



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 737 OF 2019

GEOFFREY NGANGA TAMBARA.....CLAIMANT

V

RADIO FREQUENCY SYSTEMS LTD.....1ST RESPONDENT

SIMON HORNER.....2ND RESPONDENT

MICHEAL JOHN MWAURA.....3RD RESPONDENT

RULING NO. 2

1. On 5 June 2020, the Court delivered a Ruling relating to the legal representation of the Respondents thus paving way for the Court do dispose of the Motion dated 9 December 2019 by Geoffrey Nganga Tambara (applicant) seeking orders

1. Spent.

2. Spent.

3. Spent.

4. **THAT** pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders freezing account number 0170296936184 held by the 1st Respondent at Equity Bank Limited, Community Branch Nairobi.

5. Spent.

6. **THAT** in the alternative to 3 and 4 above and without prejudice to the foregoing, this Honourable Court be pleased to order the 1st, 2nd and 3rd Respondents jointly and severally do pay into a joint interest-earning account of the parties advocates the sum of Kshs 18,810,000/- in respect of the sums claimed by the Respondent (sic) against the Respondents.

7. Any other relief that the Court deems fit in the interest of justice.

8. **THAT** costs of this application be in the cause.

2. The 2nd Respondent filed on 24 December 2019 a replying affidavit on his and the 2nd Respondent's behalf in opposition to the Motion.

3. The replying affidavit prompted the applicant to file a supplementary affidavit on 13 January 2020.

4. Despite the Court directions on 16 January 2020, the 3rd Respondent did not file a response to the Motion (the affidavit filed related to the question of representation only).

5. Pursuant to further Court orders, the applicant filed his submissions on 29 September 2020 and the 1st and 2nd Respondents on 8 October 2020.

6. To support the Motion, the applicant asserted that he was offered employment by the Respondents as a General Manager on 11 January

2018 at a gross monthly salary of Kshs 570,000/- but that due to disagreements between the 2nd and 3rd Respondents, directors of the 1st Respondent, he was never paid the agreed remuneration up to the time he moved to Court alleging breach of contract.

7. The applicant also asserted that because of the disagreements, the 1st Respondent ceased to operate or maintain a physical office in the country and that save for bank account number 0170296936184 held at Equity Bank Kenya Ltd, the Respondents had no other known assets with the attendant risk that were he to succeed in the Cause, any decree would be rendered worthless or nugatory.

8. Citing *DCF Engineering Ltd v Johari Ltd & Ar* (2013) eKLR, the applicant submitted that the test for granting a freezing order was the establishment of an arguable case, availability of Respondent's assets within the jurisdiction, a real risk of removal of the assets from the jurisdiction or danger of dissipation of the assets and balance of convenience.

9. And urging the alternative prayer for security for costs, the applicant drew the attention of the Court to *Aggrey Shivona v Standard Group Plc* (2020) eKLR.

10. The applicant contended that he had an arguable case with high chances of success and that the Respondents had no other known assets in the country.

11. In resisting the Motion, the 2nd Respondent denied having participated in the employment of the applicant as he was out of the country at the material time and that the applicant's alleged contract was subject to probation and there was no evidence he had been confirmed.

12. According to these Respondents, the Cause before Court was a fraud orchestrated between the applicant and the 3rd Respondent.

13. On the merit of the freezing order, it was asserted that the named bank account had no funds which could be frozen and therefore any such order would be in vain.

14. It was deposed to in the replying affidavit that the funds in the account had been subjected to transfer by dint of Court order in Nairobi ELRC No. 567 of 2019, *Nehemiah Kiprop Kiplagat & 18 Ors v Radio Frequency Systems Ltd* and that the applicant was privy to the Court order therein.

15. Submitting on why the Court should not grant any of the orders sought and citing *Awo Shariff Mohamed t/a Asmi Service Station v Caltex Oil Kenya Ltd* (2008) eKLR, the Respondents contended that the applicant had not satisfied the test as outlined in the *DCF* case and that the Court had not yet made a finding on whether the applicant was an employee of the 1st Respondent.

16. On the question of security, it was submitted that the threshold was a high one (*Shiva Enterprises Ltd v Jivaykumar Tulsidas Patel t/a Hytech Investments* (2006) eKLR).

17. The Court has considered the Motion, affidavits and submissions.

18. There is un rebutted evidence that the funds in the account sought to be secured are the subject of Court orders in Nairobi Cause No. 567 of 2019, *Nehemiah Kiprop Kiplagat & 18 Ors v Radio Frequency Systems Ltd* and, that the applicant is privy to the Court orders. Any such funds may therefore not be available for a further freezing order.

19. There is also a serious dispute as to whether there existed a valid employment relationship between the applicant and the 1st Respondent.

20. In fact, the High Court in Nairobi Misc Civil Application No. 393 of 2017, *Simon Horner v Michael John Mwaura & Ors* made a finding that the 3rd Respondent had been involved in forgery of the 1st Respondent's records.

21. In light of these facts, the Court is of the view that this is not a suitable case to grant any of the orders sought.

22. The Motion is dismissed with an order that costs be in the cause.

23. The parties should now move to progress the Cause to be heard on a priority basis.

Delivered through Microsoft teams/email, dated and signed in Kisumu on this 18th day of November 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Andiwo instructed by O & M Law Advocates

For 1st – 2nd Respondents Mr. Midenga instructed by Midenga & Co. Advocates

For 3rd Respondent Mr. Cheloti instructed by Cheloti Karanja Advocates

Court Assistant Judy Maina