



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 655 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**OWEN MACHARIA MAINA.....CLAIMANT**

**VERSUS**

**BRAVA FOOD INDUSTRIES.....RESPONDENT**

**RULING**

The applicant filed two applications. The first is dated 2<sup>nd</sup> May 2018 and seeks the following orders –

1. A declaration to issue to the effect that the termination of the Claimant's contract of employment herein was unprocedural, wrongful and unfair hence null and void.

2. That the Claimant herein be paid a total amount of Kshs.4,017,403 by the Respondent as tabulated below –

- a) One month's salary in lieu of notice Kshs.210,000
- b) One year's months' pay in lieu of leave  
Kshs.210,000/30 days x 13/4 days x 18 months Kshs.220,500
- c) One month's notice in lieu of redundancy Kshs.210,000
- d) Ex gratia pay Kshs.320,000
- e) Severance pay  $15/30 \times 210,000 \times 1\frac{1}{2}$  years Kshs.375,000
- f) Salary underpayments from July 2017  
(Kshs.210,000 – Kshs.160,000) x 8 months Kshs.400,000
- g) Medical, parking and night out claim to refund Kshs.121,903
- h) 12 months' salary for unfair termination  
Kshs.210,000 x 12 Kshs.2,520,000
- i) Less payment made (Kshs.300,000)

**Total Due Kshs.4,017,403**

3. That the claimant's claim herein be secured by an appropriate and satisfactory personal guarantee by the respondent's Directors or bankers or alternatively by a deposit in court or an appropriate court supervised interest earning account.

4. That the costs of this suit be met by the respondent.
5. That the respondent herein pays interest on items (1) and (b) at court rates from date of filing suit till payment in full.
6. For any other further and better relief that the court may deem just fit to grant.

The second application is dated 16<sup>th</sup> July 2018 and seeks the following orders–

1. That the Respondent and its directors be committed to civil jail for a term of six (6) months for contempt of court for having deliberately disobeyed orders of this court issued on 7<sup>th</sup> May 2018.
2. Summons to be issued against the directors to appear before this court and show cause why they should not be committed to civil jail for such term as the court may deem just.
3. Any other or further orders of the court geared towards protecting the dignity and authority of the court.
4. Costs of this application be provided for;

The application dated 16<sup>th</sup> July 2018 was compromised following the payment by the respondent of Kshs.300,000 on 26<sup>th</sup> March 2018 and a further Kshs.393,970.80 on 11<sup>th</sup> July 2018.

In support of the application dated 2<sup>nd</sup> May 2019, the claimant avers in the grounds and affidavit in support of the application that the respondent was in the process of selling off the assets, that one of the Directors of the respondent is foreigner while the Kenya Directors have interests abroad and that the Directors may flee from the jurisdiction of this court prior to satisfying the award that may be granted to the claimant pursuant to his claim herein.

For the respondent, URSULA KEVOGO, the Human Resource and Administration Manager has sworn a replying affidavit in which she deposes that the respondent has paid the claimant all his dues after making statutory deductions. She denies that the company was in the process of being sold off or that the assets of the company may be disposed of by the respondent's Directors. She further denies that the Directors are a flight risk. She states that the orders to deposit the Director's passports and security of the claimed sum is unwarranted and the justification for the same has not been demonstrated.

### **Analysis and Determination**

I have considered the application together with grounds and affidavit in support thereof. I have further considered the affidavit of the respondent in opposition

to the application and the submissions by both parties.

There is rich jurisprudence in Kenya with respect to the requirement for deposit of security before judgment as demonstrated by the many authorities cited by both parties in their submissions.

Deposit of security is provided for under Order 39, Civil Procedure Rules.

The court summarised the provisions thereof in the case of **Kanduyi Holdings Limited –VS- Balm Kenya Foundation and Another (2013) eKLR** as follows–

*'...Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK....Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.'*

*Order 39 rule 1 and 5 of the CPR is about giving security for appearance or satisfaction of a decree, which may be passed against the Respondent. The Respondent may be arrested or he may be called upon to show-cause why he should not give security for his appearance or satisfaction of the decree which may be passed against him. Rule 1 is more draconian and may result into the arrest of the Respondent. I think, in my own view, it applies in desperate cases where the person has absconded or is on the verge of leaving the jurisdiction of the court or has sold or removed his property from the jurisdiction of the court, such that there is no time to issue a notice to show-cause why he should not furnish security. See the conditions to be satisfied under rule 1. Rule 5 on the other hand is milder and deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court. I think in my own view, it fits situations where the property is still available but is about to be removed from the jurisdiction and that is why it adopts less intrusive method of calling upon the Respondent by notice to appear and show-cause why he should not furnish security. But both of these rules share two common things, namely; 1) both serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the decree that may be issued against the Respondent; and 2) the standard of proof is that set out in the case of **GIELLA v CASSMAN** that is. establish prima facie case of the conditions set out in the particular*

*rule.”*

In the present case, the respondent has, as admitted by the claimant, paid all the sums admitted. According to the respondent, it has paid the full terminal dues owed to the claimant/applicant and do not owe him any other benefits. . The claimant has not demonstrated that the respondent is in the process or intends to dispose of any of its assets.

He has further not demonstrated that the respondent’s Directors are a flight risk, or that the respondent will not be in a position to satisfy any decree that this court may grant him.

I find that the claimant has not met the threshold for grant of the orders sought. He is thus not entitled to the said orders. The result is that his application fails and is accordingly dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**