



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

**CAUSE NO. 459 OF 2018**

(Before Hon. Lady Justice Maureen Onyango)

**TERESIA NJERI GICHUHI.....CLAIMANT/APPLICANT**

*VERSUS*

**SIMBA PHARMACEUTICALS LIMITED.....1<sup>ST</sup> RESPONDENT**

**DIPANKAR KUMAR JHA.....2<sup>ND</sup> RESPONDENT**

**RULING**

By application dated 25<sup>th</sup> April 2018 the claimant seeks the following orders—

1. That this application be certified as urgent and heard ex-parte in the first instance
2. That the 2<sup>nd</sup> respondent do deposit his passport in this honourable court pending the hearing and determination of this case.
3. That pending compliance of order 2 above the director of immigration do ensure the 2<sup>nd</sup> respondent does not leave the jurisdiction of this honourable court.
4. That in the alternative to granting of prayer 2 above, the 2<sup>nd</sup> respondent do deposit in this honourable court a sum of Ksh.2,000,000.00 or other property equivalent to the said sum 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.
5. That the court be pleased to take the parties herein evidence on a date fixed by this honourable court so as to enable the claimant's advocate to cross- examine the 2<sup>nd</sup> respondent.
6. That the costs of this application be in the cause.

The application is made under Rule 15 of Industrial Court (Procedure) Rules (sic) and Section 3 of the Employment and Labour Relations Court Act 2011 and Order 38 Rule 1, 2 and 3 of the Civil Procedure Rules.

The grounds upon which the application is made as expressed on the face of the application and in the supporting affidavit of the claimant/applicant are that the citizenship of the 2<sup>nd</sup> respondent is unknown to the claimant, that his residence is probably pegged on his work permit which may be cancelled at any time at the 1<sup>st</sup> respondent's discretion, that the claimant has reported the 2<sup>nd</sup> respondent to the Directorate of Criminal Investigation and the Police and he is likely to face criminal charges and has rushed to court to file **HCCR MISC. APPLICATION NO. 168 OF 2081 DIPANKAR KUMAR JHA -V- DCI PARKLAND AND 2 OTHERS** in which he obtained orders granting him anticipatory bail of Kshs.100,000, that he is a flight risk as he travels out of Kenya frequently and may decide not to come back to Kenya. It is further deposed that the court is currently not giving hearing dates for cases filed after 2014 and this case may not be fixed for hearing soon. Annexed to the affidavit supporting the application is a copy of the court order in MISC. CRIMINAL APPLICATION NO. 168 OF 2018.

The respondents filed grounds of opposition in which they raise the following grounds –

1. The application is based on the wrong provisions of the law and as such making it impossible to respond to the application.
2. That this Court lacks the jurisdiction to grant the orders sought more so in this instance where the Criminal Court has already granted bail terms on the 2<sup>nd</sup> Respondent.
3. The 1<sup>st</sup> Respondent is variously liable for the actions of the 2<sup>nd</sup> Respondent and as such no need to impose sanctions on the 2<sup>nd</sup> Respondent.
4. The application is an abuse of court process solely intended to grant the Applicant an early hearing date.

The application was argued in court on 4<sup>th</sup> July 2018, Mr. Darr holding brief for Mr. Gomba appeared for the claimant/applicant. He reiterated the grounds in support of the application and those in the replying affidavit. He submitted that the 2<sup>nd</sup> respondent having been accused of sexual harassment, it will be necessary to cross examine him not only to prove the case but for the ends of justice to be met. Mr. Darr submitted that the respondent has filed grounds of opposition only, thus the factual assertions in respect of the 2<sup>nd</sup> respondent's status as a foreigner and a flight risk are not opposed. That this is proof of improper motive with which the 2<sup>nd</sup> respondent is evading the jurisdiction of this court.

Mr. Darr submitted that the 2<sup>nd</sup> respondent has not filed a memorandum of appearance or defence, that he has not even submitted to the jurisdiction of the court. He urged the court to grant prayers 2, 3 and 4 of the application or in the alternative, give a hearing date.

Mr. Irungu for the respondents submitted that the provisions under which the application had been made makes it impossible for the respondents to respond to the same, that order 38 is for test suits yet this is not a test suit, that counsel has not pointed out that this was a mistake. He submitted that every application should be anchored on the provisions of the law and if this is not done it goes to the root of the application. He submitted that citing the wrong provisions would only be a technicality if it is indicated that it is an oversight, otherwise the court has to answer whether the application or claim is a test suit.

Mr. Irungu further submitted that this court has no jurisdiction to grant the order sought which are more inclined to a criminal court. He pointed out that there are proceedings in the High Court in which the court granted anticipatory bail of Kshs.100,000 to the 2<sup>nd</sup> respondent as has been pleaded in the affidavit in support of the claimant's application. He submitted that this application seeks to enhance already granted bail/bond terms, that the purpose of the bail is to ensure that a party attends proceedings, that the criminal court found that the 2<sup>nd</sup> respondent would attend court.

Mr. Irungu submitted that the 1<sup>st</sup> respondent is vicariously liable for the actions of the 2<sup>nd</sup> respondent who is its employee and even if the 2<sup>nd</sup> respondent escapes the jurisdiction of the court it is not true that it would be impossible to execute a decree of this court. He pointed out that the statement of claim seeks an award against the 1<sup>st</sup> respondent as employer, that there is no claim against the 2<sup>nd</sup> respondent and therefore the claim can be fully satisfied by the 1<sup>st</sup> respondent.

Mr. Irungu submitted that the application is unwarranted and is intended to harass the 2<sup>nd</sup> respondent.

In a brief rejoinder Mr. Darr submitted that the provisions of Article 159(2)(d) condones technicalities, that the respondents are not in doubt as to which orders were being sought, that Section 3 of the Employment and Labour Relations Court Act gives the court powers to grant orders that meet the ends of justice. He submitted that the 1<sup>st</sup> respondent may or may not be vicariously liable, and that vicarious liability is not an excuse for a party to evade jurisdiction of the court.

He submitted that it is not true that there are no orders sought against the 2<sup>nd</sup> respondent as prayer (c) in the claim seeks damages against both respondents. He further submitted that the application does not seek to enhance bail as this is a different application. That it is trite law that the level of proof in a criminal case is not the same as in a civil matter and the orders sought are in no way antecedent to bail. He submitted that the accusations against the 2<sup>nd</sup> respondent are grave and the applicant should be granted an opportunity to face the 2<sup>nd</sup> respondent in court.

### **Determination**

I have considered the application, affidavit and grounds in support thereof. I have also considered the grounds of opposition and submissions by counsel in support of and in opposition to the application.

The first issue for consideration is whether this court has jurisdiction to grant the orders sought. What the applicant seeks are orders to conserve the subject matter of the suit being the presence of the 2<sup>nd</sup> respondent within jurisdiction or in the alternative deposit of security. These are orders that are well within this court's jurisdiction under Section 3 and 12 of the Employment and Labour Relations Court Act.

I thus find that the court has jurisdiction to grant the orders sought. The anticipatory bail granted to the 2<sup>nd</sup> respondent in Misc. Criminal Application No. 168 of 2018 are intended to protect the 2<sup>nd</sup> respondent from arrest and to ensure his attendance of any criminal case that may be filed against him. The said orders would not protect the claimant should she be successful in her claim herein against the 2<sup>nd</sup> respondent.

The second issue is whether the citing of a wrong provision of the law would go to the root of the application if the same has not been acknowledged to be an error or oversight. I think both Section 20 of the Employment and Labour Relations Court Act and Article 159(2)(d) are explicit on how such procedural technicalities should be addressed. The respondents did not state that they were prejudiced by the citing

of the wrong procedural provisions. The prayers sought are unambiguous and the respondents have in their grounds of opposition and in the submissions adequately addressed the same.

Turning to the substantive issues in the application, I find that the applicant has not provided the court with compelling evidence to justify the court's limiting the freedom of movement of the 2<sup>nd</sup> respondent that is guaranteed under the Bill of Rights. The applicant has not proved that the 2<sup>nd</sup> respondent is not a Kenyan by producing either a copy of his passport or work permit. In the supporting affidavit she deposes that his residence status is unknown to the claimant. She further deposes that his residence status is (probably) pegged to his work permit which may be cancelled any time at the 1<sup>st</sup> respondent's discretion further confirming her lack of knowledge of the 2<sup>nd</sup> respondent's citizenship.

The applicant has further deposed that the 2<sup>nd</sup> respondent is a flight risk without any evidence to support the averment. She has further not submitted any proof either in her affidavit or in the claimant that he travels out of Kenya frequently or that he is a foreigner. In the descriptive paragraphs of the claim the 2<sup>nd</sup> respondent is described a male adult of sound mind residing and working for gain in Nairobi within the (aforesaid) Republic.

For the foregoing reasons I find that the claimant has not adduced sufficient grounds to justify the grant of the orders sought. The application is dismissed with costs in the cause.

**DATED AND SIGNED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2018**

**MAUREEN ONYANGO**

**JUDGE**