



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 562'B' OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 18th May, 2018)

TIMOTHY GRAEME STEEL.....CLAIMANT

-VERSUS-

TNT EXPRESS WORLDWIDE (KENYA) LIMITED.....RESPONDENT

RULING

1. The Application before Court is the one dated 7/4/2017 filed by the Applicant herein through a Notice of Motion of even date. The Application was filed under Section 12 of the Employment and Labour Relations Court (Procedure) Rules 2016.

2. The Applicant seeks orders that:

1. This Application be certified urgent and heard ex-parte in the first instance;

2. Pending the hearing of this Application inter partes this Honourable Court do issue an ex parte order requiring the Respondent to provide sufficient security for US Dollars 336,000 (or the Kenya Shilling equivalent thereof) being the minimum aggregate amount claimed by the Claimant against the Respondent in this cause;

3. As an alternative to prayer 2, pending the hearing of this Application inter partes, this Honourable Court do issue an ex parte order requiring the Respondent to have and maintain in its bank accounts in Kenya an aggregate minimum balance of USD 336,000 (or the Kenya Shilling equivalent thereof) and demonstrate evidence thereof to the satisfaction of this Honourable Court;

4. Pending the hearing and determination of this case, this Honourable Court do issue an order requiring the Respondent to provide sufficient security for US Dollars 336,000 (or the Kenya Shilling equivalent thereof), being the minimum aggregate amount claimed by the Claimant against the Respondent in this cause;

5. As an alternative to prayer 4, pending the hearing and determination of this cause, this Honourable Court do issue an order requiring the Respondent to have and maintain in its bank accounts in Kenya an aggregate minimum balance of US Dollars 336,000 (or the Kenya Shilling equivalent thereof) and demonstrate evidence thereof to the satisfaction of this Honourable Court;

6. The costs of this application be awarded to the Claimant.

3. The Application is supported by the annexed affidavit of Timothy Graeme Steel and on the following grounds that:-

a) The Claimant has filed a claim against the Respondent in which he seeks declaratory and pecuniary remedies against the Respondent for unlawful redundancy, constructive dismissal, unfair termination, unfair labour practices and breach of contract.

b) The Claimant claims arise from a forced termination of his employment following an attempt by the Respondent to forcefully and unilaterally change the terms of his employment to require him to work in Dubai in the United Arab Emirate. This occurred at a time when the Claimant's position was in the course of being eliminated but the Respondent disregarded the redundancy procedure and instead put in place measures that were intended to wholly evade its statutory obligations.

c) In the past week, the Respondent has announced to its customers and employees that it has appointed a third party company – Pan African Express - to take over and manage its operations in Kenya with effect from 1st April 2017.

d) The Respondent has already terminated the employment of a number of employees and arranged for Pan Africa Express to employ them directly. The Respondent is also in the course of terminating the employment of its other staff members.

e) The Respondent's announcement and actions evidence its winding down and possible closure. This appears to be in line with internal reorganizations affecting subsidiaries within the TNT group. The reorganizations are a consequence of the acquisition of the TNT group by FedEx Corporation and FedEx Acquisition B.V. Indeed, Pan Africa Express is the FedEx licensee in Kenya.

f) In view of the above, there is an imminent risk that the Respondent will transfer its entire business in Kenya to another entity or close its business altogether. If this happens, the Claimant will never be able to recover the relief that is likely to be awarded by this Honourable Court.

g) Unless the annexed application is heard immediately, the Claimant is likely to be left without relief.

h) It is just, fair, proper and equitable for the orders sought herein to be granted.

4. The affidavit in principle reiterates the facts set out in the above grounds. In the affidavit, the deponent further depones that in May 2016 FedEx Corporation and FedEx Acquisition B.V (FedEx) acquired a majority stake in TNT Express N.V (TNT), the Respondents holding Company.

5. He also depones further that by way of a joint press release by FedEx and TNT dated 25/5/2016 on FedEx's website, the two companies stated that **"FedEx has acquired TNT Express, the integration process will begin immediately. The FedEx track record of successful acquisition integrations in the US and globally will serve the combined companies well to leverage investments in technology, infrastructure, facilities and operational capabilities to position the combined companies for long-term growth and success"**. The joint press release was annexed as Exhibit TGS 2.

6. The Applicant further avers that by way of another joint press release by FedEx and TNT published on 6.6.2016, the two companies officially announced that FedEx owns more than 95% of the shares in TNT (Exhibit TGS 3).

7. The Applicant avers that this takeover consequently led to reorganizations in the TNT operations and its subsidiaries. The Respondent thereafter issued a circular dated 26.3.2017 stating that the Respondent would be effectively transferring its operations to a 3rd Party in this case Pan Africa Express.

8. It is for the above reasons that the Applicant avers that from the above communications, the Respondent's business is currently being restructured and would probably be closed down and subsumed in FedEx's.

9. The Applicant fears that in case of the Respondents winding down or closing down, then his claim will be rendered unexecutable and he would be unable to recover any relief that is likely to be awarded by this Honourable Court.

10. The Respondents opposed this application. They filed their Replying Affidavit on 18/4/2017 through the firm of Kaplan & Stratton Advocates. The affidavit was deponed to by one Jessicah Kaingu the Respondent's Country General Manager who deponed that this Court lacks jurisdiction to grant the orders for security of costs herein as Order 26 rule 1 of the Civil Procedure Rules 2010 provides that only a Defendant or 3rd Party can apply for security for costs against a Claimant (Plaintiff).

11. They aver that this Court also lacks jurisdiction to grant an order for attachment before judgement under Section 12 of Employment and Labour Relations Court Act and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 relied on by the Claimant.

12. They also aver that the Applicant has not provided any evidence before Court that the Respondent is intent to avoid any process of the Court or that it is about to leave the jurisdiction or about to remove any of its property from the jurisdiction of this Honourable Court.

13. The Respondent aver that they are a limited liability company duly registered in Kenya and carrying on business in Africa, Europe, Middle East, Asia, Pacific and America and they have no intention of winding up.

14. They aver that they have outsourced certain services and this cannot be a basis upon which the Applicant can allege winding up by the Respondent.

15. The Respondents contend that affidavit of the Applicant is full of averments which are hearsay. The Respondent deponed that the Applicant voluntarily resigned from work and he knew the consequences and that this application is not merited.

16. They aver that in any event that the Claimant succeeds, the judgement cannot be anywhere near 336,000 USD sought by the Applicant. The Respondent want this Application dismissed accordingly.

17. The Claimant filed a Supplementary Affidavit on 26/4/2017. He avers that his application is not for security of costs.

18. He avers that this Court has jurisdiction to grant orders sought. He avers that indeed many employees of the Respondent many of them

listed under paragraph 7 of the Supplementary Affidavit have been terminated and transferred to Pan Africa Express. That others have been declared redundant and the Respondents employees have reduced from 70 to about 30 and this demonstrates a winding down of Respondents business.

19. He reiterates averments made in his supporting affidavit and seeks orders sought to be granted to him.

20. Both parties filed their respective submissions. The Respondent had submitted that this Court lacks jurisdiction to entertain this application under Order 26 Rule 1 of the Civil Procedure Rules 2010. This would be the first issue for this Court to address before delving in other issues.

21. Order 26 Rule 1 of the Civil Procedure Rules 2010 reads as follows:-

“Order 26 rule 1 – security for costs

“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”.

22. The concept of security for costs is discussed in detail in Mulla, The Case of Civil Procedure Sixteenth Edition Vol 3 at page 3242 as follows:-

“the object of rule 1 of 0.25 (equivalent to Order 26 rule 1 of the Kenya Civil Procedure Rules 2010) is to provide for the protection of defendants in certain cases where in the event of success, they may have difficulty in realizing their costs from the Plaintiff”.

23. Thus, the concept of security of costs is meant to protect the interest of the Defendant and not a Claimant.

24. The Claimant has sought various prayers in this application but none is strictly for security of costs as envisaged under Order 26 of the Civil Procedure Rules 2010. What Claimant seeks is sufficient security to realize his judgement if awarded by Court.

25. The submissions that this Court lacks jurisdiction to entertain this application on security is therefore without basis and I find that in terms of the prayers for security sought, this Court has jurisdiction to entertain the same. In the same vain the issue of jurisdiction is also alluded to by the Respondent in terms of whether the Court has jurisdiction to grant orders for attachment before judgement.

26. The jurisdiction of the Court is set out under Section 12 of the Employment and Labour Relations Court which jurisdiction is conferred under Article 162 (2) of the Constitution.

27. Section 12 (1) of the Employment and Labour Relations Court Act states as follows:-

1) “The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

a) disputes relating to or arising out of employment between an employer and an employee”.

28. In this regard so long as an order sought is between an employer and an employee, this court has jurisdiction to entertain the same. It is therefore my finding that this Court has jurisdiction to entertain this application.

29. In considering whether or not to grant the orders sought, I note the Applicant/Claimant is apprehensive that if he finally gets a judgement against the Respondent, the same will be unexecutable because the Respondent will no longer be in existence.

30. The Claimant/Applicant has submitted that the Respondent is a shell given that FedEx now owns more than 95% shares in TNT. The Applicant has also pointed out that majority of the employees of Respondent have since been declared redundant or been terminated and of course this is a worrisome trend which though disputed by the Respondent is the truth in view of the documents exhibited by the Applicant and which Respondent only in passing stated were not true.

31. The situation faced by this Court in this Application is what has been referred to as security for judgement in other jurisdictions. In the case of **West Jet vs ELS Marketing Inc (2013) 574 AR 281 (QB) Court of Queen’s Bench of Alberta (Canada)** while granting orders for security of judgement, the Court noted that this order can be granted:-

- **“where a litigant avails themselves of every right of appeal and request for re-argument in the litigation, yet inexplicably fails to fulfil the obligations imposed by a judgment in that same litigation;**
- **where there is no dispute the defendant had enjoyed the benefits of what the plaintiff was seeking compensation for, yet refuses to pay;**
- **where an appellant has no assets in the jurisdiction and their appeal is questionable;**
- **where Security for Judgment is needed to encourage respect for the judicial process or prevent abuse of process.....”**

32. In Kenyan jurisdiction, this is what is akin to an attachment before judgement. Order 39 rule 5 of the Civil Procedure Rules provides as follows:-

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; or

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, within 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 the 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 furnish security.

2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

33. An order such as is sought by the Applicant herein will be merited if indeed it is shown to the satisfaction of the Court that the acts or omissions of the Respondent are calculated to defeat any outcome in a judgement that could be given to the Claimant rendering the judgment a mere academic exercise.

34. The Applicant has indeed demonstrated that the Respondent as they stand now are a pale shadow of their former self. Exhibit TGS 2, 3 and 4 are proof this development in Respondents standing. It is my finding that with also the termination by the Respondent of other employees as deponed by the Applicant, there is a real likelihood of the Applicant suffering and failing to reap fruits of his judgment if he gets one.

35. I find the application is merited and I therefore order that the Respondent do deposit in a joint interest earning account held in the joint names of Counsels on record an equivalent of USD 100,000 within 30 days. In default execution to issue.

36. Costs in the cause.

Dated and delivered in open Court this **18th day of May, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbanya holding brief for Omondi for Claimant

Oyoo holding brief for Muthuri for Respondent