



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 119 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 4th October, 2018)

LUCY N. KARIUKI-KENJI.....CLAIMANT

-VERSUS-

RMA MOTORS (KENYA) LIMITED.....RESPONDENT

RULING

1. The Application before the Court is brought pursuant to Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 39 Rules 1 and 2 of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A of the Civil Procedure Act Cap 21, Laws of Kenya where the Applicant seeks for prayers that:-

1. *The Application be certified as urgent and service be dispensed with due to reasons of urgency.*
2. *That this Honourable Court be pleased to make orders compelling the Respondent Company to furnish five million eight hundred and forty two thousand Kenya shillings (KES.5,842,000.00) as security to cover the Claimant/Applicant's claim.*
3. *That this Honourable Court do grant such alternative orders that be reasonable to meet the ends of justice.*
4. *Costs of this application be provided for.*

2. The Application is premised on the grounds that the Claimant came across a newspaper report indicating that the Respondent was exiting the Kenyan market confirmed by a subsequent newspaper report of 2nd July, 2018. That subsequently upon invitation by Mr. Sanjiv Shah, the CEO of the Respondent, the Claimant had a meeting at the Respondent's offices on 12th June, 2018, in which meeting the Respondent's CEO intimated that it was winding up operations in Kenya by end of June, 2018 and Jaguar Land Rover had found another investor to take over the franchise in Kenya who had no intentions of taking over the Respondent's responsibilities.

3. That the CEO threatened the Claimant with a counterclaim if she did not drop her claim against the Respondent. She claims that she does not know the Respondent's assets in the country and is apprehensive that once the takeover is complete, she may never recover the amounts sought in the Claim if she succeeds. Further that the matter stands to be rendered nugatory as the Respondent is likely to wind up by the end of June, 2018.

4. The Respondent filed a Replying Affidavit on 23rd July, 2018, sworn by one Sanjiv Shah the Chief Executive Officer of the Respondent. He denies that the Respondent is a foreign company as it is a Company registered under the Companies Act Cap 486.

5. He states in his affidavit that as at July 20, 2018, neither the Respondent nor the parties mentioned in the newspaper articles referred to by the Claimant had made any official announcement to substantiate the information contained in the said articles.

6. He avers that the Claimant on or about March 2018, contacted him through HR Director, requested for a meeting at which meeting she apologized for her conduct during employment including breach of her contractual duty as set out in the Counterclaim dated 17 July 2018. She promised to provide contacts which would assist in settlement of amounts owed for repair work carried out on KBU 212K.

7. He alleged that the Claimant breached her contract with the Respondent by purporting to be acting on behalf of RMA and entering into a verbal agreement with Michael Manwaring under which:-

a. the said Mr. Manwaring handed over to her (and she took possession) of a Range Rover Evoque registration number KBU 212K (the "Motor Vehicle") belonging to him;

b. without explicit authority from the Respondent she undertook that the Motor Vehicle would be displayed at the Respondent's premises at Delta Towers, Westlands (hereinafter "the Respondent's Premises") for viewing;

c. unknown to the Respondent she undertook that the Respondent would sell the Motor Vehicle on behalf of Mr. Manwaring to a third party and the proceeds of the sale would eventually be handed to Mr. Manwaring.

8. That the Claimant and Kenneth Nduati Irungu, a former employee of the Respondent, conspired to cause the Motor Vehicle to be delivered to the Respondent's workshop at Industrial Area and booked for repair after it was involved in a road traffic accident arising from the verbal agreement with Mr. Manwaring and the underhanded dealings of the Claimant and Kenneth Nduati Irungu. He avers that the actions of the Claimant and Kenneth Nduati Irungu have caused the Respondent to suffer great loss and expense.

9. That he disclosed to the Claimant in good faith that the Jaguar Land Rover franchise which had previously been awarded to the Respondent may be moved to another entity which would be the new dealer of the Jaguar Land Rover brand. That notwithstanding the transfer of the franchise to a third party, the Respondent does not intend on absconding the jurisdiction to obstruct or delay the execution of any decree that may be passed against it. The Respondent has several ongoing Court cases which it intends to continue prosecuting and defending as against the respective parties.

10. He avers that it will be prejudicial if this Honourable Court were to grant the prayers sought in the application since the Respondent also has a viable claim against the Claimant in the form of the Counterclaim. The Respondent is desirous of defending the suit and prosecuting the Counterclaim against the Claimant contrary to what is set out at paragraph 8 of the Supporting Affidavit and besides that, it has assets within Kenya, which are capable of satisfying the Claimant's claim in the event it is successful.

11. The Claimant's apprehension that she will not be able to recover the decretal sum if she succeeds is unfounded and based on the wrong assumption that the Respondent is a foreign incorporated company. The Respondent therefore prays that the Claimant's Notice of Motion dated 3rd July 2018 be dismissed with costs.

Claimant/Applicant submissions

12. It is submitted that the Applicant is apprehensive that in the event this Honourable Court grants the prayers sought for, it may prove futile to execute them. This is owing to the fact that the Respondent is a foreign company registered in Kenya whose main and so far only business in the country was to sell luxury vehicles on behalf of Jaguar Land Rover.

13. That the Applicant is also aware that the Respondent is being bought out by a company called Inchcape PLC hence is winding up its business locally. This is as per Exhibit LKK1 where two Newspaper Articles confirm that indeed the Respondent will no longer be carrying out business in the country. The Respondent has not denied the said claims. They cite the case of **Alice Aloo Betty Were Thompson v Said Mohammed Said & 2 others [2014]eKLR** where the Court held that since the Respondent had not shown proof of assets, it had to exercise its discretion to order for security of costs as requested by the Applicants.

14. The Claimant submits that they are apprehension over the likelihood of the Respondent inability to settle costs owing to the fact that he is not based in the country, does not intend to do business in the country and has not indicated any assets. She prays that this Honourable Court does grant the prayer for security for costs.

Respondent's submissions

15. It is submitted that the Respondent is a Kenyan incorporated company under the provisions of the Companies Act, Cap 486. Further that the Respondent has confirmed in its Replying Affidavit that it has assets within Kenya which are capable of satisfying the Claimant's claim in the event it is successful.

16. That the newspaper article relied on by the Claimant is a statement of fact which is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported. That even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper as was held in **Civil Appeal No. 224 of 2017 - Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**.

17. It is the Respondent's submission that relying on newspaper cuttings which are an unverified and untrue account of the business affairs of the Respondent would be unfair and prejudicial to the Respondent.

18. It is further submitted that the Respondent has not even as at the present date wound up its operations in Kenya. The assertion therefore that the Respondent would wind up its operations by the end of June 2016 is fictitious. They cite the decision in **Civil Case 1962 of 1999 - Awo Shariff Mohamed T/A Asmi Services Station V Caltex Oil Kenya Ltd [2008] eKLR** where the Court held that in order to be granted the type of relief sought by the Claimant herein, it is necessary to prove:-

a. That the Respondent intends to abscond the jurisdiction;

b. The Respondent intends to dissipate assets; and

c. The disposal is to defeat the possible outcome of the case.

19. That the threshold set out in the aforementioned case has not been met by the Claimant and therefore the application should not be allowed.
20. The Respondent submits that it would be prejudicial to the Respondent, if the Court was to grant the orders sought since the Court has not had an opportunity to try the claim. Further, there is a counterclaim filed by the Respondent, which is yet to be heard and determined on its merits.
21. The Respondent submit that the Claimant has failed to disclose sufficient evidence to satisfy the requisite test for grant of the orders sought in the Application, and as such the Application should be dismissed with costs.
22. I have examined the averments of both parties. The prayers sought by the Claimant/Applicant were hinged on the understanding that the Respondents were winding up their operations in June 2018.
23. The same has not yet happened to date. It is my view that the prayers have been overtaken by events. I decline to grant prayers sought in the application and direct the Claimant to proceed with the Claim.
24. Costs in the cause.

Dated and delivered in open Court this 4th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbaiyia for Respondent

Anam for Claimant – Present