



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 84 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 2(1), (2), (5), 20(1) & (2), 22(1), 23,  
28, 31, 40, 41 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 28, 29, 31, 40, 41 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONSTRUCTIVE DISMISSAL  
OF THE PETITIONER FROM CENTUM LEARNING LIMITED**

**BETWEEN**

**SUHAYL ESMAILJEE.....PETITIONER/APPLICANT**

**VERSUS**

**CENTUM LEARNING LIMITED.....RESPONDENT**

**RULING**

The application before Court is dated 31<sup>st</sup> August 2018, wherein the Petitioner/Applicant seeks for orders that:

1. That this Court be pleased to hear the Application during the current Court Vacation
2. That the Honourable Court do certify this Application as urgent and hear this application ex parte in the first instance.
3. That pending the hearing and determination of this Application inter partes this Honourable Court do issue an injunction barring the Respondent, its servants and/or agents or otherwise howsoever from removing from this jurisdiction, diminishing, transferring, disposing, alienating, operation and/or otherwise interfering and/or dealing with any of its assets within this jurisdiction, which assets include but are not limited:-
  - a. All bank accounts in the name of the Respondent in Kenya
  - b. Kenya Shilling Bank Account Number [xxxx] Standard Chartered Bank Kenya Limited, Westlands Branch, Nairobi-Kenya; and

c. United States Dollar Account Number [XXXX] Standard Chartered Bank Kenya Limited, Westlands Branch, Nairobi-Kenya.

4. That pending the hearing and determination of this Application the Court do issue an Order compelling the Respondent to furnish a complete set and/or list of all its assets as well as its Bank Accounts.

5. That pending the hearing and determination of the petition filed herewith, the Court do issue an Order compelling the Respondent to furnish a complete set and/or list of all its assets as well as its Bank Accounts.

6. That pending the hearing and determination of the Petition filed herewith, this Honourable Court do issue an injunction barring the Respondent, its servants and/or agents or otherwise howsoever from removing from this jurisdiction, diminishing, transferring, disposing, alienating, operating and/or otherwise interfering and/or dealing with any of its assets with this jurisdiction, which assets include but are not limited to:-

a. All Bank Accounts in the name of the Respondent in Kenya.

b. Kenya Shilling Bank Account Number [XXXX] Standard Chartered Bank Kenya Limited, Westlands Branch, Nairobi-Kenya; and

c. United States Dollar Account Number [XXXX] Standard Chartered Bank Kenya Limited, Westlands Branch, Nairobi-Kenya.

7. That this Honourable Court be pleased to grant any other relief that it deems fit in the interests of justice.

8. That the costs of this Application be provided for.

9. That it is therefore in the best interests of justice and expediency that the Application filed herewith be admitted for hearing during this Honourable Court's vacation.

The Application is premised on the grounds that:

1. On 11<sup>th</sup> February 2016, the Applicant concluded an Employment Agreement with the Respondent, under which the Applicant served the Respondent in the position of vice president and Head-Business Development (Corporate Training Division.)

2. Having served the Respondent with the finesse of an astute manager, in or about March 2017, the Applicant was promoted to the position of the Vice President and Africa Business Head, with the responsibility of overseeing the entire Respondent's business in Africa.

3. In later 2017 and early 2018, the Respondent's Chief Executive Officer (CEO) stripped the Applicant of his key decision- making powers that were fundamental to his role thus making it extremely difficult for the Applicant to discharge his responsibilities under the terms of his employment agreement.

4. In March 2018, an expatriate from India Mr. Pankaj Sootha was sent to Kenya to serve the Respondent in the same capacity and post as that of the Applicant, consequent upon which the duties of the Applicant were rendered superfluous.

5. In or about 3<sup>rd</sup> April 2018, the Respondent invited the Applicant to a sham leadership conclave to the Respondent's Group Head Office in India scheduled for 18<sup>th</sup> April, 2018. Upon arrival in India, the Applicant was unlawfully detained, questioned, deprived of his property and forced to resign.

6. In forcing the Applicant to resign, the Respondent created a very hostile environment by threatening the Applicant with detention at the Indian Police cells and legal action if he did not admit the allegation being levelled against him.

7. Aggrieved by the circumstances leading up to his forced resignation and of the resignation itself, the Applicant has filed a constitutional petition herein alleging grave violations of his constitutional rights and fundamental freedoms, as a result of which he seeks inter alia compensation by way of special damages in the sum of Kshs.39,338,160.00

8. The Applicant believes that he has a strong claim against the Respondent, judgment in respect of which will be rendered nugatory if this application is not heard and determined urgently for the following reasons:-

a. The Respondent is registered as a foreign company carrying on business in Kenya.

b. The Respondent has no known assets in Kenya save for the funds occasionally deposited in the Respondent's Kenya Shilling Bank Account Number [XXXX] and United States Dollar Account Number [XXXX] Standard Chartered Bank Kenya Limited, Westlands Branch, Nairobi-Kenya.

c. The said bank accounts are replenished at the end of every month with monies meant for staff remuneration and miscellaneous operational expenses of the Respondent, consequent upon which the accounts are depleted at the beginning of every month.

d. The Respondent has adopted deliberate business model that ensures that there are no assets within the jurisdiction of Kenyan Courts except what is absolutely necessary for the remuneration of its employees and settling miscellaneous expenses.

