



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.601 OF 2019

DAVID OHANA.....CLAIMANT

VERSUS

KENOL KOBIL PLC.....RESPONDENT

RULING

The respondent, Kenol Kobil PLC filed application dated 27th January, 2021 and seeking for orders that;

1. Spent.
2. The claimant do furnish security for costs in the sum of Ksh.4, 543,381.16 and further sum of USD.67, 719.27 or such amount and within such time as the court may direct/determine.
3. In default of furnishing the said security within the prescribed time, the claim fled herein be struck out with costs to the respondent.
4. Costs of this application be borne by the claimant.

The application is supported by the affidavit of Caroline Kamau the human resource manager and on the grounds that the claimant has no known assets in Kenya and upon termination of his employment by the respondent he relocated to Israel where he is resident and has admitted as much in his Memorandum of Claim. The employment contract had provided for a relocation allowance to Israel upon termination of contract and the claimant is not resident within the jurisdiction of the court.

In her Supporting Affidavit Ms kamau avers that upon termination of his employment, the claimant owed the respondent USD.67, 719.27 and it is in the interests of justice that the claimant be required to furnish security for costs in this matter before the hearing of the main suit or taking any other step.

The claimant has made a claim of ksh.268, 225,411 in addition to other reliefs and the computation of costs has been made based on the minimum instructions fees due on the claim and in the event the respondent is successful in defending the instant suit it will be unable to recover any costs in view of the claimant being out of jurisdiction.

In reply the claimant filed grounds of opposition that the application lack merit and is aimed at denying him access to justice and a delay tactic to stall the hearing of the main suit. the defence has no chance of success and the application if made in bad faith and should be dismissed with costs.

The claimant also filed his Replying affidavit and avers that the application before court for security for costs is tantamount to application for attachment before judgement. There is no counterclaim for the purported USD 67,619.27 or any other amount to warrant the instant application.

The claimant also avers that his employment was terminated by the respondent in July, 2019 without notice or payment in lieu of notice in breach of the contract of employment. he filed his claim herein for payment of terminal dues following the unlawful termination of contract of employment. save for claim for compensation, other claims are based on the express terms of contract.

At the time employment terminated the gross salary was Ksh.4, 892,181.85 and the total claim for Ksh.268, 255,411 is based on the remedy for unlawful termination of employment provide in law.

It is over 11 months since filing the claim and the delay in filing the application herein is inordinate. Upon filing his claim, the claimant disclosed he is resident in Israel. This is after working for the respondent for 17 years and rising through the ranks.

The claim before court is meritorious and the defence is a sham and comprise mere denials. Under clause 14 of the contract of employment the claimant was entitled to 6 months' notice; payment of costs of living adjustment, salary for June, 2019 was underpaid, clause 8 of the contract the was entitled to a bonus of between USD 250,000 to USD 700,000 based on the boards assessment of performance, clause 17 allowed for 6 months' salary benefit upon termination of contract, a promise for employment for 2 years, as part of the claims made based on the contract of employment.

The claimant also avers that his claim has high chances of success and application by the respondent should be dismissed with costs.

The respondent filed Further Affidavit sworn by Ms Kamau and who avers that the claimant has not disputed the fact that he has no known assets in Kenya and within the jurisdiction of the court and that he remains resident in Israel. There is a bonafides defence to justify application for security for costs. The alleged unlawful termination of employment was with due process and based on internal human resource policy and reasons for termination related to poor performance as assessed by the board. The claimed bonus payment was discretionary, the costs of living adjustment was not payable to the claimant and the settlement agreement dated 9th April, 2019 did not apply to management level employees.

Ms Kamau also avers that the respondent has met conditions to justify the grant of orders of security of costs by the claimant.

Both parties agreed and addressed the application by way of written submissions.

The respondent as the applicant submitted that Order 26 Rule 1 of the Civil Procedure Rules provides for the taking of security for costs of the suit of any defendant or third party of subsequent party who has no sufficient immovable property within the jurisdiction of the court as held in **Shah v Shah [1982] KLR** that security is normally required from plaintiffs resident outside the jurisdiction.

The claimant is not resident in Kenya as confirmed in his Memorandum of claim and on the defence filed which has high chances of success the claimant should make security for costs. There is nothing offered by the claimant as evidence of ownership of any asset or bank accounts in Kenya. In the case of **Cosmos Holiday PLC v Dhanjal Investment Limited HCCC No.112 of 2012** the court held that lack of evidence of ownership of assets is a crucial issued in determining whether to grant security for costs.

The respondent has shown a bona fides defence where employment was terminated lawfully and the claims made are addressed and not due. with a good defence with high chances of success and the claimant not having any known immovable assets within the jurisdiction of the court, an order for security for costs should be made.

The claimant submitted that the principles of access to justice under article 48 of the constitution and section 29 and 20 of the Employment and Labour Relations Court Act read together with Rule 39 of the Employment and Labour Relations Court (Procedure) rules requires parties to be heard without undue limitations and allowed expeditious resolution of disputes within the applicable rules which outline the fees to be charged in employment and labour relations claims. upon termination of employment, the respondent failed to pay the claimant his terminal dues leading to the instant suit.

Unlike the High Court, the costs awarded by this court are regulated under the court rules read together with section 12(4) of the Employment and Labour Relations Court Act. the award of costs by this court is discretionary as held in **Alfred Mutuku Muindi v Rift Valley Railways Limited [2015] eKLR**; and the case of **Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company Ltd & others [2015] eKLR**.

The claimant also submitted that an application seeking security for costs should be looked at with regard to this court's objectives as held in **Sammy Murere Biketi v Insteel Limited [2016] eKLR**. the costs claimed by the respondent are without merit and an impediment to access to justice and should be dismissed with costs.

Determination

The respondent is seeking for security for costs by the claimant on the grounds that upon termination of his employment he relocated to Israel and has no known asserts within the jurisdiction of the court and hence he should furnish security for costs before the hearing of the main suit. the computation of costs has been made based on the minimum instructions fees due on a claim of ksh.268,255,411 in accordance with the Advocates (Remuneration) (Amendment) Order, 2014.

Under the Civil Procedure Act and the Rules thereto, in civil litigation, under Order 26 Rule 1, the court may order for security for costs where it is established that a party has no 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 bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account as held in **Jayesh Hasmukh Shah v Narin Haira & another (2015) eKLR**.

However, in employment and labour relations the principal objections of the court are different pursuant to section 3 of the Employment and Labour Relations Court Act, 2011 read together with the Rules and which requires parties to be heard without undue regard to technicalities and *to facilitate the just, expeditious , efficient and proportionate resolution of disputes governed by this Act*.

In this regard, and unlike commercial disputes, employment and labour relations disputes and for connected purposes, the award of costs is regulated under the constitutive Act and under section 12(4) of the Employment and Labour Relations Court Act, 2011 and in the following terms;

4. In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

Upon hearing the parties on the merits, the award of costs is not a matter of course but discretionary based on what the court may consider to be just. This is unlike civil and commercial disputes where costs follow the suit. see Court of Appeal in **Alfred Mutuku Muindi v Rift Valley Railways (Limited) [2015] eKLR** and the finding with regard to costs that;

The couching of the provision [section 12(4) of the Employment and Labour Relations Court Act, 2011] gives the trial court discretionary powers to award costs or not. The costs in these kind of claims do not automatically follow the event unlike other civil claims. The court gave reasons for declining to award costs to the appellant, stating that he did not comply with the directions of court as to filing and service of written submissions and only did so long after the respondent had filed.

Unless the claim filed by a claimant is found to be frivolous and has no possible chance of success, the court will not order for security for costs as a hurdle such party as held in **Archybal Masinde Munialo v Metal Crowns Limited Cause 834 of 2014** where the employer asserted that the employee had been paid all his terminal dues hence a bona fides defence that they would be unable to claim for costs should the claim not succeed.

The issue in dispute herein is the alleged unlawful and unfair termination of employment, discrimination against the claimant and non-payment of terminal dues. these are matter which must be heard on the merits and before the court can consider the award for costs.

Intimately, even where there is a *bona fides* defence, in employment and labour relations disputes, section 35(4) of the Employment Act, 2007 must come to bear. The law requires that;

(4) 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.

accordingly, for reasons set out above, application dated 27th January, 2021 is hereby declined. Parties shall be heard on the merits. No orders to costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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