



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1130 OF 2018**

**(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> June, 2019)**

**GAL ARBEL.....CLAIMANT**

**VERSUS**

**BALTON CP LIMITED .....RESPONDENT**

**RULING**

1. The 1<sup>st</sup> application before the Court is in respect to the Claimant Gal Arbel and is dated 23<sup>rd</sup> October, 2018, brought under Section 12 of the Employment and Labour Relations Court Act, 2007, Article 159(2)(d) of the Constitution of Kenya 2010, and all other enabling provisions of the law seeking for Orders that:-

***1. This application be certified as urgent and its service be dispensed with in the first instance.***

***2. Pending the hearing and determination of this application and further orders of the Court, an order be issued freezing the Claimant's bank accounts as particularised below:-***

***i. Commercial Bank of Africa (Kenya Shilling) Account Number 6706430011 domiciled at CBA Head Office Branch.***

***3. In the alternative to prayer No. 2 above, pending the hearing and determination of this application and or further orders of the court, this Honourable Court be pleased to order the Claimant to pay into a joint interest earning account of the parties' advocates' the sum of Kshs. 27,072,960/- in respect of the sums claimed by the Respondent as against the Claimant.***

***4. The Claimant do appear on a date and time to be fixed before this Honourable Court to show cause why he should not furnish such security as the court may direct by way of money or property sufficient to answer the claim against him in the sum of Kshs. 27,072,960/=.***

***5. Pending the hearing and determination of the Claim, an order be issued freezing the Claimant's bank accounts as particularized below:-***

***i. Commercial bank of Kenya (Kenya Shilling) Account number 6706430011 domiciled at CBA Head Office Branch.***

***6. In the alternative to prayer number 5 above, pending the hearing and determination of the claim, this Honourable Court be pleased to order the Claimant to pay into a joint interest earning account of parties; advocates' the sum of Kshs. 27,072,960/- in respect of the Sum claimed by the Respondent as against the Claimant .***

***7. Pending the hearing and determination of the Claim, this Honourable Court be pleased to Order the Claimant to give security for costs in the sum of Kshs. 1,000,000/=, or in the alternative such other sum as the court may assess as fair and reasonable, within 14 days from the date of such Order in default, the Memorandum of Claim dated 3<sup>rd</sup> July, 2018 to stand as automatically dismissed.***

***8. The costs of this application be borne by the Claimant.***

2. The Application is premised on the grounds that:

*i. The Claimant, a former employee of the Respondent, breached the terms of his employment by participating (with two of his former colleagues) in the formation and management of competing businesses which actions occasioned the Respondent a loss of Kshs. 75,898,953.62.*

*ii. The Claimant has also declined to return some of the Respondent's assets which were given to him by reason of his employment and to refund prepayments made on his behalf by the Respondent. On account of the foregoing, the Claimant owes the Respondent a sum of Kshs. 1,773,308.76.*

*iii. The Respondent has raised a counterclaim against the Claimant for the losses suffered as a result of his unlawful conduct. The counterclaim was filed in Nairobi ELC 1130 of 2018 (intended to be consolidated with Nairobi ELRC Nos. 1100 of 2018 and 1139 of 2018) and the same is pending hearing.*

*iv. For reasons that the loss of Kshs. 75,898,953.62 was occasioned by the Claimant alongside two of his former colleagues and on an equitable basis, the Respondent is entitled at a minimum to recover from the Claimant one third of the loss being Kshs. 25,299,651.21. The total sums due from the Claimant is therefore Kshs. 27,072,960.00.*

*v. The Claimant is a foreign national who was in the Country on the strength of a work permit obtained by the Respondent and was provided with housing and a vehicle during his employment. The Claimant has no assets in Kenya known except for the monies in the bank accounts referred to hereinabove.*

*vi. In light of the foregoing, the Respondent is apprehensive that the Claimant will leave Kenya under circumstances affording reasonable probability that he Claimant will or may thereby obstruct or delay in the execution of any decree that may be passed against him in the proceedings against him.*

*vii. In the event the Claimant's claim fails and the Respondent is awarded costs for defending the claim, it will have no chance to recover the costs from the Claimant given that the Claimant is a foreign nation national with no assets in Kenya.*

*viii. Given the fact that the Claimant's annual income was more than Kshs. 10 million, the minimum award for costs would be 1,000,000/=.*

*ix. It is in the interest of justice and fairness that this application is allowed.*

*x. Unless this application is certified as urgent and freezing orders for attachment before judgment issued, the Respondent will suffer irreparable loss as it is a counterclaim will in all likelihood be rendered moot.*

3. Which application is also supported by the affidavit of Nicholas Mudasia wherein he reiterates the grounds on the face of the application.

4. The other 2 applications of even date seek similar orders save for the fact that the accounts be frozen. In Respect to Amir Grenberg the accounts to be frozen are:

*i. I & M Bank (Kenya Shilling) Account Number 001658842010*

*ii. I&M Bank (US Dollar) Account Number 03001658884550151 (Fixed Deposit Account)*

5. The accounts should be frozen in order to answer to a claim against him of Kshs. 28,480,060.88 and the same be deposited in a joint interest earning account in the names of Counsels on record.

6. In Respect to Amir Grenberg the accounts to be frozen are:

*i. Commercial Bank of Africa (Kenya Shilling Account number 7157660018 domiciled at the CBA head office branch.*

7. The accounts should be frozen in order to answer to a claim against him of Kshs.28,480,060.8830,609,866.87 and the same be deposited in a joint interest earning account in the names of counsel on record.

8. The Claimants/Respondents filed Grounds of Opposition opposing the applications and a Replying affidavit sworn by the 3<sup>rd</sup> Claimant on his own behalf and that of his of co-claimants stating that the said applications are not envisaged under the Employment and Labour Relations Court Act, 2007 or the Employment and Labour Relations Court (Procedure) Rules 2016.

9. That the said Application is intended to have the Claimants' suits dismissed without a hearing in blatant disregard of Article 159(2) (a) which requires justice to done to all irrespective of status" which includes pecuniary status. Furthermore, that it is self-defeating for the Respondent to contend on the one hand that the Claimants are a flight risk with no assets in Kenya, while at the same time assert that the Claimants are directors of numerous companies that are in competition with the Respondent in Kenya.

10. The Claimants also aver that they have recently left employment and are in the process of establishing business in the Country and cannot possibly afford to obtain the colossal sums sought as deposit as well as security of costs. In addition to this, that the prayer for security of costs is absurd in view of the fact that the Respondent has yet to establish its case to warrant a presumption that it would be entitled to recover any sum from the Claimants.

11. That the Prayer to freeze the Claimants' accounts is illogical and unlawful for the reason that it has the effect of rendering the Claimants impecunious leaving the Claimants with no way to eke a living and/or even sustain themselves.

12. That the Claimants have a good defence to the Respondent's counter claim and in any event, any judgment obtained against them can be enforced in Israel under the Foreign Judgments Enforcement Law, 1958 Laws of Israel. They urge the Court to dismiss the application with costs.

### **Submissions**

13. The Applicant submits that it has met the test for the grant of a mareva injunction order. The tests for the granting of the Order were set out in the case of **DCF Engineering Limited v Johari Limited & Another (2013) eKLR** to include:-

***“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction the Court will usually require to be satisfied that:-***

***a. The Claimant has a good arguable case based on a pre-existing cause of action;***

***b. The claim is over which the Court has jurisdiction.***

***c. The Defendant appears to have assets within the jurisdiction;***

***d. There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and***

***e. There is a balance of convenience in favour of granting the injunction.***

14. The Respondent/Applicant further submits that it has met the test from the grant of orders of security of costs and security for performance of the decree. That the test to be satisfied is the threat of the Plaintiff resides out of jurisdiction or he/she is likely to leave the jurisdiction of the Court as was set out in the case of **Shah v Shah (1982) KLR 95 and Kinuthia Nderu, Helen Njeru Nderu vs Andrew Kinuthia Nderu (1988) 2 KAR 1287 – 1334.**

15. On behalf of the Claimants/Respondents, it is submitted that the application have no basis in law and are not envisaged in the Employment and Labour Relations Court Act, 2007 or the Employment and Labour Relations Court Procedure (Rules) 2016. That the Orders sought are the preserve of Order 26 of the Civil Procedure Rules, 2010.

16. It is also submitted that the prayers are omnibus, which ought to be read conjunctively and not disjunctively, as they are not made in the alternative to each other. They rely on the case of **Pyaralal Mhand Bheru Rajput vs Barclays Bank and others Civil Case. No. 38 of 2004** where it held:-

***“There is no doubt the application is an all-cure omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An Omnibus application is incapable of proper adjudication by the Court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the Court needs to consider before granting the entire reliefs sought. This alone makes the Plaintiff's application incurably defective, and a candidate for striking out.”***

17. That the applications have not been made in good faith as the Respondents are hoping that a grant of the same would disentitle the Claimants of their rights to pursue justice before this Honourable Court since their claims against the Respondent would be dismissed for want of merit. Further that the Respondents have not demonstrated to the Court that the Claimants are a flight risk, and the claims as set out in the counterclaim have not been established.

18. It is also submitted that the applications do not meet the threshold for grant of the Orders sought in order to freeze the Claimant's accounts and that the Respondents do not have an arguable case. That the companies cited by the Respondents as having been formed the basis of the counterclaim do not at all belong to the Claimants and the Respondent has not shown any nexus at all to the Claimants. A mandatory injunction can therefore not issue as a clear case has not been established as was stated in the case of **Kenya Breweries Ltd & 2 Others Vs Washington Okeyo (2002)eKLR.**

19. That Article 21 (1) & (4) offers protection to all persons under the jurisdiction foreigner or not and that if a judgment is entered in favour of the Respondent's favour there is a Foreign Judgments Enforcement Law – 1958 which would enable the Respondent enforce the judgment in Israel. The Claimants urge the Court to dismiss the Applications with costs.

20. I have examined the averments of both parties. The Respondent/Applicants have not in my view established compelling reasons to warrant issuance of the security sought.

21. Article 48 of the Constitution provides as follows:-

***“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede***

*access to justice”.*

22. The Claimant/Respondents aver that the Application is aimed at denying them access to Court, as they do not have the colossal sums sought by the Respondent/Applicants to be deposited in Court.

23. I do agree that for this Court to grant the orders sought, they must prove that the Claimants’ case is frivolous and that the Claimants would be unable to pay them up upon loosing this Claim.

24. This Court also has jurisdiction under Order 26 rule 1 of the Civil Procedure Rules to grant orders sought. Order 26 rule 1 states as follows:-

***1. “In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party”.***

25. Indeed the Applicant has not proved that the Respondent is out of the Court jurisdiction or intents to abscond from the Court’s jurisdiction or that he has no property within the Court jurisdiction. I therefore decline to grant orders sought and order this case to proceed to conclusion.

Dated and delivered in open Court this 27<sup>th</sup> day of June, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Thuku holding brief Nyachoti for Claimants – Present

Onyango holding brief Owiti for Respondent – Present