9. There is a risk that unless the enclosed Application is heard and determined as a matter of urgency and the orders issued *ex parte* in the first instance: -

a. The Respondent will transfer and dissipate its assets from Kenya and the jurisdiction of this Court, and/or close its bank accounts in Kenya.

b. The Respondent will stop operating in Kenya and within the jurisdiction of this Court.

c. The Respondent's assets will be transferred in a bid to defeat and/or render otiose any orders that this Honourable Court will give upon the hearing of this Petition on its merits.

10. Granting the Orders sought by the Applicant would facilitate the just, expeditious, proportional and economical disposal of this matter and would be beneficial to all the parties hereto and to the Honourable Court.

The application is also supported by the affidavit of the petitioner wherein he reiterates the grounds on the face of the motion and adds that his salary as at the time of employment was Kshs. 2,506,161.00 and that he was also entitled to other incentives as per the incentives scheme for each financial year.

He alleges that he was head hunted by the Respondent from his former employer where he held the position of Regional Director to serve the Respondent with a promise of a share agreement which would accrue on account of his contribution to the growth and profitability of the Respondent's business.

That the said employment was governed by the Employment Agreement of Centum Learning Limited Kenya Branch Policy Manual which expressly applied to all members of staff, Clause 1.1 thereof was that he would report to the senior Vice President, Mr. Dipankar Paul. There was a policy requiring staff to bring their own laptop to work upon which the respondent would pay a Bring Your Own Device (BYOD) entitlement of USD 50 per month.

He contends that he was asked to spearhead which he did the acquisition of new business in 2016 as previous attempts at winning new business by the Respondent had not been successful. He avers that he secured revenue for the Respondent in the sum of USD 1 Million.

That his responsibilities were expanded to include the autonomy to build the Africa team and structure the Respondent to provide learning and development solutions to the corporate segment as well as build capacity of youth by providing skills to enable them get employment opportunities.

The Applicant avers that in March 2017, the Respondent's CEO, Mr. Dipankar Panel left and was replaced by one Mr. Sanjay Bahl who relieved all the direct reports of the former CEO alleging that the organisation was too top heavy. The petitioner states that he was promoted to the position of Vice President & Africa Business Head with responsibilities of overseeing the entire business in Africa, replacing the former Senior Vice President.

He contends that despite his increased responsibilities, his remuneration remained the same. That the change in responsibilities slowly rendered him superfluous which concerns he raised with the new CEO albeit unsuccessfully.

That around March 2018, the CEO visited Kenya and met the Applicant to discuss the possibility of exiting the Respondent with effect from May 2018, but continue to be a valuable resource to the respondent.

In the same month of March 2018, the CEO introduced a Mr. Sootha who held a similar position to that of the Applicant making it clear to him that his working conditions were being frustrated by the Respondent making it difficult for him to continue working.

On 3<sup>rd</sup> April the Applicant states that he was sent to India and upon arrival he was informed that the CEO wanted to meet with him and at the meeting he was faced with a panel of six people who claimed to be the Respondent's internal audit team together with the head of Human Resources. He was questioned for close to 6 hours about a Company that he had allegedly incorporated which they claimed was taking away business from the Respondent which allegation he states was untrue.

That his laptop was confiscated and the door locked and the panel started to threaten him with detention in police cells and legal action. That the said panelists became hostile upon which he requested to be allowed to have a representative which request was denied. He claims that this Ordeal was in stark contrast to the disciplinary procedure in the policy manual which has caused him to suffer loss and damage.

The Respondent has opposed the Application by filing Grounds of Opposition in which the respondent states that the application does not meet the criteria for the granting of a *mareva* injunction. That he has not proved that the Respondent is intent to delay the Petition; or to avoid any process of the Court; or to obstruct or delay the execution of any decree that may be passed against it; or has absconded or is about to leave the local limits of the jurisdiction of the Court; or has disposed of or removed from the local limits of the jurisdiction the Court its property or any part thereof.

That the Applicant has not proved that the Respondent is about to leave Kenya under any circumstances affording reasonable probability that the Petitioner will be delayed or obstructed in the execution of any decree that may be passed against the Respondent.

The Respondent further plead that the Petitioner/Applicant seeks a mandatory injunction the criteria of which has not been established in the instant application. It is the respondent's case that the Petitioner/Applicant voluntarily resigned on 16<sup>th</sup> April 2018, and thus has not demonstrated that he has a prima facie case. Further that he has not shown that he will suffer irreparable harm that cannot be compensated by an award of damages. The respondent states that the orders sought are in the nature of crippling its operations and should not be allowed. The Respondent contends that it is a thriving business in Kenya and it has no intention of closing down its operations in Kenya.

Further that the Court has no jurisdiction to grant a temporary injunction where the same has not been pleaded in the main suit. That the *ex parte* Order of 31<sup>st</sup> August 2018, is disproportionate to the Claim being asserted by the Petitioner and to which the Respondent has a complete answer and counter-claim.

The Respondent also filed a replying affidavit sworn by one Samra Rahman, their Head of Human Resources wherein he states that it has been in operation in Kenya for over 7 years and is currently executing large value Orders with global giant, Google and Airtel Kenya this year. That the fact that the Respondent has a different business model from the typical brick and mortar model cannot be a basis for the drastic orders that the Petitioner seeks.

He avers that the *ex parte* orders freezing the Respondent's accounts had the effect of grinding the operations of the Company to a halt. That the said Order is prejudicial to the Respondent for the reason that it has forced the respondent to incur additional expenses when transacting business especially on account of the dynamics of foreign exchange.

He also avers that the Petitioner has not established why he is entitled to the grant of information relating to the Respondent's assets and bank accounts. The Respondent prays that the Court grants the Company equal protection of the law against unwarranted orders being sought by the petitioner which have no legal basis and which are only intended to harass them.

In a rejoinder the Petitioner states that he has an arguable case having demonstrated that he was terminated unfairly. Further that the Respondent has not demonstrated that it has tangible assets in Kenya and that Bank Accounts are not proof of financial status.

### **Applicant's Submissions**

It is submitted that Applicant has proved that the Respondent is likely to dissipate its assets in Kenya and thus render any judgment herein nugatory. That the Respondent has proved its financial probity and thus the Application should be allowed. The applicant relies on the case of **Imperial Bank Kenya Limited -v- Janco Investments Limited & 10 others [2018] eKLR** where it was held that:

*"It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstance of the case..."*

Further that the Respondent is registered as a foreign Company which is the more reason the Court should allow the prayers sought. He cites the case of **Third Chandris Shipping V Unimarine (1979)2ALL ER 980** where it was held that:

*"We often see in this Court a Corporation which is registered in a country where the Company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat. In such cases the very fact of incorporation gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied."*

They urge the Court to allow the Application.

In addition to the averments in the Replying Affidavit and grounds of opposition the Respondent submits that the Application is unfounded for the reason that it well grounded in Kenya and it still has business in Kenya with Companies like Skills Real and vituzote.com.

That the Petitioner seeks for the Respondent to furnish a list of assets which prayer is in the form of a mandatory injunction but he has not satisfied the conditions for such prayer being granted.

On whether the Petitioner/Applicant has an arguable case it is submitted that the case of the Petitioner, if any, is one of unfair termination and has no nexus to the Orders sought. Further that the Petitioner has not satisfied the requirements of the granting of a *mareva* injunction as set out in the case of **International Air Transport Association & another v Akarim Agencies Company Limited & 2 others [2014] eKLR** and as such the Application should be dismissed with costs.

### **Determination**

The orders sought by the petitioner/applicant are in the nature of a *mareva* injunction which is an order in personam restraining or enjoining a party from dissipating an asset directly or indirectly.

The issue for determination is therefore whether the Petitioner/Applicant has satisfied the requirements for the granting of a *mareva* injunction/freezing order. The threshold were set out in the case of **International Air Transport Association & Another v Akarim Agencies**

**Company Limited & 2 Others [2014] eKLR** as follows:

*“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions... Before granting a freezing injunction the court will usually require to be satisfied that;*

*(a) The claimant has ‘a good arguable case’ based on a pre-existing cause of action;*

*(c) The claim is one over which the court has jurisdiction;*

*(c) The defendant appears to have assets within the jurisdiction;*

*(d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and*

*(e) There is a balance of convenience in favour of granting the injunction;*

*(f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”*

In this case the applicant has not stated the basis for seeking the orders other than the fact that the respondent is a foreign company with no known assets. The respondent states in the replying affidavit that it is currently executing large value orders with global giant Google and African’s leading telecommunications company, Airtel in Kenya this year and it is India’s leading training and skills development company working in close association with the Ministry of Skills (MSDE), Government of India.

Would such an operation be a flight risk because of the petitioner’s claim of about Kshs.40 million? I do not think so. I do not find any demonstrated risk of removal of assets or even a risk of incapacity to pay any decree of this court that the petitioner may obtain in this court.

For the foregoing reasons I find no merit in the application and dismiss the same.

Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**