



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NUMBER 1458 OF 2017

HUMPHREY GATONGA NGUMBURU.....CLAIMANTS

VERSUS

WESTLANDS GREEN GROCERS LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion dated 29th September, 2017 the claimant sought orders among others that:

a) That pending **the hearing and or determination of this Application inter-partes, an interlocutory injunction be and is hereby issued restraining the Respondent, its servants, advocates, employees and/or agents from alienating, disposing, dealing with or selling tis property and assets.**

b) That the Respondent be ordered to deposit the sum of Kshs. 1,500,000/- in court or such sum in this Honourable Court may deem fit as security for its appearance at any time when called upon while the suit is pending and until satisfaction of the decree that maybe passed against it in this suit.

c) That in the alternative to prayer 3 above this Honourable Court be pleased to order the Respondent within a time to be fixed by the Court to show cause why it should not furnish security by depositing in Court the sum of Kshs. 1,500,000/- or such sum therefore as may be sufficient to satisfy the decree that may be passed against it in this suit.

d) That for the Court to satisfy itself to the sufficiency of the security, the Respondent through the Managing Director, Mr. Jaspal Singh Arora be ordered to appear in Court within a time to be fixed by the Court to show cause why he should not furnish the security ordered by the Court.

e) That in default of compliance with prayer 5 above, the said Director of the Respondent be arrested and committed to civil jail for such time as the court may direct.

f) That this Honourable Court be pleased to grant an urgent hearing date of this suit.

g) That the costs of this application be provided for.

2. The application was supported by the affidavit of the claimant who depend among others that:

a) That he was employed by the Respondent on 1st March 1995 and I have worked in various positions the latest being a Market Supervisor/Chief Shop Steward at a gross monthly salary of Kshs. 19,415/- per month.

b) That by a letter dated 5th October, 2016 the Respondent unlawfully terminated his employment with effect from 31st December 2016.

c) That the Respondent re-employed him on 3rd January, 2017. I reported back to work and continued working until 8th April 2017 when the Respondent in flagrant breach of statutory and contractual obligations and fair labour practices, unlawfully, maliciously and summarily dismissed him again.

d) That by a letter backdated to 13th April 2017 addressed to his former advocates, the Respondent purported to have withdrawn the termination letter it had issued to him and reinstated him to work with immediate effect but before reinstating him the Respondent instructed him to write a letter informing it that he had withdrawn the matter from his previous advocates and he was ready to resume duty which instructions he carried out by a letter dated 8th May, 2017.

e) That on 8th May 2017 he went to the Respondent's shop with a view to resuming his duties but the Respondent locked him out and did not allow him to resume his duties. This compelled him to report the matter to Kenya Union of Commercial Food and Allied Workers.

f) That on 7th June 2017 a meeting was held at the Respondent's business premises between himself, Mr. Jaspal Arora the Respondent's Director and Benson Kyalo and James Ngare, two union representatives where the Respondent declined to allow him to resume his duties and verbally told him to proceed on leave without paying him his salary arrears for the month of April and May 2017.

g) That the Respondent is technically insolvent as can be confirmed by a letter dated 18th June, 2015 from the Respondent to the Secretary General, Kenya Union of Commercial Food and Allied Workers, dated 28th November, 2016 from the Respondent to the Ministry of East African Community, Labour and Social Protection and a letter dated 5th June, 2017 by the same Respondent.

h) That he knows of his own knowledge that the respondent is in the process of selling its shares and assists to an unknown person/entity and the said sale is due to be completed soon.

i) That the claimant is apprehensive and have good reason to believe that should the Respondent sell its assets, he will be obstructed or delayed in the execution of any decree that may be passed against it in this suit.

j) That in view of the matters stated at paragraphs 11,12 and 13 above, he is advised by his advocates on record which advice he verily believes to be correct and that he will be unable to enforce any decree that might be passed against the Respondent in this suit and he will be unable to recover any costs.

3. By an application dated 8th November, 2017 the respondent sought the suspension or vacation of the ex parte court order issued by Honourable Justice Wa Makau requiring the respondent to deposit Kshs. 1,500,000/- as security from any decretal sum to be awarded as per the application dated 29th Septemebr, 2017. The application was supported by the affidavit of one Jaspal Singh Arora who deponed on the main that:

a) That he is advised by the Respondent's advocate on record, which advice I verily believe to be correct that the Claimant is guilty of material non-disclosure and misrepresentation and as such he is not entitled to this Honourable court's discretion for failing to disclose that the issue of selling the company's assets and or winding up has since been reversed as the performance of the company has improved since the year 2015 when it was about to be wound up. Annexed hereto and marked JSA 1 is a copy of the lease renewal licence to confirm the company's continuity.

b) That the Claimant made false misrepresentation by indicating that the assets of the company have and or are being sold with no tangible proof or at all.

c) That the Claimant failed to disclose that he was summarily dismissed for desertion of duty and fraudulent non-payment of clients for goods received.

d) That even before the termination, the Claimant failed to attend the reconciliation meetings set up by the Union and the conciliator, Ministry of East African Community, Labour and Social Protection. Annexed hereto and marked JSA 3 are letters dated 17th October, 2017 and 11th October, 2017 confirming this.

4. On 14th of November, 2017 in the presence of Counsel for both parties, the court directed that the respondent's application dated 8th November, 2017 and the supporting affidavit be treated as a response to the claimants' application dated 12th October, 2017 and that parties do file and exchange submission on the applications dated 12th October, 2017.

5. In support of the application and urging the confirmation of orders issued by Honourable Justice Wa Makau, Mr. Kipngeno submitted that there was no evidence to show the learned judge exercised his discretion wrongly. In issuing an order for security for costs, case law revealed that the court ought to be guided by relevant facts which included good prospects of success, bona fide claim, insolvency or inability to pay costs or any other relevant circumstance or conduct of the plaintiff or defendant.

6. According to Counsel, the claimant had proved through annexures to the application that the respondent would not be able to satisfy the decree passed against it since it had initiated the process of selling off its assets. Further the attached correspondence revealed that the respondent had cashflow problems and was intending to close the business.

7. In reaction to the respondents' opposition to the orders sought, counsel submitted that the most prudent action by the respondent would have been to file an affidavit of means to convince the court that it shall be in a position to satisfy the decree that shall be passed against it.

8. Concerning the sum of Ksh. 1,400,000/- as security for costs. Counsel submitted this was a matter for the court's discretion and should be commensurate with the subject matter of the proceedings. In this respect counsel relied on the case of Clearspan Construction (A) Limited v East Africa Gas company Ltd.

9. According to counsel, the security sought was commensurate with the claimant's claim and was not unreasonable or excessive in the circumstances.

10. Mr. Mandala for the respondent on the other hand submitted that whenever the court is faced with an application for security for costs it must put into consideration a number of factors. The applicant has the obligation to tender sufficient evidence and to demonstrate to the court that the respondent cannot by all means possible if successful, pay the decretal sum. According to counsel, an order of security for costs is an impediment to access to justice and the right to fair hearing as the application was allowed at an ex parte stage.

11. The claimant herein pleaded that he was employed by the respondent on 1st March, 1995 and worked in various positions the last one being as Market Supervisor and Chief Shop Steward.

12. He was on 5th October, 2016 terminated from respondent's employment but was later reemployed on 3rd January, 2017 and worked until 8th April 2017 when the respondent summarily dismissed him.

13. In his itemized claim, the claimant claims among others severance pay for 22 years, three months' salary in lieu of notice, unpaid travelling allowance, unpaid leave allowance and unpaid gratuity. These heads of claim form the bulk of the sum of money the claimant wants ordered to be deposited in court as security.

14. The claimant's payslip attached at page 17 of the bundle of documents filed shows that deductions were made from his salary on account of NSSF. The claim for service pay is therefore unsustainable in any event the claimant has described the payment as severance pay which is only payable in cases of redundancy. Further the claimant was a member of a Union and Chief Shop Steward, it seems odd therefore that he could have served the respondent this long without being paid leave and travelling allowances. The claimant has further not demonstrated either by letter of appointment or CBA that he was entitled to three months notice of termination.

15. An order for security for costs and decretal sum is a very drastic order and ought to be made sparingly and in clear and obvious cases. Where there are inconsistencies in the claim and contested facts the order ought not to be made.

16. The claimant has averred that the respondent is in the process of selling its business, which fact the respondent has denied. However correspondence attached to the claimant's memorandum of claim suggest that indeed the respondent was facing cashflow problems. The respondent further conceded that there was arrears of salary.

17. The claimant however did not produce any evidence to show that the respondent was about to transfer the business to another party.

18. Insolvency is a normal phenomenon in a business life cycle. It is evidence that the business is not in the best financial health. The business may rise up and get back to good financial health or degenerate into insolvency. The process is thereafter governed by the Insolvency laws. Employee claims such as salary arrears are not secured debts. They are however preferential debts which will be settled on priority basis once the secured creditors are paid. To order a company or business facing financial downturn to deposit money in court in a contested claim would be tantamount to elevating employment claims to the level of secured creditors yet the law as it is presently make no such provision.

19. The court will therefore decline the application dated 12th October, 2017 and discharge the ex parte orders granted by my learned brother Justice Wa Makau.

20. It is ordered.

Dated at Nairobi this 18th day of January 2019

Abuodha J. N.

Judge

Delivered this 18th day of January, 2019

Abuodha J. N.

Judge

In the presence of:-

.....for the claimant

.....for the Respondent

Abuodha J. N.

Judge