REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 379 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

STEPHEN GACHENGO.....CLAIMANT

-VERSUS-

SOLENTA AVIATION KENYA LIMITED.....RESPONDENT

R U L I N G

By an application vide notice of motion dated 20th July 2017 filed under certificate of urgency; the applicant seeks the following orders–

1. That this application and the main claim be certified as urgent.

2. That in view of the urgency herein, service of this application upon the respondent be dispensed with in the first instance and the application be heard ex parte.

3. That pending the hearing and determination of this application and the claim, an interim injunction do issue barring and/or restraining the respondent's shareholders and/or directors from winding up the respondent company.

4. That pending the hearing and determination of this application and the claim, the respondent be ordered to deposit in court the sum of United States Dollars 72,516/= within 14 days to answer the claim against it.

5. That the respondent be order to provide a copy of the respondent company's registration certificate and provide evidence of its current shareholders and directors.

6. That in default of the respondent's compliance with the above orders, the respondent be estopped from defending the claim and their defence be struck out.

7. That the claimant/applicant be awarded the costs of this application.

The application is made under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 39, Rule 1 and 2 and Order 40, Rule 1 (b) of the Civil Procedure Rules. It is supported by the affidavit of STEPHEN GACHENGO, the claimant/applicant and on the following grounds –

(i) There are substantial indicators showing that the respondent company will wind up its operations in Kenya. This expectation is based on the following factors.

a. In paragraph 24 of the respondent's memorandum of response, the respondent states that its "only source of business" has been terminated.

b. The respondent company has terminated all its employees including its management.

c. The respondent company does not have any physical address and after the termination of its employees, it gave up the office space that it occupied at Wilson Airport.

(ii) Whereas the respondent company trades in the name "Solenta Aviation Kenya Limited", the companies' registry has no record

of such a company. The only company whose records had "Solenta Aviation (PTY) Kenya Limited. It is not known whether the two are the same company.

(iii) The respondent through its memorandum of response dated 11th May 2017 has made certain admission that establish for the claimant a prima facie case with a high probability of success.

(iv) Unless the court grants the orders sought, the claimant/applicant will undoubtedly be obstructed and delayed in prosecuting his claim and executing any decree that may be obtained against the respondent in the suit.

(v) It is in the interest of justice that the interim orders sought herein be granted to ensure that the respondent answers the claim that has been filed against it; and that the claimant/applicant is not obstructed or delayed in enforcing any award that may be made in his favour.

In the supporting affidavit, the claimant stated that the respondent, which trades in the name Solenta Aviation Kenya Limited, is not registered at the companies' registry, that the records at the companies' registry bear the name Solenta Aviation (PTY) Kenya Limited, that there is therefore doubt over the incorporation of the respondent. The applicant deposes that as at May 2016, the respondent had four employees being three pilots and an Operations Manager. The respondent has since terminated the services of all the pilots leaving the Operations Manager as the sole employee. He deposes that the respondent no longer occupies its former office at Wilson Airport. He further deposes that in its defence, the respondent avers that it has no business as its only source of business was terminated.

The applicant states that there are high chances of success of his case as the respondent has in the defence admitted the averments in the memorandum of claim and therefore he is entitled to the orders sought in the application to ensure that he will not be obstructed, frustrated and delayed in executing any award that the court many make in his favour.

The respondent filed grounds of opposition to the application as follows –

1) That the application is incompetent, misconceived and lacks merit.

2) That the application herein is an abuse of the court process.

3) That the application is merely a claim at large, speculative and lacks foundational assessment.

4) That the respondent herein is neither in the process of winding up, nor has it any intention of winding up as alleged by the applicant. The reasons stated by the applicants are fabricated and made up conveniently for their application.

5) That the respondent is seeking to curtail the respondent's right to be heard.

6) That the issues raised in the applicant's application are issues that can be addressed during execution of any decree if at all.

7) That the orders sought ought to be declined forthwith as granting them will perpetuate abuse of the court process.

The application was by consent of the parties argued by way of written submissions.

Applicant's Submissions

It is the applicant's submission that he has a prima facie case with high probability of success, that if the respondent is not restrained from winding up, the claimant's claim would be defeated as there will be no possibility of realising the award. It is submitted that the court cannot rely on any undertaking of the respondent as it is not trustworthy having pleaded that it has been wound up while at the same time pleading that it has no intentions of winding up.

It is further submitted that under Article 35 (1) (b) of the constitution, the applicant has a right to information required for the exercise or protection of any right or fundamental freedom and he requires the information to exercise and protect his right to fair hearing under Article 50 (1) of the constitution.

The applicant submits that he has satisfied the requirements under Order 39, Rule and 2 of the Civil Procedure Rules and is entitled to the orders sought.

Respondent's Submissions

For the respondent, it is submitted that the applicant has not met the threshold in **Giella -vs- Cassman Brown and Company Limited** for injunctive relief orders, that the application is based on generalities and lacks foundation for assessment, that there is no proof of unfair termination. It is submitted that the applicant has not established a prima facie case with probability of success to justify the orders sought and that there is no proof of intention to wind up the respondent.

The respondent relies on Section 107 (1) and (2), Section 190 and 112 of the Evidence Act on burden of proof and submits that the burden of proving the averments of the allegations by the applicant has not been discharged.

The respondent further relies on the case of **Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others** where the court stated as follows: -

> "*On the second factor, that the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" e compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such nature that monetary compensation, of whatever amount will never be adequate remedy*."

He further relies on the **Court of Appeal's** decision in **Amritlal -vs- City Council of Nairobi, CA No. 47 of 1981,** where the court pronounced itself eloquently as follows –

> "*…that where an award of damages constitutes an adequate remedy, an order of injunction cannot issue…"*

On the issue of furnishing security, the respondent submits that the applicant does not meet the principles set out in the case of **Ndirangu -vs- Abdalla (1984) KLR 746 – 750** as follows

> "*Examination of Order XXXVIII Rules 5 and 6 shows that the court must move step by step. Before the court can take any action under those rules, it must satisfied that the defendant with intend to obstruct or delay thee execution of any decree that may be passed against him;-*
>
> *a. Is about to dispose of the whole or any part of his property; or*
>
> *b. Is about to remove the whole or any part of his property from the local limits of jurisdiction of the court. The final step is set out in Rule 6 (1) where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, the court may rode the attachment or property sufficient to satisfy the decree. In my own view, the learned Judge ordered an attachment of thein this case in total disregard of the provisions of Rules 5 and 6."* (As per Potter JA, at page 749 and 50 respectively).

The learned Judge Law JA delivered himself as follows:

> "*This purported attachment was a nullity, as property cannot be ordered to be attachment before judgment at the instance of a plaintiff unless the defendant is given an opportunity to show cause why he should not furnish security, or fails to show cause, why he should furnish security, or fails to show cause, or to furnish the required security,"*

While the learned Judge Miller JA observed as follows:

> "*By Rule 6 of the order, it is upon the defendant's failure to show cause why he should not furnish security, or to furnish he security required within the specified time that the court may order the attachment of the property sufficient to satisfy the decree which may be passed in the suit. The learned Judge was in error to order the summary attachment of the vehicle at first instance on the respondent's application without calling upon and requiring the appellant to show cause."*

The respondent further relied on the case of **Saving and Loan Kenya Limited -vs- Erustus Mwangi Mugai, Nairobi High Court Civil Case No. 775 of 2000** in which the learned Judge Ringera J, as he then was observed that –

> "*…before a court can either order a defendant to furnish security or attach his property conditionally before judgment as provided by Order XXXVIII, Rule 5 of the Civil Procedure Rules, it must be satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is either about to dispose of the whole of is property, or is about to remove his property from the jurisdiction of the court and that mere apprehension however well-grounded without evidence that the defendant intends to do what is feared does not suffice…"*

The respondent submitted that the applicant has not proved that it intends to dispose of the whole or part of its property, to obstruct or that the respondent intends or is in the process of removing any property form the jurisdiction of this court. The respondent relied on the case of **FTG Hollan -vs- Afapack Enterprises Limited & Another [2016] eKLR** in which the Court of Appeal held as follows –

> "*……the court…. Had to be satisfied that the appellant was about to dispose of its assets or repatriate them from the local limits of the court's jurisdiction. The respondent provided no evidence at all to demonstrate that any of the above was about to happen…… For these reason, although the learned Judge had complete discretion to order for security, we think he improperly exercised that discretion and in the result erred by making a general proposition that a foreign registered company sued in Kenya must provide security even in the absence of evidence that the company intends to dispose or repatriate its property out of the jurisdiction…"*

On the applicant's prayer that the court strikes out the defence, the respondent submits that such an order would be against the rule of natural justice as it would be condemned unheard. The respondent relied on the case of **Peterson Njue Njeru & Rachel Njoroge -vs- Maralal Senior Resident Magistrate [2010] eKLR** in which the learned Judge relying on the Court of Appeal case of **Prime Sart Works Limited -**

vs- Kenya Industrial Plastics Limited [2001] E.A. 528 observed that –

> *"…. Implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall judge of his own cause and that no man shall be condemned unheard, that these two principles of natural justice must be observed by the courts save where their application is expressly excluded."*

Similarly, the Court of Appeal Judges in **Blue Shield Insurance Company Limited -vs- Joseph Moya Oguttu [2009] eKLR** stated:

> *"The principles guiding the court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of **D.T. Dobie and Company (Kenya) Limited –vs- Muchina (1982) KLR I** discussed the issue at length and although what was before him was an application under Order Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -*
>
> *"The power to strike out should be exercises after the court has considered all facts but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."*
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> *We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L. J in the case of **Cail Zeiss Stiftung -vs- Ranjuer & Keeler Limited and Others (No. 3) (1970) ChapD 506**, where the Lord Justice : -*
>
> *"The power to strike out any pleading or any part of a pleading udner this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."*
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> *We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."*

The respondent prays that the application be dismissed with costs on grounds that the applicant has irredeemably failed to establish the legal requirements for issuance of the orders sought.

Finding and Determination

I have considered the application filed by the claimant together with the grounds and affidavit filed therewith, the grounds of opposition, the submissions and the authorities cited. The issue for determination is whether the applicant has proved that it is entitled to the orders sought.

The legal underpinning for attachment and security before judgment is set out in Order 39, Rule 1 and 2 as follows-

ORDER 39

ARREST AND ATTACHMENT BEFORE JUDGMENT

[Order 39, rule 1.] Where defendant may be called upon to furnish security for appearance.

> **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.**

[Order 39, rule 2.]

Security.

> **2. (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.**
>
> **(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.**

These provisions were considered in the case of **Ndirangu -vs- Abdalla (supra)** where the Court of Appeal stated that before the court orders the arrest or attachment before judgment, it must be satisfied that the defendant is intent on obstructing or delaying execution of any decree that may be passed against him, or about to dispose of it property or remove the property from the jurisdiction of the court. The court further observed that the defendant must be given an opportunity to show cause.

In the present case, the applicant avers that the respondent intends to wind up its operations in Kenya. The only evidence the applicant has offered is the averments at paragraph 24 of the defence to the memorandum of claim to as follows -

> *"Further the respondent adds that it informed all its employees on the 7th May 2016 that is was ceasing business owing to the cancellation of aircraft lease between the respondent and Astral Aviation Limited which contract was the respondent's only source of business."*

Ceasing business and winding up are not synonymous. The fact that a company ceases business does not mean that the company is about to be wound up. The procedure for winding up of limited companies like the respondent is elaborately provided for in law and any person who alleges that a company is about to wind up must demonstrate how that conclusion has been reached by submitting proof to the court of the steps that have been taken in the furtherance of the intention to wind up.

Conclusion

I find no merit in the application. I find that the application is not just speculative as stated by the respondent in the grounds of opposition but also vexatious; I do not think I need to spend any further judicial time in its consideration.

The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE