



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2445 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**FELIX ODHIAMBO AWUOR.....CLAIMANT**

*VERSUS*

**ELECTORAL INSTITUTE FOR**

**SUSTAINABLE DEMOCRACY IN AFRICA (ELSA).....RESPONDENT**

**RULING**

By application filed under certificate of urgency by way notice of motion dated 28<sup>th</sup> November 2016, the applicant seeks the following orders –

- 1) That the application be certified urgent and be heard ex parte in the first instance.
- 2) That pending the hearing and determination of this application and this suit, this Honourable Court be pleased to issue an interim injunction of the decision of the Respondent taken to shut down its Kenya Country Offices in Nairobi as communicated by the Operations Director of the Respondent in the email of 15th November 2016 addressed to the Respondent's employees.
- 3) That pending the hearing and determination of this application and this suit, this Honourable Court be pleased to issue an interim injunction against the Respondents by itself or its agents, servants, employees, officers or whomsoever so acting on its behalf from transferring any funds from the Respondent's NIC Bank Account EISA-1 No. 1000020617 and EISA-5 No. 1002501388.
- 4) That pending the hearing and determination of this application and this suit, this Honourable court be pleased to issue an equitable relief in the nature of specific performance directing that the Respondent, its authorized agents, servants, employees, officers or whomsoever so acting on its behalf to honour the terms of the employment contracts and pay the claimant all the salary and employment benefits in accordance with the employment contract.
- 5) That the costs of the application be paid by the Respondent.

The application is supported by the affidavit of FELIX ODHIAMBO OWUOR the applicant and the following grounds –

- a) That the Respondent intends to shut down its Kenya Country Office by 30<sup>th</sup> November 2016 and thereby threatening the livelihood of the Claimant through constructive termination of employment.
- b) The Respondent whose Headquarters is in Johannesburg South Africa, intends to transfer the funds held in its Accounts in Kenya earmarked for the employees' salaries and benefits.
- c) The Claimant stands to suffer irreparable loss by the Respondent's decision to shut down its Kenya Country Office before paying the employees their dues.
- d) The Claimant has at all times carried out the duties assigned to him in a transparent, diligent and loyal manner without fail in accordance with his employment contracts and the law.
- e) The Respondent is solvent with many sources of funds capable of meeting its responsibilities to the Claimant.
- f) The Respondent's agents, servants, employees, officers have all along acted in bad faith against the Claimant by attempting to

transfer the funds from the jurisdiction of the Court to its Headquarters in Johannesburg South Africa with the intention of not honouring the employment contract of the Claimant.

g) The Respondent has treated the Claimant with contempt, haughtiness and high handedness and has threatened to terminate the employment of the Claimant without following the laid down procedures in the law for termination of employment.

h) The Claimant is entitled to protection by this court and the laws of the country and it is in the interest of justice that the application herein be allowed so as to uphold the Claimant's rights.

The application was heard ex parte on 29<sup>th</sup> November 2016 and the following orders granted –

1. That current month's pay, one month's pay in lieu of notice, one month's pay in lieu of leave and severance pay at the rate of 15 days' pay for each completed year of service totalling to USD 75,686.67 be hereby frozen in respondent's account at NIC Bank Account EISA -1 No. 1000020617 and EISA -5 No. 1002501388 pending the hearing inter-partes of this application on 8<sup>th</sup> December 2016.

2. That the Respondent be hereby served.

In the supporting affidavit of the claimant, he reiterates the grounds on the face of the motion. The applicant filed a further affidavit (titled replying affidavit) sworn and filed on 6<sup>th</sup> January 2017 in which he raises issues that are not relevant for the purpose of determination of this application and which I shall not include in this ruling.

The respondent filed a replying affidavit of ILONA TIP of Auckland Park, Johannesburg, South Africa in which she denies that the respondent intends to relocate its offices from Kenya Sheavers. That the applicant is still an employee of the respondent as Country Director and that his prayers in the claim are only available to an employee whose services have ceased.

It is further Ms TIP's averment in the affidavit that the claimant had absconded duty from 10<sup>th</sup> November 2016.

She deposes that the respondent is funded by donors and the funds in account EISA -1 No. 1000020617 and EISA -5 No. 1002501388 which the applicant seeks to freeze are donor funds that have been recalled. Ms. TIP further avers that contrary to the applicant's averments in the affidavit in support of the application he was paid salary for November 2016. She deposes that the applicant's salary was not paid through the accounts he seeks to be frozen.

Ms TIP deposes that the money in the accounts intended to be frozen are for use in implementing donor funded projects with specific timelines and the balance of convenience favours the lifting of the interim orders of the court and allowing the respondent access to the funds held in the frozen accounts.

The application was disposed of by way of written submissions, which the parties highlighted on 17<sup>th</sup> July 2018.

### **Determination**

I have considered the application, the pleadings, the written and oral submissions by the parties and authorities cited. During the oral submissions, parties informed the court that the applicant's employment contract had since been terminated and the claimant had filed an amended statement of claim.

The only issue for determination is whether orders of the court dated 30<sup>th</sup> November 2016 should be confirmed pending the hearing of the amended statement of claim herein. This is because prayer no. 4 can only be granted after hearing the claim while prayer no. 1 has been overtaken by events, having not been granted in the interim.

The respondent has not denied the applicant's averments that it has ceased operations in Kenya and terminated the services of all EISA Kenya staff. It has further not demonstrated that the amounts frozen by the court in the sum of USD 75,686.67 would cripple its operations or that the applicant was paid terminal benefits upon termination of his employment. Whether or not the applicant is entitled to the sums claimed is a matter for determination after consideration of evidence to be adduced at the hearing.

In the letter of termination of the claimant's employment it is stated that he is entitled to unpaid leave days outstanding, salary for days worked in the month of December and certificate of service. The letter is proof that there is money owing to the applicant from the respondent, the exact amount being subject for determination by the court.

From the foregoing, I am satisfied that there is a prima facie case, that the respondent had admitted owing some monies to the applicant and that the respondent has ceased its operations in Kenya. On these grounds, I confirm the orders of this court dated 30<sup>th</sup> November 2016 to the effect that ***"The sum of USD 75,686.67 be hereby frozen in respondent's account at NIC Bank Account EISA -1 No. 1000020617 and EISA -5 No. 1002501388 pending the hearing and determination of the claim herein."***

Costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**