application is opposed by Respondent vide the Notice of Preliminary Objection dated 1.3.2021 and the Replying Affidavit sworn by Mr. Chandru. I. Ramchandani on 2.3.2021.

Applicant's Case

3. Mr. Kurauka, learned counsel argued the application for the Applicant. He relied entirely on the grounds set out in the motion and the supporting affidavit. In brief he submitted that the Claimant was employed by the Respondent and relied on the letter dated 20.7.2020 as proof of the said employment relationship. The said letter is an undertaking by the Respondent to pay the Claimant his salary arrears at the rate of Kshs. 120,000 per month for April 2019 to February, 2020 totalling to Kshs. 1,320.00.

4. The Counsel further submitted that the directors of the Respondent are Indian Nationals residing in Kenya on two months visitors pass and consequently they are flight risks. He argued that unless the orders sought are granted, the Respondents Directors might leave the jurisdiction of the court before paying the Claimant's debt.

5. He further submitted that the salary of an employee in Kenya is protected by the Employment Act and as such the failure by the Respondent to pay the Claimant's salary for the said period is both unlawful and negligent.

6. As regards the Respondent's Preliminary Objection, he argued for the Claimant that, this court is established pursuant to Article 162 (2) (a) of the Constitution to determine employment and labour relations disputes. He therefore urged that in view of the letter dated 20.7.2020,

the dispute herein is brought within the jurisdiction of this court and as such the preliminary objection is superfluous.

Respondent's case

7. Mr. Wembale learned counsel opposed the application on behalf of the Respondent. He relied on the said Replying Affidavit sworn on 1 by Mr. Chandru I.Ramchandani on 2.3.2021. In brief he submitted that there has never been any employment relationship between his client and the Claimant and dismissed the letter dated 20.7.2020 as a fake document.

8. He further submitted that his client has denied that the said letter was given by its director and drew the court's attention to the copy of Police Occurrence Book No. OB/83/01/03/2021 annexed to the Replying Affidavit to prove that the matter has been reported to the police for investigations.

9. He argued that the letter dated 20.7.2020 was printed out from email and as such the applicant ought to have produced a certificate since it is a requirement in relation to electronic evidence.

10. He also submitted that the Respondent's Director have been in Kenya for over 20 years and they have no intention of leaving the country and therefore opposed to any interim orders being granted.

11. As regards the jurisdiction of the court, he submitted for the Respondent that there is no evidence to prove that the parties herein were engaged in any employment relationship. He reiterated that, the only evidence being relied upon is the letters dated 20.7.2020 which has been disowned by the Respondent and which has not been authenticated by a Certificate.

12. Finally, he argued that the Claimant has previously extorted money from the Respondent and he is now using the fake letter dated 20.7.2020 to extort more money from the company.

Rejoinder by Applicant

13. Mr. Kurauka submitted that after producing the letter dated 20.7.2020, the burden of proof has shifted to the Respondent to prove by forensic evidence that the letter is fake. He contended that the Respondent has not denied that the same email address used to serve the said letter on the Applicant is the same one used to serve the application, herein.

14. He further argued that although the Claimant has been described as an extortionist, no police records have been exhibited. He further contended that the Respondent has not demonstrated any other relationship with the Claimant other than employment. Finally, he maintained that the court has jurisdiction to determine the dispute herein and urged the court to grant the orders sought by the applicant.

Issues for determination

15. The issues for determination are:

(a) **Whether the court has jurisdiction over the dispute in the suit herein.**

(b) **Whether orders sought in the motion should be granted.**

Jurisdiction

16. Jurisdiction is the authority or mandate which a court has to decide a matter before it. It flows from the Constitution or statute or both. It is everything to a court and whenever the issue of jurisdiction is raised, the court should address it immediately. **In the owners of the motor vessel "Lillian s" v. Caltex Oil (Kenya Ltd. [1989] KLR1** the Court of Appeal held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step . . . A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

17. The jurisdiction of this court is given by section 12 of the ELRC Act, pursuant to Article 162(2)(A) and 165(5) of the Constitution of Kenya 2010. Basically, and as agreed by counsel for both parties herein, this court is established to determine disputes related to employment and labour relations. The suit before the court revolves around the letter dated 20.7.2020 by which the Respondent admitted a claim of salary arrears payable to the Claimant and undertook to pay the same as soon as it received payment in respect to a completed road construction contract. However, the Respondent has disputed the existence of employment relationship between it and the Claimant and maintained that the letter dated 20.7.2020 is fake and it is being used to extort money from the company.

18. Having considered the material before the court, the court finds that the dispute before it relates to the alleged employment relationship between the two parties which is subject to prove at the trial. Consequently, I must, which I do, hold that the court has jurisdiction to determine the suit before it and the objection by the Respondent must fall on its face.

The Order Sought

19. Prayer (a) and (b) are already spent because they involved certification of urgency and temporary injunction pending hearing and determination of the application.

20. Prayer (c) and (d) are final orders lifted from the statement of claim. The restriction of movement for the Directors would be necessary if there is clear proof of indebtedness and that they are about to flee the country. Having considered the material presented by the parties, it is obvious that the alleged employment relationship between the parties is strongly contested and the letter dated 20.7.2020, which is the only evidence of the alleged relationship is now the subject of police investigations.

21. Again the evidence produced by the applicant to substantiate the allegations that the Respondent's directors are a flight risk is computer generated copy of visitors pass for one of the Respondent's Director Mr. Chandru Ramchadani. The document was generated on 6.6.2020 and there is no certificate under section 106A of the Evidence Act to authenticate the same. Consequently, I find and hold that there is no obvious evidence of indebtedness of the alleged salary and the alleged possibility of flight by the Respondent's Directors.

22. Finally, the prayer for summary judgment is declined because, as observed above, the letter dated 20.7.2020 is the basis upon which the suit is brought, and since it is strongly challenged, it is only fair that the same is tested at the trial. Consequently, both the Notice of Motion dated 17.2.2021 and the Notice of Preliminary Objection dated 1.3.2021 are dismissed with no order as to costs.

Dated, signed and delivered in Nairobi this 4th day of March, 2021.

ONESMUS MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGES