



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 916 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 7th February, 2019)

OSCAR JUMA.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....1ST RESPONDENT

SIMON LEE.....2ND RESPONDENT

LINDA ROTICH.....3RD RESPONDENT

RULING

1. There are two Applications before this Honourable Court. The 1st Application before Court is the one dated 4th June 2018. The Application was filed under a Certificate of Urgency through a Notice of Motion filed under Article 159 of the Constitution, Section 12 (3) of Employment & Labour Relations Court Act, 2011 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. The Application herein seeks orders that:-

a) The Application be certified as urgent and service of the application be dispensed with and be heard ex parte in the first instance.

b) Pending hearing and determination of this Application, an order do issue restraining the 1st Respondent from negotiating and or getting into any arrangement with Airtel Kenya or any other entity to amalgamate, merge, transfer or reorganize its business and or dispose of towers.

c) Pending hearing and determination of this Suit, an Order do issue restraining the 1st Respondent from negotiating and or getting into arrangement with Airtel Kenya or any other entity to amalgamate, merge, transfer or reorganize its business and or dispose of its towers.

d) In the alternative and without prejudice to prayer 2 of this Application, pending hearing and determination of this application, the 1st Respondent do deposit the sum claimed in this suit in court or otherwise do furnish security to satisfy the herein on such terms and conditions as the court may deem fit.

e) In the alternative and without prejudice to prayer 3 of this application, pending hearing and determination of this suit the 1st Respondent do deposit the sum claimed in this suit in Court or otherwise do furnish security to satisfy the Claim herein on such terms and conditions as the Court may deem fit.

f) The court be at liberty to make any order it deems fit in the interest of justice.

g) The costs of the application be in the cause.

3. This Application is premised on the grounds that:-

i. The 1st Respondent is in the process or reorganizing and/or merging its business with Airtel Kenya.

ii. *The 1st Respondent has also commenced the process to dispose of its towers constituting its assets in a transaction that is reported as being earmarked for completion in the 2nd half of 2018.*

iii. *The Claim herein risks being impaired if the aforesaid reorganization proceeds and completes before the matter is determined. The Claim shall be overtaken by events as the 1st Respondent may cease to exist in a form that the Claim can be enforced against it.*

iv. *There is therefore a risk that if the matter goes to trial and the Claimant is successful against the 1st Respondent; the 1st Respondent will be out of reach with regards to enforcing an award.*

v. *The Orders sought will preserve the subject matter of the Claim and ensure that the Claimant is not engaged in an academic pursuit.*

vi. *Grant of the Orders is in the interest of Justice.*

4. The Application is supported by the affidavit of **OSCAR JUMA** sworn on **4th June 2018** in which he reiterates the averments made in the Notice of Motion Application.

5. That the instant Application was heard on 27th June, 2018 albeit in absence of the Respondents' herein and this Honourable Court granted ex parte **orders that:-**

- *Pending hearing and determination of this Application, the 1st Respondent do deposit a sum of 4 Million in Court.*
- *The security be deposited in Court within 30 days.*
- *Hearing inter-partes on 11.7.2018.*

6. The Respondents' opposed this Application and they filed a replying affidavit dated 20.7.2018 sworn by **ROBERT IRUNGU**, the 1st Respondent's Legal Counsel. He avers that the allegation of the merger is baseless as there are no plans for such merger with Airtel Kenya Limited.

7. He further avers the newspaper articles relied upon by the Claimant cannot be used as a basis to demonstrate that the 1st Respondent is taking any steps which materially affects its core business which is provision of telecommunication services.

8. He contends that the Claimant's allegations are based on mere suspicion against which a court ought not to grant either an order of injunction or an order for security before judgment. They want this Application dismissed with costs to the 1st Respondent for lack of merit.

9. The 2nd Application was filed by the Respondents on 19/07/2018 through a Certificate of Urgency filed through a Notice of Motion filed under Section 12 & 16 of the Employment and Labour Relations Court Act, Rule 17 of Employment and Labour Relations Rules, and all other enabling provisions of the law.

10. The Applicant sought the following orders:-

1. THAT this application be certified urgent and be heard ex parte in the first instance.

2. THAT the Honourable Court be pleased to issue an order for temporary stay of execution of its order made on 27th June 2018 requiring the Applicant to deposit in Court a sum of Kshs. 4 Million pending the inter-parte hearing and determination of this Application.

3. THAT the Honourable Court be pleased to set aside and/or vary the Order made on 27th June 2018 requiring the Applicant to deposit in Court a sum of Kshs. 4 Million.

4. THAT the costs of this Application be provided for.

11. The Application was based on the following grounds that:-

1. On 27th June 2018 this Honourable Court directed that the Applicant to deposit in Court a sum of Kshs. 4,000,000.00 within Thirty (30) days from the date of the Order being security before judgment in respect of the Claimant's Claim.

2. The Order was issued in absence of the Applicants and without considering the Applicant's position. The failure by the Applicant to attend Court on 27th June 2018 when the said ex parte Orders were issued was due to an excusable and inadvertent mistake. The mistake ought not to be visited upon the Applicant who is ready to defend this suit.

