



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

**AT NAIROBI**

**CAUSE NO 397 OF 2017**

**MURIITHI DICKSON KITHINJI.....CLAIMANT**

**VERSUS**

**ECONOMIC HOUSING GROUP LTD....RESPONDENT**

**RULING**

1. By a notice of motion dated 22<sup>nd</sup> February, 2017 the claimant sought orders among others that a temporary injunction issues restraining the respondent from disposing, transferring leasing or in any manner changing ownership of vehicles registered as KAU 403V and KAW 288Y pending the hearing and determination of the main suit.
2. The application was brought on grounds among others that the claimant was retained as a consultant by the respondent and that on 23<sup>rd</sup> November, 2016 the respondent without any just cause terminated the services of the claimant. The claimant further complained that as at the time of termination of his services, the respondent had not paid for work already done for 5 months amounting to 791,1919/= a debt they admitted to but having difficulty on paying. The applicant further stated that he was aware that the respondent's offices had closed and no business was coming in.
3. The respondent opposed the claimant's application and filed a replying affidavit through one David Mwangi who deponed on the main that the court lacked jurisdiction to determine the dispute as the claim was based on an independent consultancy agreement with no employer employee relationship.
4. Mr Mwangi further stated that the respondent was solvent and in active business with no likelihood of closing down and further that its had tangible assets including vehicles, buildings and pieces of land in Naivasha and Nairobi.
5. Mr Mwangi further deponed that the application lacked merit since clause 4 of the consultancy agreement provided for early termination of contract which the respondent invoked after the claimant failed to make even a single sale in his 4 ½ months yet earning hefty retainer fees.
6. Mr Maina further stated that the amount lawfully due to the claimant is Kshs 791,1919/= and that the respondent was willing to enter into a payment plan without the need for an order of provision of security as prayed. On 28<sup>th</sup> February, 2017 Lady Justice Mbaru granted ex-parte orders restraining sale, disposal and or transfer of the subject motor vehicles pending inter partes hearing of the present application.
7. The respondent herein contents it had justifiable reasons for terminating the claimant's service which was that the claimant failed to meet targets for 4 ½ months despite earning a hefty salary. The claimant disputes the reason for termination. Further, the respondent contents the jurisdiction of the court to entertain the dispute herein contending there was no employer-employee relationship. According to the respondent the claimant was a consultant. The claimant on his part contents the stand taken by the respondent insisting he was the respondent's employee.
8. These two issues, namely the validity of reasons for termination and the question of whether the claimant was an employee or an independent contractor are contested by both parties and documents and arguments by both require that the issues be subjected to a full trial where either side shall have the right to interrogate and cross-examine witnesses.
9. The applicant seeks orders the nature of which are provision of security for judgement since he is of the view that the respondent is undergoing financial difficulty and may not be able to satisfy the judgement amount if the claimant becomes successful in the suit.
10. As observed earlier the two issues between the parties that is the validity or otherwise of the reasons for termination and whether the court has jurisdiction in the matter are hotly contested. The decision can go either way. It would in the circumstances not be right for the

court to burden the respondent with an injunctive order over its assets on a matter that is highly contested. An order for security before judgement ought to be made in exceptional cases particularly where the applicant has demonstrated a strong case against the respondent vis-à-vis a weak and almost hopeless defence by the latter. Further, the order ought only to be made in cases where the respondent is shown to be dissipating its assets or transferring them outside the jurisdiction of the court. Financial trouble of the respondent is no reason to issue an order for security before judgement.

11. A judgement is neither a charge not debenture or preferential debt over the assets of a company. Its realization in cases where the judgement is obtained when a company is undergoing liquidation or under receivership ought to follow insolvency procedures under the company law. The above reasoning applies to individuals whose inability to satisfy a judgement of a court should be dealt with through the execution process and bankruptcy laws.

12. To encourage a liberal regime of granting security before judgement especially in employment matters would be to set a dangerous precedent where any employee contesting reasons for separation from employment under circumstance such employee thinks were influenced by the employer's financial difficulty, would get an order freezing such assets of an employer as would satisfy the judgement such employee might ultimately obtain. The court must guard against this.

13. In the circumstances, the court will dismiss the application and discharge the ex-parte order made herein but order that the respondent do pay to the claimant forthwith the admitted amount of Kshs 791,191/= together with interest at court rates from date of filing within 30 days from todays date. In default execution to issue in respect thereof.

14. The applicant/claimant shall further have costs of the application.

15. It is so ordered.

Dated at Nairobi this 6<sup>th</sup> day of July, 2018

**Abuodha J. N.**

**Judge**

**Delivered at Nairobi this 6<sup>th</sup> day of July, 2018**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant

.....for the Respondent