



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 698 OF 2017

ROSALINA ATOLWA.....CLAIMANT

VERSUS

A-Z PETROLEUM PRODUCTS KENYA LTD.....RESPONDENT

RULING

1. By a motion dated 10th April, 2017 the claimant sought orders that the respondent deposits in court the sum of kshs 437,240/= being the claimant's terminal benefits and compensation for unlawful and unfair loss of employment. The claimant further sought the order of the court to restrain the respondent from closing down or changing ownership of the business before paying the claimants terminal benefits.
2. The application was based on the grounds the respondent terminated the claimant's services on 30th January, 2017 without serving her with termination notice of payment in lieu. Further that the respondent is a foreign company and has issued a notice of closing down operations in Kenya.
3. The respondent opposed the application and filed a replying affidavit through one Emeka Oloisiuba who stated among others that the respondent is a company duly incorporated in Kenya hence not a foreign company. According to him, the claimant services were properly terminated and due process followed. Mr Oloisuba further stated that the claimant was guilty of insubordination and excessive absenteeism for which she was warned severally.
4. In his submissions in support of the application Mr Nduma for the claimant submitted that the claimant's termination letter never talked of payment of terminal benefits. Counsel further submitted that the respondent's ownership was 100% foreign and had in the recent past laid off majority of its employees. The claimant therefore apprehensive that the respondent was likely to close business and run away from jurisdiction of the Honourable Court without paying her terminal benefits and compensation for loss of employment.
5. Mr Kamunya for the respondent on the other hand submitted that the primary issue in dispute is whether the claimant's employment was unlawfully and unfairly terminated by the respondent. This has been vehemently denied by the respondent. Hence the issue of terminal benefits and compensation for loss of employment can only arise and be determined after a finding is made by the court that the claimant was unlawfully terminated.
6. Mr Kamunya further submitted that the respondent was a limited liability company duly incorporated and registered in Kenya and its head office was situated at 12th Floor, Embankment Plaza Upperhill, Nairobi. An order for deposit for security before judgement is a drastic order that should be made in clear and obvious cases only. The order must be backed by credible evidence that the respondent in a bid to evade or defeat a judgement which the court might ultimately enter against him is dissipating or sending out of jurisdiction his assets. Further the applicant must show that it has a very strong case with a high likelihood of success and that the respondent has weak or no defence at all to the claim. The order ought not to be made where facts are hotly contested.
7. In the matter before me, the claimant alleges that the respondent unlawfully and unfairly terminated her services and did not pay her terminal benefits which she has calculated at kshs 437,240 which she would like the court to order the respondent to deposit in court since according to her the respondent is a foreign company and is likely to run away before meeting the judgement of the court if entered in her favour.
8. The respondent contested the allegations and has produced warning letters to the claimant prior to termination of her services. The claimant refutes these warning letters and claims they were a forgery and or she never received them. This clearly demonstrates that the issues in dispute are contested and it would not be right to order the respondent to deposit any money in court as security for judgement in the circumstances. The fact that the respondent directors are foreigners is not reason enough to assume it is about to close down and the directors run away from jurisdiction. In any event a company is a body corporate distinct and separate from its directors.

9. The claimant has not produced any plausible evidence before court to reasonably demonstrate that the respondent is about to close shop. In the circumstance the application is found without merit and is hereby dismissed with costs.

10. It is ordered.

Dated at Nairobi this 20th day of July, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 20th day of July, 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent