



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 916 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 17th July, 2019)

OSCAR JUMA.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....1ST RESPONDENT

SIMON LEE.....2ND RESPONDENT

LINDA ROTICH.....3RD RESPONDENT

RULING

1. The application before the Court is dated 1st March, 2019, brought under Article 159 of the Constitution, Section 12(3) of the Employment and Labour Relations Court Act, 2011, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 seeking for Orders:-

1. *The application be certified urgent and service of the application be dispensed with and be heard ex parte in the first instance.*
2. *The Order do issue reviewing the order of the Court of 7th February, 2019, and substituting it with an order that the 1st Respondent furnish security for the entire claim on such terms as the Court will direct and deem fit.*

2. The application is premised on the grounds that:-

- a. *The Claimant has a substantial claim against the Respondents.*
- b. *In a Ruling delivered on the 7th of February, 2019 the Court declined to order the 1st Respondent to furnish security.*
- c. *Previously, and up to the time the aforesaid ruling was delivered, the 1st Respondent vociferously denied that it had entered into any engagement to merge its business with Airtel Networks Kenya Limited or otherwise dispose of its business in a manner that would imperil the Claim herein.*
- d. *On the 8th February, 2019, the 1st Respondent made a public announcement that it had entered into a binding agreement with Airtel Networks Kenya Limited to merge their mobile enterprise and carrier business which is in essence the entire telecommunications business. The telecommunications business is the 1st Respondent's core business. The merged business according to the aforesaid announcement will be under a new venture joint company.*
- e. *This announcement constitutes new evidence that was not before the Court when the Order of 7th February 2018 was made.*
- f. *Unless the 1st Respondent is ordered to furnish security, the claimant's claim will be imperilled as he will be pursuing a claim against an entity that has disposed of its core business.*
- g. *Grant of the orders sought is in the interest of justice.*

3. The Application is supported by the Claimant's affidavit wherein he reiterates the grounds on the face of the application.

4. The Respondents have filed grounds of opposition opposing the application where they state that the Claimant has not demonstrated any or sufficient grounds warranting a review.
5. That the application is premature as the proposed merger is subject to approval by the relevant authorities which approval is yet to be granted. Further that the 1st Respondent is not winding up and neither are its assets being disposed off and in any event the Claimant has not produced any new evidence to demonstrate that the 1st Respondent's financial ability to honour judgment or order of the Court will be hindered.
6. The Respondent claims that it has not intentions of ceasing its operations in Kenya and or obstructing enforcement of any judgment that may be passed against it.
7. That the public announcement made on 8th February, 2019, does not constitute new evidence warranting review of the Orders issued on 7th February, 2019. They pray for the application to be dismissed as it is an abuse of Court process.

Submissions

8. The Claimant/Applicant submits that the application has merit as demonstrated in the application and urges the court to allow it with costs.
9. The Respondent on the other hand submits that the application does not meet the criteria set out in Section 16 of the Employment and Labour Relations Court Act and Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, on review.
10. That the Court at paragraph 42 of its ruling, already acknowledged that the merger of the Respondent with Airtel would not make the 1st Respondent's presence in the Country invisible and therefore there is no imminent threat warranting the orders sought which position has not changed. That the current application is a regurgitation of the previous application dated 4th June, 2018 which was dismissed by the Court merit.
11. The Respondent urge the Court to dismiss the application with costs.
12. I have examined the averments of the Parties in this application. The Applicant seeks order to compel the Respondents herein to furnish security for judgement on account of the envisaged merger of the Respondent and another which the Applicant contends will change the landscape against his case.
13. Under Order 34 rule 1 of the Civil Procedure Rules, this Court has powers to order security (read attachment) before judgement in the following circumstances:

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. In the circumstances of this case the merger of the Respondent with another falls under Order 39 rule (iii) above which will impact negatively upon the Applicant.
15. In the circumstances, the application is merited. I therefore review earlier orders and direct the Respondent to deposit Kshs.10 million in Court as security for judgement pending the hearing and determination of this claim within 30 days.
16. Costs in the cause.

Dated and delivered in open Court this 17th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gaya holding brie Mr. Wangila for Claimant/applicant

Respondent – Absent