3. The said Order was premised on a misrepresentation of facts by the Claimant that there are on-going restructuring activities

involving the Applicant which might render the Applicant incapable of honouring any judgment or decree that this court might award after the hearing and determination of the Claimant's claim.

4. The Applicant is aggrieved by the said Order as it is only premised on wrong and misleading facts with regard to the alleged re-organization of the Applicant but also misconceived as to the Applicant's financial ability to honour any decree/award that this Court may order.

5. The Claimant's Application was based on mere apprehension and no evidence was presented to the Court to warrant the order to deposit of security before judgment.

6. In particular, the Claimant did not demonstrate that the Applicant has any intention of leaving the jurisdiction of this Court and or that it intends to remove its assets from the Court's jurisdiction with the intention of defeating and/or delaying the execution of a judgment or decree of the Court.

7. The Applicant verily believes that the said Order was made in error as it has no intention of ceasing its operations in Kenya. As a large telecommunication service provider in which the Government of Kenya is a significant shareholder, it has assets in Kenya which it has no intention of disposing and there has been no change of its legal structure or risk posed to its existence in Kenya that would warrant the issuance of such an Order.

8. There are sufficient reasons for reviewing, setting aside and varying the Order made by this Honourable Court on 27th June 2018.

9. It is in the interest of justice to grant the reliefs sought.

12. The Application is further supported by the supporting affidavit of **ROBERT IRUNGU** the Applicant's Legal Counsel.

13. The Applicants have deponed that they are dissatisfied with this Court's ex-parte Order and therefore seek orders of stay and/or set aside and/or vary the said Order.

14. The Claimant/ Respondent with respect to the instant Application filed a Further Affidavit sworn by **OSCAR JUMA** on **30th August 2018** and filed in Court on the same date. In which he avers that during his subsistence of his employment with the 1st Respondent, the 1st Respondent had been disposing off substantial properties including prime real estate properties like its warehouses on Pemba Road in Industrial Area. He further avers that his Claim will be prejudiced if the security was not furnished as sought.

Claimant's Submissions (Applications dated 4th June 2018 and 19th July 2018)

15. It is submitted on behalf of the Claimant that the deposit of the Security of Kshs 4,000,000.00 in Court is warranted as the 1st Respondent had been disposing off substantial properties including prime real estate like its warehouse on Pemba Road in Industrial Area and was in the process of disposing off its towers.

16. The Claimant further submitted that under Section 112 of the Evidence Act it is provided that:-

"In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him"

17. The Claimant submits that the 1st Respondent has a burden of proving that it has a business which is not in peril and that it would be able to satisfy such an award as may be awarded. For emphasis the Claimant relied on the Authority of **Kimotho Versus Kenya Commercial Bank (2003) 1EA 108.**

18. It is further submitted that the concealment of the audited accounts of the 1st Respondent in the face of the claims that it is in financial distress and is disposing assets in such a way that will imperil its ability to satisfy an award made in this matter, must be construed against the Respondent.

19. The Claimant has submitted that the attempt to set aside the Order made for interim deposit to be made should fail in light of the serious concealment of the audited accounts of the 1st Respondent.

20. The Claimant urged the Court to order the entire claim be deposited in Court.

Respondents' Submissions

21. The Respondents' submitted that the interlocutory injunction granted is not merited as the Claimant has not satisfied the requirements for the granting of such orders.

22. It is further submitted that the prayer for interlocutory injunction is premised on misleading and incorrect set of facts. It is the Respondent's further submission that there is no such transaction as a merger that is currently on-going between the 1st Respondent and Airtel Kenya Limited and further that there is no concrete evidence has been adduced by the Claimant to support this allegation which is

based on mere apprehension and suspicion.

23. The Respondent submits that the Claimant has not shown any infringement of a right that is sufficient for the granting of such orders. For emphasis the Respondents relied on the case of **Mrao Versus First American Bank of Kenya Limited and 2 Others (2003) KLR.**

24. The Respondents further submit that the Claimant's case is based on extracts of a newspaper cutting and articles which alleged that there is an intended merger of the 1st Respondent's operations with Airtel Kenya Limited and is as such not conclusive evidence. For emphasis, the Respondents relied on the case of **Independent Electoral and Boundaries Commission (I.E.B.C) Versus National Super Alliance (NASA) Kenya & 6 Others (2016) eKLR** where the admissibility and probative value of newspaper cuttings was discussed.

25. With regards whether the Order for deposit of security is merited, the Respondent submits that the Court's jurisdiction to review its Orders is provided under Section 16 of the Employment and Labour Relations Act which provides:-

"16. Review of Orders of the Court

The Court shall have power to review its judgment, awards, orders or decrees in accordance with the Rules."

26. It is further submitted that the Claimant has not satisfied the conditions on the law on attachment/security before judgment as held in the leading decision of **Bayusuf Grain Millers Versus Bread Kenya Limited (2005) eKLR.**

27. The Respondents further relied on the authority of **Jimmy Mwanzia Versus Cadbury Kenya Limited, Cause No. 479 of 2018** where Radido J held that:-

"...so long as the Respondent maintains presence however minuscule in Kenya, it would be subject to any orders of the Court. What the Applicant has presented before the Court are just mere apprehensions and fears which do not meet the threshold expected to be demonstrated in an application of this nature."

28. The Respondents submit that the order for deposit of security was made in error as the Claimant did not demonstrate by way of evidence that the Respondent has any intention of ceasing its operation in Kenya and/or obstructing enforcement of any judgment that maybe passed against it.

29. The Respondent further submitted that the 1st Respondent has no intention of leaving the Jurisdiction of this Court or ceasing its pertains as alleged.

30. In Conclusion the Respondents' urged the Court to dismiss the Claimant's Application dated **4th June 2018** with costs to the Respondents' and allow the Respondents' Application dated **19th July 2018** and as a consequence to set aside the order requiring the 1st Respondent to deposit the sum of Kshs. 4 Million in Court as security.

31. I have examined all the averments of both parties. In the first instance, I wish to point out that the order to deposit the 4 million in Court was made on 27.6.2018 when the Respondents who had been served for hearing of the application interpartes failed to attend Court.

32. As the application stood, there was no opposition to the same hence it was just and right in the circumstances to allow the application and order deposit of the 4 million in Court.

33. Having affirmed as above, the issue now is whether I should allow an application for review and set aside the said orders. The Respondent have submitted that the application of the Claimant was based on mere suspicion which is not supported by substantive facts and reasons.

34. In determining whether to allow the Respondent's application, the law is clear on when Courts can order for security before judgement.

35. Order 39 rule 1(a) and (b) states 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".

36. In Bayusuf Grain Millers vs Bread Kenya Limited (2005) eKLR, the Court held as follows:-

"What is the plaintiff required to establish under the provisions of Order XXXVIII of the Civil Procedure Rules? The plaintiff is required to prove that the defendant with the intent to delay the plaintiff or to avoid the process of the court or to obstruct or delay the execution of any decree that may be passed against him has either disposed off or removed from the local limits of the jurisdiction of the court his property or is about to abscond or leave the local jurisdiction of the court. In Savings & Loan Kenya Ltd versus Eustace Mwangi Mungai Nairobi HCCC No. 715 of 2001 (Milimani) (unreported), Ringera J (as he was then) stated at page 5 when a similar application for attachment before judgment was made;

"Be that as it may, I think that howsoever well grounded the plaintiff's apprehension might appear to be, it remains just that; well grounded apprehension. Without evidence that the defendant intends to do what is feared, the court cannot grant the order of pretrial attachment of the defendants property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the defendant intends to dispose of his assets. Such positive facts might have included the fact that the defendant either negotiating the sale of his properties or entering into an agreement to sell the same."

37. In another decision, Radido J in Jimmy Mwanzia vs Cadbury Kenya Limited Cause No. 479 of 2018 held as follows:-

"A mere well-grounded apprehension is not enough and the party seeking the order must provide sufficient evidence through affidavitit is correct that the Respondent has massively scaled down its business operations in Kenya and that redundancies were declared in 2015. However in view of the Court, that is not sufficient evidence that it has ceased or intends to cease operations in Kenya or relocate of that the restructuring was meant to or would obstruct or delay execution of any decree, which may be issued against it. So long as the Respondent maintains presence however minuscule in Kenya, it would be subject to any orders of the Court. What the Applicant has presented before the Court are just apprehensions and fears which do not meet the threshold expected to be demonstrated in an application of this nature."

38. My proposition is that for me to allow the application for depositing of security of judgement, I must be satisfied that indeed the Respondent is about to dispose of their property as alleged by the Applicant. This should not remain as mere statements but should be supported by evidence or affidavits.

39. The Applicant sought to rely on newspaper cuttings as proof of the intended merger between the Respondent and Airtel Kenya.

40. The Court of Appeal in Independent Electoral & Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya and 6 Others (2017) eKLR pronounced itself on the admissibility and probative value of newspaper cuttings and held as follows:-

"44. On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of Laxmi Raj Shetty -v- State of Tamil Nadu 1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence.

45.We affirm the finding by the trial judges at paragraph 137 of the judgment that newspaper cuttings and various media print outs are insufficient evidence to discharge the burden of proof. We hold that without corroborative evidence, the probative value and weight of newspaper cuttings as items of evidence to prove a fact in issue is low."

41. There is no any other evidence that was really presented before Court of what the Respondent's position really is.

42. The Respondent on the other hand is a telecommunication company whose presence is still visible in Kenya with the Kenya Government having notable shareholding. I do not believe that the merger of the Respondent with Airtel will make the Respondent's position invisible in the circumstances.

43. I believe I made orders for depositing of the 4 million in Court without all the probative evidence before me and now ceased with the correct position and the law, I believe the application by Respondent to review my orders and set aside the orders of 27.6.2018 are merited and I proceed to set aside the orders of 27.6.2018 and order that the parties proceed to file all documents needed in order to prosecute the main claim as expected.

44. Costs in the cause.

Dated and delivered in open Court this 7th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties