



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

CAUSE NO. 805 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

LELAND ISANDULAH SALANO.....CLAIMANT

VERSUS

INTERCONTINENTAL HOTEL.....RESPONDENT

RULING

Vide an application dated 30th October 2020 filed under certificate of urgency, the claimant seeks the following orders against the Respondent: -

1. Spent.
2. That the Respondent be directed to deposit the sum of Kshs.5 Million as security for the Claimant/Applicant's claim to cushion the anticipated Judgment by this Court when the matter is determined to the satisfaction of this Court.
3. That the costs of this application be paid for by the Respondent.

The grounds upon which the application is premised are that –

- a. That the Claimant/Applicant has reason to believe that the *Respondent is in the process of leaving the jurisdiction of this Court.*
- b. That the Respondent has shut down its operations in the Country and has declared its employees redundant.
- c. That it is only fair and just that the orders sought be granted.

The application is supported by the affidavit of LELAND I. SALANO, the claimant in which he deposes that this suit has been heard and finalised. That he has filed his submissions but the Respondent is yet to file submissions since 6th May 2020 when it was expected to have filed.

The claimant deposes that he received information from his former co-workers that the Respondent was in the process of declaring all employees redundant and closing its operations in Kenya. That should his claim be successful, the Respondent will not be in a position to pay his costs as it is about to leave the jurisdiction of the court.

In response to the application, the Respondent filed both grounds of opposition and replying affidavit of OLIVER GEYER, the Respondent's General Manager.

In the grounds of opposition, the Respondent rises the following grounds: -

- a. The Application has not met the legal threshold for the grant *of the Orders Sought therein.*
- b. The Order sought by the Claimant cannot be granted before a Notice to Show Cause is issued. As the Claimant has not sought the issuance of a Notice to Show Cause, the Orders sought herein cannot be granted. The Court of Appeal in the case of **David W.Ndirangu v Adijah Hassan Abdalla [1980] eKLR** held as follows:

"An order of attachment before judgment can only be made after notice to the defendant. In this case no notice was given, although the defendant had entered an appearance in the suit.

"This purported attachment was a nullity, as property cannot be ordered to be attachment before judgment at the instance of a plaintiff unless the defendant is given an opportunity to show cause why he should not furnish security, or fails to show cause, why he should furnish security, or fails to show cause, or to furnish the required security,"

c. Paragraph 5 of the Supporting Affidavit of Leland Selano should *be struck out for failing to disclose the source of information set out therein.*

d. The Claimant has not alleged in his Application and Supporting Affidavit that he has a bona fide case which is a mandatory requirement for the grant of the orders sought.

e. The Claimant does not have a bona fide case against the Respondent herein and as such the Orders sought herein are not granted.

f. The Claimant has not presented sufficient factual grounds for the grant of the Orders Sought. It is trite that the mere cessation of business is not synonymous to winding up. This court in the case of **Stephen Gachengo v Solenta Aviation Kenya Limited [2018] eKLR** stated as follows in this regard:

"Ceasing business and winding up are not synonymous. The fact that a company ceases business does not mean that the company is about to be wound up. The procedure for winding up of limited companies like the respondent is elaborately provided for in law and any person who alleges that a company is about to wind up must demonstrate how that conclusion has been reached by submitting proof to the court of the steps that have been taken in the furtherance of the intention to wind up."

g. The Applicant has not alleged, or provided any evidence of, intent, on the part of the Respondent, to delay or obstruct the enforcement of any decree that may be issued herein against it. In the case of **Kuria Kanyoro T/A Amigos Bar & Restaurant-Vs-Francis Kinuthia Nderu & Others [1985] 2 K.L.R. 126**, quoted with approval in the case of **John Kipkemboi Sum v Lavington Security Guards Limited [1998] eKLR** the Court of Appeal held as follows:

"that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by orders 38 rule 5 of the Civil Procedure Rules, namely, that the Defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."

In the replying affidavit, Mr. Geyer deposes that the application is not merited as it does not meet the threshold for granting of the orders sought. He deposes that contrary to the depositions of the claimant, the suit was not filed in 2014 but on 14th May 2012. Further that the suit has not been closed. That rather, the claimant closed his case but the Respondent's witness was stood down pending cross examination.

Mr. Geyer seeks the striking out of paragraph 5 of the supporting affidavit for not disclosing the source of information.

The affiant states that ceasing operations is not synonymous with winding up and that the claimant has not adduced evidence to demonstrate that the Respondent had made any attempts to remove its assets from the jurisdiction of the court with the sole intention of defeating execution of any decree that may be obtained by the claimant in this suit, or any intention by the Respondent to evade settlement of any decree that may be issued by this court against it.

Mr. Geyer deposes that to the contrary, the Respondent had recently made efforts to settle the claim herein as is reflected in letters annexed to his affidavit as exhibit "OG1" "OG2" and "OG3" respectively.

That the Respondent is a reputable international brand which still carries on operations across the globe and as such the Claimant would have available to it the benefit of the provisions of the **Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters**, to which Kenya is a signatory, in enforcing any decree in this matter which may go unsatisfied locally.

The affiant avers that the Claimant has not provided any justification for the demand for deposit of the sum of KShs.5,000,000 and, there is no justification for the said demand for the following reasons:

a. In the Statement of Claim, the Claimant sought payment of Special Damages as set out under part D (Paragraph 15) of the Statement of Claim. At the hearing, when he took the stand, the Claimant abandoned the said prayer which fact can be verified from the record;

b. The Claimant had further sought the payment of his salary for the entire period the Claimant has been out of employment since termination. This claim has no basis in law and has no chances of success as the Court is only mandated to award damages up to a maximum of 12 months in the event of a finding of unfair termination;

c. The Claimant also sought payment of a maximum of 12 months' salary as damages for wrongful termination which, based on his basic salary and house allowance total of KShs.143,716, would amount to a maximum of KShs.1,724,592.

d. The Claimant further sought, in the Statement of Claim, as an ALTERNATIVE prayer to the foregoing remedies, the payment of

all lawful terminal dues comprising Notice Pay, Leave due Allowance, Salary for days worked and Service Pay for the Claimant. The Claimant however admitted on cross-examination, and the Respondent also produced evidence to demonstrate, that these dues have already been paid to the Claimant in full.

That the claimant having confirmed in his testimony that he had been paid his terminal dues, he is not entitled to grant of the main prayers in the claim including the prayer for payment of damages for wrongful termination, and that a party cannot benefit from both the main and alternative prayers in a suit.

That the claimant does not have a *bona fide* case which is a mandatory requirement before he can be granted orders of attachment before judgment.

The claimant filed a supplementary affidavit sworn on 13th November 2020 in which he deposes that the Respondent has not denied that it is winding up and/or closing its operations in Kenya. He states that the reference to 2014 as the date of filing suit in his supporting affidavit was a typographical error.

On the source of exhibits attached to his supporting affidavit the claimant states that he downloaded the same from the internet on the website of **Business Daily** and **Trends in Africa** which information is in the public knowledge. He referred to his exhibits LIS-1 and LIS-2 which are communications proving that the Respondent was ceasing operations in Kenya. He pointed out that the Respondent had conceded that the only option he had should his claim succeed was to enforce the decree in a foreign court, thus there is risk that his decree may not be satisfied locally, a good reason for deposit of security.

The claimant deposes that his application is thus merited.

The application was disposed of by way of written submissions.

Claimant's Submissions

The Claimant submits that Order 39 of the Civil Procedure Rules provides for arrest and attachment before judgment. That the claimant has a prima facie case with a probability of success and that the Respondent has declared its intention to leave jurisdiction of the court. The claimant submits that it has demonstrated that the Respondent is in the process of winding up its operations in Kenya. That the claimant is likely to suffer irreparable harm as the Respondent's assets are unknown to the Claimant.

The claimant relied on the decision in **Monica Imali Muliango v Catherine Masaka ELRC Cause No. 989 of 2018** where the court held that: -

“In an application for the deposit of security for costs, the Court noted that the Respondent had not denied that she is in the country as an employee and that she was serving on a Contract with UNDP for one year but she did not give any indication that the contract may be reviewed. The Court allowed the application and directed the Respondent to deposit Kshs.323,181.51 in Court as security for Judgment that the Court may ultimately enter in favour of the Claimant.”

Respondent's Submissions

The respondent submits that under Rule 39 of the Civil Procedure Rules no arrest before judgment can be ordered without a notice to show cause first being issued to the Respondent. It relied on the decision in **David W. Ndirangti v Adijah Hassan Abdalla [1980] eKLR** where the Court of Appeal held as follows: -

“This purported attachment was a nullity, as property cannot be ordered to be attachment before judgment at the instance of a plaintiff unless the defendant is given an opportunity to show cause why he should not furnish security, or fails to show cause, why he should furnish security, or fails to show cause, or to furnish the required security,”

That by failing to issue the notice to show cause, the claimant's application is fatally defective as granting the orders sought would amount to depriving the Respondent of its right to due process.

It is further the Respondent's submission that the claimant does not have a *bona fide* case. That the Claimant having confirmed on the stand that his terminal dues have been paid to him in full, he is not entitled to the grant of the main prayers including the prayer for payment of damages for wrongful termination since it is trite law that a party cannot have the benefit of both the main and alternative prayers in a suit.

The Respondent submits that the Claimant has not set out a *bona fide* case against the Respondent and the present application has no merit.

The Respondent's third ground of opposition to the application is that the claimant has not presented sufficient factual grounds for the grant of the orders sought. That the only allegation presented by the Claimant in his Application herein is that, based on media reports, the Respondent has ceased operations and has declared all its employees redundant.

The Respondent submits that the mere cessation of business is not a ground for the grant of the order of attachment before judgment which has been sought by the Claimant. That cessation of business is not synonymous to winding up. That in the case of **Stephen Gachengo v Solenta Aviation Kenya Limited [2018] eKLR** the court held as follows in this regard:

"Ceasing business and winding up are not synonymous. The fact that a company ceases business does not mean that the company is

about to be wound up. The procedure for winding up of limited companies like the respondent is elaborately provided for in law and any person who alleges that a company is about to wind up must demonstrate how that conclusion has been reached by submitting proof to the court of the steps that have been taken in the furtherance of the intention to wind up."

That in the case of **Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumti Limited [2016] eKLR** the court stated as follows:

"I also agree with the submissions by Mr. Omondi that the Claimant has not proved that the Respondent has either absconded, or intends to remove its property out of the jurisdiction of this court. As submitted for the Respondent, it is a juristic person and has not started any process for winding up or become insolvent. Tire Claimant has further not proved that the Respondent will be incapable of complying with any decree that may be issued by this court should his claim be successful."

The Respondent submits that the Claimant has failed to demonstrate through any evidence, that: -

1. The Company is being wound up; or that
2. The Respondent will be incapable of complying with any decree that may be issued by this Court should the Claim be successful.

The Respondent submits that the authority of **Monica Imali Muliango v Catherine Masaka ELRC Cause No. 989 of 2018** is clearly distinguishable from the circumstances herein for the reason that in that case the Respondent was an individual, while in this case the Respondent is a juristic person, which attracts different considerations.

The Respondent further submits that no evidence of intent to delay or obstruct the enforcement of any decree that may be issued herein has been adduced by the claimant.

The Respondent submits that in the case of **Kuria Kanyoro T/A Amigos Bar & Restaurant v Francis Kinuthia Nderu & Others [1985] 2 K.L.R. 126**, quoted with approval in the case of **John Kipkemboi Sum v Lovington Security Guards Limited [1998] eKLR** the Court of Appeal held as follows:

"that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by orders 38 rule 5 of the Civil Procedure Rules, namely, that the Defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."

The Respondent submits that the Claimant has failed to demonstrate any of the above elements, including the following:

1. The Claimant has failed to identify what property of the Respondent is in the process of being disposed or removed from the jurisdiction of the Court; or
2. That the removal or disposition of such property, if proven, is being done with the intent of obstructing or delaying the settlement of any decree that may be issued herein.

The Respondent submits that there is nothing in its conduct that can be said to be aimed at frustrating any decree that may be issued herein. That indeed, as demonstrated in the Affidavit of Oliver Geyer, the Respondent even opened good faith negotiations with the Claimant, seeking an amicable settlement of the matter.

The Respondent submits that it is an international brand with operations all across the world. That even if the Respondent was removing its assets from the jurisdiction of the Court, the Claimant would still have available the provisions of **the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters**, to which Kenya is a signatory, in enforcing any decree in this matter which may go unsatisfied locally.

Finally, the Respondent submits that the Claimant has sought in his application the deposit of Kshs.5,000,000 without providing any basis for how this amount was arrived at.

The Respondent submits that in the event this Court is inclined to grant the Order for deposit of funds, the amount would not be Kshs.5,000,000. Instead, the amount would be no more than Kshs.1,724,592 as demonstrated under Paragraph 11 of the Replying Affidavit of Oliver Geyer.

The Respondent prays that the application be dismissed.

Determination

I have considered the application, the grounds of opposition and replying affidavit of the Respondent, and the submissions by parties.

It is not in doubt that the Respondent has started the process of winding up its operations in Kenya. The only issue for determination is therefore whether the Claimant meets the threshold for grant of the orders sought.

Order 39 Rule 1 of the Civil Procedure Rules provides for Arrest and Attachment before judgment as follows –

[Order 39, rule 1.] Where defendant may be called upon to furnish security for appearance.

1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

a. that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

i. has absconded or left the local limits of the jurisdiction of the court; or

ii. is about to abscond or leave the local limits of the jurisdiction of the court; or

iii. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof;

or

b. 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, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

Order 39 Rule (1) is only available for an Applicant who proves that the Defendant has committed any of the acts set out in sub rule (1)(i) to (iv) with the intention to delay the plaintiff, avoid any process of the court or abscond or delay execution of a decree.

The letter relied upon by the Claimant/Applicant is a notification of redundancy to one of the respondent's employees and is reproduced below –

“3rd August 2020

...

Delivery by Email

Dear...

Re: Notice of Intention to Declare a Redundancy

We refer to the above matter.

We write to inform you that InterContinental Hotels Corporation Limited (Kenya Branch) ('IHCL') is, for operational reasons, considering a permanent closure of the InterContinental Nairobi (the 'Hotel') and winding up all its operations in the Republic of Kenya. As a consequence of such intended winding up, all employment positions within the Hotel, including your position of would become redundant.

Therefore, in line with section 40(1)(b) of the Employment Act, 2007 we hereby give you forty-five (45) days' notice of the Hotel's intention to declare your position redundant.

Please note that we have set up communication channels to receive and address any concerns you may have in relation to the redundancy process. Please feel free to ask or share with us any questions, comments or suggestions you may have.

Please sign the acknowledgement below and return to us a copy of this letter for our records.

Yours faithfully,

Intercontinental Hotels Corporations Limited

SIGNED

Name: Oliver Geyer, its appointed Attorney”

There is no evidence in the letter that the Respondent intends to remove its assets on to avoid or delay execution should the claimant be successful. It is further evident from the matters deposed to in the affidavit of the Claimant/Applicant sworn on 13th November 2020 that after the date of the notice of redundancy, the letter above, the Respondent has approached the claimant and the claimant engaged the Respondent with a view to resolving the instant suit out of court. In the letter dated 19th October 2020 from Counsel for the Claimant addressed to Counsel for the Respondent, the claimant's Counsel wrote as follows –

19th Oct., 2020

M/S Walker Kontos Advocates

Hakika House, Bishops Road

P. O. Box 60680 – 00200

NAIROBI

ATT: MR. HENRY OMINO

Dear Sir

RE: ELRC CAUSE NO. 805 OF 2012

LALAND I. SALAND V INTERCONTINENTAL HOTEL

Your letter of 10th October, 2020 has been received and contents noted.

Whereas our Client appreciates your Client's offer the same is on the very low side.

We have the following offer to make us a final offer and basis for a possible settlement: -

- | | |
|--|------------------------|
| 1. 12 months' salary | Kshs.2,180,592.00 |
| 2. Party & Party Costs (inclusive) | <u>Kshs.250,000.00</u> |
| TOTAL Kshs.2,430,592.00 | |
| 3. Consider some interest on the above sum | Kshs.500,000.00 |
| TOTAL KSHS.2.930.592.00 | |

We trust that the foregoing is a reasonable basis for settlement.

Yours Faithfully

J. A. GUSERWA & COMPANY ADVOCATES"

This does not portray a person who intends to escape the jurisdiction of the court, with a view to frustrating the realisation of the claim by the claimant.

In the case of **Monica Imali Muliango v Catherine Masaka (supra)** the court observed as follows –

1. "By a motion dated 18th June, 2018 the claimant/applicant sought orders among others that a warrant of arrest be issued against the respondent to bring her before the court to show cause why she should not furnish security for her appearance. Further pending the hearing and determination of the application the respondent be ordered to deposit in court the sum of Kshs.323,138/51 being sufficient security deposit to answer the claim against her in the matter.

2. The application was brought on the basis that the respondent verbally terminated the claimant's services on 5th January, 2018 with immediate effect and offered her Kshs.14,000/=. That the said termination did not talk of payment of any notice or other terminal benefits due to the claimant. The claimant/applicant was apprehensive that the respondent who is a Zimbabwean expatriate shall run away from the jurisdiction of the court without paying the claimant's entitlement.

...

11. The respondent has however not denied that she is in the country as an employee and that she was serving on contract with UNDP for one year. She has not given any indication that the contract may be renewed. In the circumstances the claimant has

reasonable cause to fear that she might be outside the jurisdiction of the court when the matter is determined and if in favour of the claimant execution would be difficult.

12. In the circumstances, the court hereby orders that the respondent deposits the sum of Kshs.323,138.51 in court as security for judgement that this court may ultimately enter in favour of the claimant.”

In above case there was real likelihood of the Respondent leaving the jurisdiction of the court which would make it almost impossible for the claimant to execute any decree that may have been passed in her favour against the Respondent. In the instant case unlike the case of **Monica Imali Muliango**, the Respondent is not an individual, but a corporate that operates internationally. Further, the Respondent has engaged the Claimant with a view to settlement of his claim after the incident that the claimant cites in support of his application, meaning that it did so before the claimant even became aware of its intention to cease its operations in Kenya.

As was observed in the case of **Stephen Gachengo v Solenta Aviation Kenya Limited (supra)** –

"Ceasing business and winding up are not synonymous. The fact that a company ceases business does not mean that the company is about to be wound up. The procedure for winding up of limited companies like the respondent is elaborately provided for in law and any person who alleges that a company is about to wind up must demonstrate how that conclusion has been reached by submitting proof to the court of the steps that have been taken in the furtherance of the intention to wind up."

Again in the case of **Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumti Limited (supra)** this court observed as follows:

"I also agree with the submissions by Mr. Omondi that the Claimant has not proved that the Respondent has either absconded, or intends to remove its property out of the jurisdiction of this court. As submitted for the Respondent, it is a juristic person and has not started any process for winding up or become insolvent. Tire Claimant has further not proved that the Respondent will be incapable of complying with any decree that may be issued by this court should his claim be successful."

It is clear from the cases cited above that the relief of execution before judgment is exercised only where the Applicant has proved the mischief as set out in Order 39(1)(a) of the Civil Procedure Rules, that is, where the Respondent intends to frustrate the realisation of a decree that may be passed against it by either removing himself or itself from the jurisdiction of the court, or dissipating its assets to ensure there is nothing to be attached in satisfaction of any decree that may be passed against it.

As was stated in the case of **Kuria Kanyoro T/A Amigos Bar and Restaurant**, there must be proof that the Respondent intends to obstruct or delay the execution of any decree that may be passed against him/it. In that case the court observed as follows –

"that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by orders 38 rule 5 of the Civil Procedure Rules, namely, that the Defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."

In this case, I find that the Claimant has not established that the Respondent intends to either dissipate its assets or remove itself from the jurisdiction of this court with the intention to obstruct the claimant from executing his decree as may be passed by this court.

I thus find that the Claimant has not satisfied the threshold for grant of the orders sought. The result is that the application fails. The same is accordingly dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF DECEMBER 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st 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.

MAUREEN ONYANGO

JUDGE