



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2052 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 28th February, 2019)

SUSAN NYAKIO GICHARA.....CLAIMANT

VERSUS

TROPIQUA GROUP LIMITED.....1ST RESPONDENT

MIKE KARANJA.....2ND RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion on 17th October 2018 under Sections 17, 23 and 68 of the Employment Act seeking the following orders:-

1. That the Honourable Court be pleased to compel the 1st and 2nd Respondents to deposit in this Court an amount not exceeding 2 million pending the hearing and determination of the Cause.

2. That costs of this Application to be provided for.

2. The Application is supported by the Affidavit of the Claimant and is premised on the following grounds:-

1. The 2nd Respondent has on several occasions asked the Claimant to have this dispute settled out of Court.

2. The 2nd Respondent was willing and ready to pay an amount of Kshs. 750,000 to the Claimant and mark this cause as settled.

3. The amount deposited in court pending hearing and determination of this dispute will not prejudice the Respondents.

4. It is in the interest of justice and fairness that the 2nd Respondent deposit in this Court the amount requested.

3. The Respondents in response to the Application filed a Replying Affidavit on 13th November 2018 sworn by Mike Karanja, the 2nd Respondent and a director of the 1st Respondent. He states that he has neither made negotiations with the Claimant to settle the case out of court nor has he made telephone calls proposing payment of a sum of Kshs. 750,000 to the Claimant.

4. He further states that the Respondents duly filed a Response to the Memorandum of Claim together with a Witness statement to ensure that the case is concluded at the earliest.

5. He states that there is no justification for him to deposit the amount sought by the Claimant, as the Claimant has not demonstrated why the amount should be deposited and he is willing to follow the Orders issue by the Court.

6. The Claimant further filed Grounds of Opposition to the Replying Affidavit on 13th December 2018 in which she states that the Claimant and the 2nd Respondent have met twice on 8th November 2017 and 22nd November 2017 in view to settle the dispute and the 2nd Respondent committed himself in writing on a draft letter and a letter addressed to Phylis Iminza, the Labour Officer the amount he was willing to pay being Kshs. 705,000.

7. The Claimant states that the 2nd Respondent has no physical address and that the 1st Respondent is a non-existent company as confirmed by the 2nd Respondent via a telephone conversation with the Claimant. She also stated that the Respondent's contradictions not to pay the Claimant are an afterthought and that the case of **Yusuf Hussein Haile v Noor Shariff Abdullahi [2017]** which the Respondents seek to rely is an Environment and Land Court case which ought not be relied on.

8. The Court directed the parties to file written submissions to the Application but only the Respondents filed the submissions as directed.

Respondents' Submissions

9. The Respondents submit that the Claimant has failed to produce evidence on the offer of Kshs.750,000 from the 2nd Respondent and that the variation in the amount sought by the Claimant in both the Notice of Motion and Grounds of opposition is proof of the extent the Claimant is willing to have her way.

10. The Respondents submit that the law is clear on the instances one is compelled to deposit security. The Respondents submit that they rely on the case of **Yusuf Hussein Haile v Noor Shariff Abdullahi [2017] eKLR** to the extent of the principles laid out in therein which would assist this Court where the court held:-

“Again for the court to make an order for the defendant to deposit money in Court sufficient to meet the plaintiff's claim against him, the plaintiff must demonstrate that the defendant has with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay execution of any decree that may be passed against him; has absconded or left the jurisdiction of the Court or is about to abscond or leave the local limits of the jurisdiction of the Court or has disposed of or removed from the jurisdiction of the Court his property or any part thereof or is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed in his favour against the defendant in the suit.”

11. The Respondents further submit that the sections of the law under which Notice of Motion has been brought do not have provisions for depositing security for costs. Hence, the Notice of Motion is frivolous and vexatious and ought to be dismissed.

12. I have examined all the averments and submissions before me. The law is clear on when the Court can grant orders for security before judgment by the Defendant.

13. Indeed the Claimant/Applicant should demonstrate that the Defendant with intent to delay execution of any decree that may be passed against him, has absconded or left the jurisdiction of Court or is about to abscond or leave the local limits of the Court or is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed in his favour against the Defendant in the suit. This is provided under Order 39 rule 1 which provides as follows:-

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”.

14. The Claimant has not demonstrated any of these and I find the application not merited. I dismiss it accordingly with costs.

Dated and delivered in open Court this 28th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

Respondent – Absent