REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1279 OF 2017

JULIUS WAWERU.....CLAIMANT

-VERSUS-

ENGEN KENYA LIMITED.....RESPONDENT

RULING

Introduction

1. The application before the Court is the claimant's Notice of Motion dated 21.2.2019 which seeks the following orders:-

> 1) THAT the application filed herewith be certified as urgent and be heard ex parte in the first instance service thereof having been dispensed with.
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> 2) THAT pending the hearing and determination of this application this Honourable Court be pleased to issue an order to restrain or stop the proposed acquisition of a 100% of the issued share capital and or the merger or sale or transfer of business or shares and/or assets of the Respondent herein to Vivo Energy Holding B.V that is scheduled to be completed on 1/3/2019 or on any other date thereafter.
>
> 3) THAT pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue an order to restrain or stop the proposed acquisition of a 100% of the issued share capital and or the merger or sale or transfer of business or shares and/or assets of the Respondent herein to Vivo Energy Holding B.V that is scheduled to be completed on 1/3/2019 or on any other date thereafter.
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> 4) THAT this Honourable Court be please to enjoin Vivo Energy Holding B.V as a respondent in these proceedings.
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> 5) THAT the respondent be ordered to deposit the sum of Kshs.8,505,860.45 in court or in a bank account in the joint names of the advocates for the parties herein within fourteen (14) days of the making of the order.
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> 6) THAT the Respondent and Vivo Energy Holding B.V be ordered to provide a suitable undertaking that they shall satisfy any decree emanating from the claim herein for amounts that may be in excess of the sum of Kshs.8,505,860.45 deposited pursuant to order No. 5 above
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> 7) THAT the costs of this application be provided for

2. The application is brought under section 12 of the ELRC Act, Rule 17 of the ELRC Procedure Rules and all other enabling provisions of the law. It is premised on the grounds set out on the body of the motion which are explained in the affidavits sworn by the Applicant on 21.2.2019 and 9.4.2019.

3. The respondent has opposed the application through the Replying Affidavit sworn by her MD who is also the MD for the proposed second Respondent Mr. Hassen Zalgaonker, on 25.2.2019.

Factual background

4. The claimant was employed by the respondent as an Accounts Manager on 11.3.2013 and rose through the ranks to become the National Commercial Manager earning a salary of Kshs.414,464.74 per month, in addition to other benefits. From December 2015 to June 2016, he was appointed the Acting National Retail Manager but he was not paidthe acting allowance due to him. In January 2017 he ran into problems with the employer and 8.2.2017 he was suspended before being dismissed on 31.3.2017 for gross misconduct after being taken through a

disciplinary process.

5. Aggrieved by the dismissal, the claimant brought this suit on 7.7.2017 seeking terminal benefits, compensation for unfair termination and general damages for violation of his constitutional rights totalling to Kshs.8,505,860.45. The respondent filed her defence on 17.8.2017 denying the alleged unfair termination and reliefs sought and prayed for the suit to be dismissed with costs.

6. In the meanwhile, the shareholding in the respondent was changed but the entity remained. However, the claimant became apprehensive that his suit was jeopardized by the change of the controlling shareholding in the respondent and brought the instant motion to guard the suit from becoming nugatory. The issues for determination are whether the proposed respondent is a necessary party warranting joinder as a defendant, and whether security should be deposited for the anticipated judgment.

Applicant's Case

7. The applicant contended that the proposed second respondent was in the process of acquiring 100% of the issued share capital the respondent and the deal was scheduled to be concluded on 1.3.2019 or thereabouts. That the said acquisition will involve merger, sale or transfer of shares, assets and/or business of the respondent to the proposed second respondent. That it was not however clarified whether the proposed respondent will take over the liabilities of the respondent including the instant claim and as such the applicant maintained that the new controlling shareholder was a necessary party to this suit. He further contended that in order to protect his right to access to justice and ensure that the suit is not overtaken by events, it is necessary to order the respondent and/or the proposed 2nd Respondent to deposit security for the sum claimed herein being Kshs.8,505,860.45. In his view, unless the joinder sought and security sought is ordered, the suit will be rendered moot and the applicant will suffer irreparably after the respondent hands over assets under the said acquisition and thereafter cease to exist.

8. In his written submissions, the applicant contended that the respondent has not produced in court, the agreement between the respondent and the proposed respondent to see whether the liability associated with the outcome of this suit is taken care of. In his view, the continued existence of the respondent was at the mercy of the new controlling shareholder who can wind up at will and render his suit nugatory. He maintained that the proposed respondent is a necessary party in this suit to enable the court to effectually and completely adjudicate upon the settle all questions involved in this suit including the future of the suit in case the respondent ceases to exist.

9. He relied of ***Elizabeth Washeke & 62 others Vs Airtel Networks (K) Limited & Another [2013]eKLR*** and ***Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016]eKLR*** to support his view that upon transfer of an undertaking, business to another employer, the rights and obligations arising from a contract of employment is transferred to the new employer.

10. As regards security for the anticipated judgment, the applicant submitted that the proposed respondent has taken over 100% share in the respondent's business and as such the respondent is unlikely to continue existing because it remains a mere shell. He therefore urged the court to order the respondent and/or the proposed respondent to deposit security to cover the sum sought in the suit. He contended that uncertainty of the respondent's future was corroborated by the undertaking given by the MD of the proposed respondent in Cause No. 2224 of 2017 ***Musyoka Ngumi Vs Engen Kenya Limited & Hassen Zalgonaker*** which is till pending trial. He however contended that the undertaking in the said suit is not sufficient security. He contended that the best security is deposit of money to satisfy the sum to be awarded plus incidental costs. He relied on ***Catherine M. Raini v CMC Holding Limited [2014]eKLR*** to support the foregoing submission.

Respondent's Case

11. The respondent observed that the application is predicated upon a fear that the transaction under reference shall have the effect of divesting the commercial activities of the respondent in Kenya and dispose of the assets, interest, commercial operations and undertaking to a third party and close down business. However, the respondent contended that the said transaction involves selling of the respondent's issued share capital in the entity know as Engen International Holdings (Mauritius) Limited to the proposed respondent and that does not affect the legal status of the respondent or threaten her existence. The respondents contended that the only thing, which changes, is the ownership of the company shares. That the respondent's shares will continue to exist but the share will now be held by the proposed respondent and the Selling Holding Company or its subsidiary.

12. The respondent further contended that the deal has already received approval from the Energy Regulatory Authority. That the Regulator has made it clear that the respondent continues to exit as an entity to discharge its legal obligation.

13. In her written submissions, the respondent contended that the impugned transaction did not involve the respondent, and it is neither a merger nor acquisition of the assets of the respondent or any other entity for that matter. That what was sold were shares in another company (EIHL) to the proposed respondent, and as such, she (the respondent) continues to exist as an entity.

14. The respondent further contended that the impugned transaction was concluded on 31.3.2019 as correctly indicated by the applicant, but she submitted that the applicant's fears are unfounded because she is still in existence and continuing with the her trade in her various stations across the country. She therefore submitted that the respondent will continue to discharge her obligations. She relied on ***Delina General Enterprises (K) Ltd v Kenol – Kobil Ltd [2019]eKLR***, in which the court held that a takeover is only a sale of shares and not assets and the intended acquisition of shares of the defendant has no effect on its status as the company has its own legal personality and as such the plaintiff's claim is not affected. She therefore submitted that the application is premised on an erroneous position.

15. As regards depositing of security before judgment, the respondent submitted that the applicant is seeking attachment before hearing and determination of the suit. She submitted that the legal threshold for ordering depositing of security before trial is provided for under order 39 rule 1 and 5 of the civil procedure Rules (CPR). That the applicant must prove that the respondent intends to delay and or obstruct justice or defeat any decree to be issued by the court. She submitted theapplicant herein has not satisfied the grounds that warrants the issuing of the order for furnishing of security pending trial. She further submitted that she has demonstrated that she is not ceasing to exist nor is she

relocating her business out of the country. That the applicant has not proved that the impugned transaction was aimed at defeating his claim. She relied on ***Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited [2016]eKLR*** to support her submissions on the threshold for ordering a defendant to furnish security before trial. He contended that in ***HCCC. 526 of 2016 Milimani – Chi Motors v Engen Kenya Limited, ELRC 2160 of 2018 and ELRC 2224 of 2017***, ***Musyoka Ngumi Vs Engen Kenya Limited***, the claimants approached the court for furnishing of security for the same reasons as in the instant application but after considering the same explanation given herein, the court was satisfied that the impugned shares transaction did pose a threat to the ability of her to meet her obligations, and the applications were compromised. She concluded by distinguishing the facts in the present case from the facts in the ***Elizabeth Washeke Case*** and ***Catherine M. Raini Case*** cited by the applicant where the transaction involved transfer of undertaking, business or part thereof; and sell of shares of the respondent respectively.

Analysis and determination

16. There is no dispute that the applicant was employed by the respondent until 31.3.2017 when he was summarily dismissed after which he brought the suit herein claiming Kshs.8,505,860.45. There is further no dispute that before the trial of the said suit, the respondents majority shareholding was changed from the EIHL to the proposed respondent. There issues for determination are:-

(a) Whether the sell of shares in the respondent from the majority shareholder to the proposed second respondent means transfer of business and the end of the Respondent.

(b) Whether the proposed respondent is a necessary party in this suit.

(c) Whether the court should order the respondent and/or the proposed second respondent to furnish security equal to the sum claimed in the suit.

The effect of the Sale of Majority Shareholding to the proposed second respondent

17. The applicant contended that the agreement between Selling and the Buying majority shareholders is unknown to the court and as such, his claim is at the risk of becoming nugatory. He further contended that the business of the respondent has been taken over by the proposed second respondent and its existence as an entity threatened because all what remains after the acquisition of the business is a mere shell.

18. However, the respondent denied the claimant's view and contended that she was not affected by the change of shareholder. She maintained that she continues to exist as a legal person irrespective of who is her shareholder. She further contended that she is still in operation even after the said sale of shares and she will pay her liabilities when they fall due.

19. I have carefully considered the facts of the case and the submissions by the parties. It is clear from the material presented that the majority shareholder of the respondent sold her shares to the proposed second respondent under a deal which was concluded on 31.3.2019. It is trite law that a company is a legal person distinct from its equity holders and it enjoys perpetual succession. It follows therefore that a sale of shares from one shareholder to a third party does not ***per se*** affect the legal status of the company nor does it end the life of the company. The corollary to the foregoing is that the change of shareholders in a company does not extinguish the legal rights and obligations of the company. If the contrary was true, then, companies would not be endowed with the all important aspect of perpetual succession.

20. The facts of this case resemble that in the ***Delina General Enterprise (K) Ltd vs Kenol – Kobil Ltd [2019]eKLR*** were the court held that:-

> ***"Their concern is that once the takeover of the Defendant Company is over the new outfit will not acknowledge inherit or settle liability from Plaintiff's claim if and when found due and owing. The new outfit may opt to sell off assets of the Company and the Plaintiff shall have no recourse.***
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> ***On the other hand in response, the Defendant through Counsel in oral and written submissions allayed fears of the plaintiff that the Takeover is only of sale of shares and not assets and the intended acquisition of share of the Defendant will have no effect on its status as the Company which has its own legal personality and consequently will not affect the plaintiff's claim. The company shall remain resident in Kenya and will not relocate out of the country.***
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> ***If that be the case, the Plaintiff's claim if and when found due and owing shall be presented to the Defendant Company for settlement."***

In view of the foregoing the court returns that, the sale of the controlling shares to the proposed second respondent did not affect the existence and the legal status of the respondent including her rights to continue owning her assets and the obligations to meet her liabilities.

21. The facts in this case are different from the facts in ***Elizabeth Washeka case and the Absyssinia Iron & Steel Limited*** case because whereas in this case there is no transfer of business, in the said cases there was transfer of undertaking.

Whether the proposed second respondent is a necessary party in this suit

22. The applicant contended that the proposed second respondent is a necessary party in the instant suit because by her controlling shareholding, she will determine the respondent's compliance with the outcome of the suit and also whether the respondent is wound up or not. In his view the joinder of the proposed second respondent is necessary in these proceedings to enable the court effectually and

completely adjudicate upon and settle all the questions involved in this suit including the fate of the claim in case the respondent ceases to exist.

23. The respondent contended that the respondent has not sold away her business and as such, she has not ceased to exist following the sale of shares by her majority shareholder to a new person. That she remains intact with full responsibility to meet her legal obligations even after the change of shareholding. She maintained that the change of shareholding was not a merger or an acquisition leading to the end of the respondent's existence.

24. I have carefully considered the rival contentions and found that the applicant's apprehension that he will prejudiced by the failure to enjoin the proposed second respondent is not farfetched. The controlling shares in the hands of the proposed second respondent will have the potential to determine the fate of the respondent's destiny, assets disposal and also the compliance with the outcome of the instant suit. In that respect, I agree with the applicant's contention that the proposed second respondent is a necessary party in this suit. She is entitled to a hearing in the dispute herein because she will have the final say in the compliance with the outcome of the suit. The foregoing view is fortified by the fact that the details of the agreement for the sale of the controlling shares have not yet been revealed to the court. Consequently, I grant the order for joinder of the proposed second respondent as a defendant herein because that will enable the court to effectively and completely adjudicate on all the matters in question and settle the same after hearing all the necessary parties.

Whether the respondent and the proposed second respondent should be ordered to furnish security

25. The applicant's contended that the court should order for furnishing of security because the proposed second respondent has acquired 100% shares and left it as a mere shell which is unlikely to continue in existence since the entire business has been taken over. He therefore believes the cash deposit is the best security in the circumstances.

26. In ***Catherine M. Raini Vs CMC Holding Limited [2014]e KLR***, Mbaru J allowed a similar application where she stated that:-

> ***"I therefore find claimant's application has merit to the extent that the application is driven by the Notice published by the respondent. The same is for a takeover of 100% shareholding in the respondent business by a third party. There is a claim already lodged by the claimant and where it appears that an arguable case as set out in the claim for payment of terminal dues, and there is danger that the respondent is in the process of disposing assets, so as to jeopardize the claim before judgment, the court has jurisdiction in a proper case to grant a conservatory order. In this case, the court is being asked to order for a deposit of terminal benefits and compensation for unlawful and unfair loss of employment, which are equitable remedies."***

27. The court agrees with the foregoing decision to the extent that the court should allow the respondent to deposit security if it proved that after change of majority shareholding, the respondent resorts in disposing of its assets so as to jeopardize the claim filed by the employee. That is in accordance with the legal threshold for furnishing security as provided for under order 39 rule 5 of the CPRs which provides as follows;-

> ***"5(1) Where at any stage of a suit the court is satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-***
>
> ***(a) Is about to dispose of the whole or any part of his property;***
>
> ***(b) Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, with a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not be furnish security."***

28. The foregoing power to order for security must however be exercised with care as it was held by Onyango J in ***Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Ltd [2016]eKLR*** when she followed the Court of Appeal decision in ***Kuria Kanyoro t/a Amigos Bar and Respondent v Francis Kinuthia Nderu & 2 others [1982]2 KAR 1287 – 1334***. That:-

> ***"The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief arrive at by order 38 rule 5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."***

29. In this case, the court finds that the applicant has failed to prove that change of the respondent's majority shareholding was mischievously done to defeat his claim in the instant suit. He has also not proved that the respondent is disposing or is about to dispose of all or part of her assets with intention to obstruct or delay any decree that may be passed against her. Consequently, the court finds that the application has fallen short of meeting the legal threshold for grant of the order against the respondent to furnish security.

Conclusion and determination

30. The court has found that the sale of majority shares to the proposed second respondent does not mean the end of the respondent but only a change of the shareholding. That court has further found that the application for furnishing of security by the respondent has not met the legal threshold set out under order 39 Rule 5 of the CPRs. The court has however found that the proposed second respondent is a necessary party herein because her controlling shareholding has the potential to determining disposal of the respondent's assets and also in determining whether the respondent will comply with the outcome of any decree, which the court may pass after the trial. Consequently, the application is

allowed only to the extent that leave is granted to enjoin Vivo Energy Holding B.V. as the second respondent in these proceedings. The claimant is directed to serve the new respondent with the court process after which the new respondent will be at liberty to file and serve her pleadings within 21 days of the date hereof. Costs of the application shall be on the cause.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE