



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE 1634 OF 2017**

**MATHIAS OMONDI NZUYA.....CLAIMANT**

**VERSUS**

**RELI CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY LIMITED.....RESPONDENT**

**RULING**

1. By a motion dated 22<sup>nd</sup> August, 2017 filed by the claimant, he seeks orders among others that the court issues an order directing the respondent to deposit security for judgement in the sum of Kshs 1,010,000/= being the amount prayed for by the claimant.
2. The application was based on the grounds among others that the claimant was a bona fide employee of the respondent but was unfairly terminated on 29<sup>th</sup> May, 2017. The applicant further averred that the respondent drew the bulk of its membership, depositors and clientele from employees of the Rift Valley Railways Limited which was granted concession to run the Kenya-Uganda Railway. This concession according to the applicant had been terminated and as a result the respondent may lose deposits and membership or face mass withdrawal of funds by apprehensive members.
3. In his affidavit in support of the application the applicant further stated that the termination of the concession of the RVR was as a result of failure to meet their financial obligations under the concession contract and that this financial failure indicated a big likelihood of inability to pay salaries or terminal benefits or remit deductions which form the bulk of the respondent's deposits.
4. The respondent opposed the application and filed a replying affidavit through one Anastancia Kanini in which she deponed on the main that she was the Chief Executive Officer of the respondent and that:
  - a. *The claimant commenced this case on 22<sup>nd</sup> August, 2017 by way of a Notice of Motion application brought under a certificate of urgency dated the same day wherein he sought the following orders:*
    - i. *That this application be certified as urgent and service of the same be dispensed with in the first instance.*
    - ii. *That the respondent be directed to deposit security for judgement to the tune of Kshs 1,010,000/= being the amount prayed for by the Claimant/Applicant in his pleadings.*
    - iii. *Costs of the application be provided for*
      - b. *That the application was certified urgent and admitted for hearing.*
      - c. *The claimant/applicant's prayers are premised on the grounds set out on the face of the application together with the supporting affidavit sworn by the claimant/applicant dated 22<sup>nd</sup> August, 2017.*
      - d. *In response, the respondent filed a replying affidavit sworn by Anastancia Kanini.*
      - e. *The claimant/applicant's main contention is that he is apprehensive that he will not be able to realize the fruits of his judgement against the respondent which may lose deposits and membership or face a mass withdrawal of funds by its members following the termination of the concession agreement of Rift Valley Railways where the respondent draws the bulk of its membership, depositors and clientele.*

f. The claimant submits that the application is well founded on the fears that the respondent might go into financial crisis since the concession agreement was terminated on account of financial failure on the part of Rift Valley Railways which indicates that it might be unable to pay salaries and remit deductions which forms the bulk of the respondent's depositors.

g. The claimant submits that he is apprehensive that should his claim succeed, the respondent may not be in a position satisfying the decree as it is likely to experience a financial crisis. The claimant further submits that should that happen, the claim would be rendered nugatory and the claimant would suffer irreparable loss. That the balance of convenience in the circumstances therefore tilts in favour of the claimant.

h.. The claimant submits that a deposit of security is intended to check on respondents who may feel inclined to be indolent in prosecuting and processing a claim to fruition with the expediency, prudence and vigour expected of such situations. The claimant further submits that the orders sought are meant to secure the claimant against any attempts on the part of the respondent to defeat execution of a decree that might be passed against it.

i. The claimant submits that deposit of security is a protective measure that is put in place to prevent the proceedings from being rendered nugatory and secondly to avoid oppression.

j. The claimant submits that the court has power to exercise its absolute judicial discretion to call for security before judgement.

k. In light of the foregoing, the claimant prays that the application be allowed with costs.

5. The claimant/applicant contest his dismissal from the respondent contending the same was substantively and procedurally unfair and unlawful. The respondent has vehemently refuted these allegations and has filed a document to support their position that the claimant's dismissal was justified. The bulk of the amount the applicant seeks to be deposited in court consist of 12 months salary as compensation for unfair termination which is provided for in the Employment Act as the maximum amount the court can award as compensation for unfair termination.

6. This amount is discretionary and will be apportioned depending on the gravity and seriousness of substantive and or procedural omissions while terminating the employee. There is no guarantee that the court will award the maximum amount as a matter of course. It is therefore erroneous for the applicant to use this as a basis for seeking an order that the respondent deposits the amount sought as security for judgement.

7. An order for security before judgement is a very drastic order and should be made only in exceptional cases and where it is clearly demonstrated that the respondent is selling or transferring its assets out of jurisdiction of the court to defeat the judgement the court might make against him. Mere speculation is not enough. Further an order for security before judgement ought to be made only where the claimant has demonstrated that it has an overwhelming case against the respondent. It should be refused where the facts are hotly contested.

8. The claimant herein contests his dismissal as unlawful and unprocedural. The respondent has resisted this allegation and exhibited document in support of the decision to dismiss the claimant. In the circumstances and for reasons above, it would not be just to order the respondent to provide security before judgement on such hotly contested facts. The application is therefore found without merit and is hereby dismissed with costs.

9. It is ordered.

Dated at Nairobi this 21<sup>st</sup> day of September, 2018

**Abuodha J. N.**

**Judge**

Delivered at Nairobi this 21<sup>st</sup> day of September, 2018

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant

.....for the Respondent.