



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 57 OF 2020**

**HAIG ASEDA.....CLAIMANT**

**-VERSUS-**

**OCTANT ENERGY LIMITED.....1<sup>ST</sup> RESPONDENT**

**OCTANT ENERGY NORTH**

**EASTERN BLOCK 1 LIMITED.....2<sup>ND</sup> RESPONDENT**

**OCTANT ENERGY SOUTH COAST L17/18 LIMITED....3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> June, 2020)

**RULING**

The claimant filed on 03.02.2020 an application by way of the notice of motion through Obura Mbeche and Company Advocates. The application was under section 12 of the Employment and Labour Relations Court Act No.20 of 2011; rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016; and any other enabling provisions of the law. The claimant prayed for orders:

- 1) That the application be certified as extremely urgent, the need for service be dispensed with and the same be heard ex-parte in the first instance.
- 2) That pending the hearing and determination of the application *inter partes* the respondent by itself, its employees, agents and servants be restrained from disposing of and removing any of its movable and immovable property from local limits of the jurisdiction of the Court.
- 3) That pending the hearing and determination of the main suit the respondent by itself, its employees, agents and servants be restrained from disposing of and removing any of its movable and immovable property from local limits of the jurisdiction of the Court.
- 4) That the respondents be ordered to deposit in Court a security for its appearance in the suit in the sum of not less than USD 151, 511.48 plus interest and costs of the suit to secure the substratum of the applicant's substantive suit within 7 days next or to the satisfaction of the Court.
- 5) In the alternative that the respondent be ordered to deposit in a joint interest earning account in the names of the applicant's counsel and in their name, with a reputable bank a security for its appearance in the suit in the sum of not less than USD 151, 511.48 plus interest and costs of the suit to secure the substratum of the applicant's substantive suit within 7 days next or to the satisfaction of the Court.
- 6) That in alternative the Honourable Court do issue any such or further orders as it may deem just and reasonable.
- 7) That the substantive suit herein be heard on a priority basis.
- 8) That costs of the application be provided for.

The application was based on the supporting affidavit by the claimant and upon the following grounds:

- a) The claimant was employed as a Senior Accountant by the letter dated 02.08.2017 and the claimant held the position until the respondents purported to declare him redundant illegally by a letter dated 17.11.2019.
- b) Prior to the redundancy the claimant advised the respondents of the statutory redundancy procedures and terminal dues to be paid to him and his colleagues including USD 73, 511.48 for his redundancy which advise on procedure was ignored and on terminal dues was applied selectively to the claimant's detriment.
- c) The 1<sup>st</sup> respondent is a foreign company registered in Canada with offices in Jersey and the applicant is apprehensive that it may shut down its East African operations because it no longer has employees in Kenya.
- d) The respondent purported to unilaterally withdraw the redundancy letter issued to the claimant and issued a letter of summary dismissal executed by Jeremy Robert Creagh Bland of Castor Vali (Africa) Limited purporting to have the authority issued to him by the 1<sup>st</sup> respondent.
- e) The substratum of the claimant's suit stands to be defeated as it is highly likely that the respondents will not assume liability including for the claimant's terminal dues owed to him by dint of statute thereby defeating this entire processes.
- f) The respondents have movable assets in the form of two motor vehicles being a Toyota Prado registration No. KBN 672V and a Nissan ZD30 registration No. KBP 429B which it may seek to dispose of or remove from the jurisdiction of the Court – and the respondent should be restrained from doing so in the interest of justice.
- g) It is in the interest of justice that the respondent be ordered to deposit in Court a sum of not less than USD 151, 511.48 together with interest and costs of the suit to secure the substratum of the suit and, the application be allowed as prayed.

The respondents appointed Wambui Kibicho Advocate to act in the suit.

The 1<sup>st</sup> respondent filed on 21.02.2020 a notice of preliminary objection against the main claim and the application upon the following grounds:

- a) The Court lacks territorial jurisdiction over the 1<sup>st</sup> respondent.
- b) The Court lacks jurisdiction over the 1<sup>st</sup> respondent as regards the subject matter of the claim.
- c) The claimant has not demonstrated a cause of action over the 1<sup>st</sup> respondent.
- d) The claimant has not demonstrated a relationship of employment between the claimant and the 1<sup>st</sup> respondent.
- e) The respondent has not shown that there exists or existed an employment relationship between the claimant and the 1<sup>st</sup> respondent.

The 2<sup>nd</sup> respondent filed on 21.02.2020 the replying affidavit of Jeremy Martin. He stated as follows:

- a) He is a British national residing at 130 Jermny Street, London, SW1Y4UJ in the United Kingdom.
- b) He is the Regional Manager for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- c) The 2<sup>nd</sup> respondent employed the claimant effective 01.09.2017. The respondents being separate legal entities they could not have at the same time have been the claimant's employer.
- d) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are locally incorporated companies.
- e) The 2<sup>nd</sup> respondent is an oil and gas exploration company whose main objective is to find oil and gas deposits of commercial value. Its activities involve collection or purchase of relevant data from the Government of Kenya, the National Oil Company, private entities and the Company's own seismic information gathering activities. The 2<sup>nd</sup> respondent then reprocesses and reinterprets the data. It then does fund raising in preparation for drilling activities. Currently the 2<sup>nd</sup> respondent is reprocessing and reinterpreting data and which the claimant knows cannot be done in Kenya due to lack of facilities. Thus beginning February 2019 parties discussed contemplated reduction of costs and the claimant participated.
- f) The claimant also knows that the 2<sup>nd</sup> respondent is under contractual duty (as an assignee of a licence in the form of a production sharing contract with the Government of Kenya) to make quarterly and annual reports to the Government of Kenya to fulfil requirements under a work programme. As a sister company to the 3<sup>rd</sup> respondent they have incurred in Kenya about USD 10, 000, 000.00, a fact in the claimant's knowledge. The claimant knows that if the 2<sup>nd</sup> respondent fails its obligations to the Government of Kenya such as through shut down or winding up operations then the 2<sup>nd</sup> respondent risks forfeiture to the Government of the exploration licence. It is untrue and misleading for the claimant to allege that the respondents are intending to restructure their East Africa operations which may lead to a complete shutdown.

- g) The claimant knows that the 2<sup>nd</sup> respondent has to uphold financial prudence to cultivate confidence in its fund raising activities.
- h) It is misleading for the claimant to state that all directors of the company are not within the jurisdiction of the Court. By the claimant's own exhibit, one of the 2<sup>nd</sup> respondent's directors is a Kenyan and habitually resides in Kenya.
- i) The 2<sup>nd</sup> respondent intends to continue business in Kenya as and when it becomes appropriate and funds are available to do so. The claimant has not shown any efforts by the 2<sup>nd</sup> respondent to remove its assets from Kenya; he has not shown that the 2<sup>nd</sup> respondent intends to wind up to defeat the judgment herein; and no efforts by the 2<sup>nd</sup> respondent have been shown towards removal of its assets from Kenya. The orders prayed for should not be granted.
- j) Legality or otherwise of the redundancy is now moot because the 2<sup>nd</sup> respondent withdrew the redundancy notice.
- k) The claimant was given a show cause notice on record but despite an opportunity to respond he failed to reply and his employment was terminated on account of gross misconduct for misappropriating funds while in the 2<sup>nd</sup> respondent's employment.
- l) It is prejudicial to the 2<sup>nd</sup> respondent for the Court to grant the orders as prayed for.

The 3<sup>rd</sup> respondent filed on 21.02.2020 the notice of preliminary objection upon the following grounds:

- a) The claimant has not demonstrated a cause of action against the 3<sup>rd</sup> respondent.
- b) The claimant has not shown that there existed or exists an employment relationship between the claimant and the 3<sup>rd</sup> respondent.

The parties filed their respective submissions. The Court has considered the parties' respective cases and all the material on record and makes findings as follows:

1) While alleging and submitting that all the respondents employed him, the claimant has failed to offer explanation and evidence about the particulars of that allegation. The 2<sup>nd</sup> respondent has admitted that it was the only employer of the claimant and taking into account the material on record there is no reason to doubt that evidence as given in the replying affidavit of Jeremy Martin. The Court finds that the claimant was employed by the 2<sup>nd</sup> respondent as per the letter dated 02.08.2017 with effect from 01.09.2017 as a Senior Accountant and signed by Jeremy Martin and the claimant on 15.08.2017. The agreed gross monthly pay was Kshs. 645,000.00. The Court further finds that 1<sup>st</sup> and 3<sup>rd</sup> respondents were not necessary parties to the suit and as per their preliminary objections are liable to being expunged from the proceedings. While making that finding the Court considers that the pay slips exhibited for the claimant show the 2<sup>nd</sup> respondent's stamp and there is no reason to doubt the 2<sup>nd</sup> respondent employed and paid the claimant.

2) The claimant's prayer is in the nature that the 2<sup>nd</sup> respondent, the employer, provides security for satisfaction of the judgment sum should the claimant be successful in the main suit. The guiding principles in such applications are provided for under Order 39 of the Civil Procedure Rules. Under Order 39 Rule 5 of the Civil Procedure Rules, where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with 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; or (b) is about to remove the whole or any part of his property from the local limits of jurisdiction of the court, the court may direct the defendant within a time to be fixed by it either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the court when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. It has been submitted for the claimant and rightly so, that the provision applies. As submitted for the respondents the claimant has not by evidence shown that the 2<sup>nd</sup> respondent, the employer, is acting to dispose of the whole or any part of its property or is about to remove the whole or any part of his property from the local limits of jurisdiction of the court. There was no evidence that the motor vehicles referred to in the application were about to be disposed.

3) It is submitted for the claimant that under Order 39 rule 1(b) the Court may issue a warrant to arrest the defendant and bring him before court to show cause why he should not furnish security for his appearance if it is shown to the court that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. It is submitted that the claimant must demonstrate that that the defendant is about to leave Kenya and there may be considerable delay or obstruction in case of execution of a decree. It is further submitted that it is clear that the respondents are preparing to leave Kenya as all employees have been terminated and lease agreements as well terminated. As per the replying affidavit it is true that the 2<sup>nd</sup> respondent will slow down its operations in Kenya. However, as submitted for the respondents, by the claimant's own exhibit HA1, the 2<sup>nd</sup> respondent is a company duly registered in Kenya and with a Kenyan Director one Lancelot Christison Benjamin Sassoon. In view of that evidence and within the Civil Procedure Rules on execution of decrees, it should be possible to readily execute any judgment in favour of the claimant against the 2<sup>nd</sup> respondent as may be the outcome of the present suit. In any event, the Court finds that the slowing down of the 2<sup>nd</sup> respondent's operations in Kenya does not show that the 2<sup>nd</sup> respondent is about to leave Kenya especially in view of the elaborate contractual arrangements between the 2<sup>nd</sup> respondent and the Government of Kenya set out in the replying affidavit and which so far have not been disputed.

4) The Court therefore finds that the claimant has failed to establish a justification for the prayers made and the preliminary objections are upheld to the extent that there exists no established contract of service between the claimant and the 1<sup>st</sup> as well as the 3<sup>rd</sup> respondent who are liable to being struck out as parties to the suit.

In conclusion the applications and the preliminary objections are hereby determined with orders:

a) The application is dismissed with costs in the cause.

b) The 1<sup>st</sup> and 3<sup>rd</sup> respondents are struck out as parties to the suit and an amended statement of claim be filed in 14 days from today and the statement of response be thereafter filed and served in 14 days from the date of the service by the claimant.

c) Parties to take steps for the expeditious hearing and determination of the suit.

**Signed, dated and delivered in court at Nairobi this Friday, 26<sup>th</sup> June, 2020.**

**BYRAM ONGAYA**

**JUDGE**