



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1324 OF 2017

BERNARD BARONGO

AMWOMA & 116 ORS.....CLAIMANTS

VERSUS

ORBIT CHEMICALS LIMITED.....1ST RESPONDENT

INSIGHT MANAGEMENT

CONSULTANTS LTD.....2ND RESPONDENT

RULING

1. Before Court is a motion dated 27 May 2019 by the 1st Respondent seeking orders

1. **THAT** the Claimants jointly and severally do within a time fixed by the Honourable Court do deposit in Court as security for costs the sum of Kshs 4,000,000/= being the 1st Respondent/Applicant's estimated costs for this Cause pending the hearing and determination of this Cause.

2. **THAT** in the alternative the Claimants jointly and severally do furnish as security for costs such sums as the Honourable Court may order to be deposited in an escrow account in the names of the Advocate for the Claimant and the Applicant pending hearing and determination of this Cause.

3. **THAT** in the event the Claimants are unable to comply with the order to deposit security then the suit against the 1st Respondent be dismissed with costs.

4. **THAT** in the alternative this Honourable Court be pleased to issue any further orders it deems mete and just including a stay of proceedings until such time that the orders herein will have been complied with.

2. The grounds which were advanced in support of the application were that the cause of action was anchored on an employment relationship while there was no privity of contract between the Claimants and the 1st Respondent; that the 1st Respondent had an outsourcing contract with the 2nd Respondent, an independent contractor; that the Claimants were employees of the 2nd Respondent in terms of the outsourcing contract; that there was no reasonable cause of action against the 1st Respondent and that the 1st Respondent would be unable to recover costs from the Claimants were the suit to fail.

3. In opposition to the application, the Claimants filed Grounds of Opposition on 2 July 2019.

4. The Claimants contended that the orders sought could only be made against a foreign national within the Court's jurisdiction where it was shown that there was risk of him leaving jurisdiction or that the foreigner had no assets in the country.

5. The Court heard arguments on 8 July 2019.

6. The Court has considered all the materials placed before it and come to the conclusion that the motion has no merit and should be dismissed because of the reasons outlined hereunder.

7. The legal principles governing the grant of an application such as is under consideration were set out in **Keary Developments v Tarmac Construction** (1995) 3 All ER 534 and the said principles were endorsed by the Court of Appeal in **Westmont Holdings SDN. BHD v Central**

8. Firstly, under section 2 of the Employment Act, 2007, employer is defined to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

9. The determination therefore whether there is privity of contract as between the Claimants and the 1st Respondent on the one part, and/or between the Claimants and the 2nd Respondent within the context of the statutory definition of an *employer* is an issue best left for a hearing on the merits where all the facts and law will be placed before the Court.

10. Secondly, Article 48 the Constitution guarantees all persons access to justice without hindrance, and no person should be restrained from benefiting from such a right unless in clear cases as may be discernible from statute or common law, and to the extent permissible in a democratic society as envisaged by the Constitution.

11. The 1st Respondent has not demonstrated that the Claimants right to access justice should be limited in this case by requiring them to deposit security for costs.

12. Thirdly, apart from alleging inability on the part of the Claimants to make up for any eventual costs, the 1st Respondent has not placed any facts or evidence before the Court to demonstrate or suggest inability on the part of the Claimants to pay costs were they to fail in the action.

13. It appears to the Court that the application for costs is meant to not only stifle but oppress the Claimants from accessing the seat of justice.

14. The Court declines to exercise its discretion in favour of the 1st Respondent and orders the application dated 27 May 2019 dismissed with costs to the Claimants.

15. The Court regrets that it could not deliver this Ruling on 27 September 2019 as earlier scheduled due to other official engagements.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimants Mr. Koceyo instructed by Koceyo & Co. Advocates

For 1st Respondent Mr. Odera instructed by Oseko & Ouma Advocates

For 2nd Respondent Mr. Mudao instructed by Mudao & Co. Advocates

Court Assistant Lindsey