



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1329 OF 2018

SAED MALEKI.....CLAIMANT

- VERSUS -

SOMEHR GROUP LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

RULING

The claimant filed the statement of claim dated 16.08.2018 alleging that the respondent employed him as a general manager effective 12.02.2017, that he was never paid the agreed salary throughout his employment, and the claim is for salary arrears and reimbursement of the money the claimant alleges he spent on a business trip to Dubai while in the respondent's employment. The amount claimed is USD 72, 408.00. The claim was filed through Alex Kibunja & Associates.

The respondent has filed on 11.09.2018 a memorandum of reply through Coulson Harney LLP Advocates and prayed that the statement of claim be dismissed with costs.

The respondent also filed on 18.09.2018 a notice of motion under section 12(3) (viii) of the Employment and Labour Relations Court Act, 2011 and Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The respondent prayed for orders that:

- a) The claimant does furnish security for costs of the respondent for the sum of Kshs.500, 000.00.
- b) The claimant does deposit the aforesaid security amount in escrow account to be opened in the joint names of its advocates M/s Alex Kibunja & Associates Advocates and that of the respondent's advocates M/s Coulson Harney Advocates, with such period as the Honourable Court may direct.
- c) Upon failure to furnish such security as the Honourable Court may direct, the claimant's suit against the respondent be dismissed with costs.
- d) The Court is at liberty to make any further order and directions in the interest of justice.
- e) The costs of the application be borne by the claimant.

The application is based on the supporting affidavit of Wilson Murage and upon the following grounds:

- a) The claim against the respondent is a sham and there are no prospects of success in circumstances whereby the respondent is exposed to colossal amount of money in costs for defending the suit.
- b) The claimant is a foreign national not resident in Kenya and the respondent will suffer immensely because he has no assets within jurisdiction of the Court sufficient to meet any costs order as may be awarded.
- c) It is just, equitable and expedient that the orders sought be granted.

The supporting affidavit further shows as follows:

- a) The claimant was initially employed on secondment to the respondent under arrangements that his salary would be directly paid from and by one of Solico Group Companies known as Kalleh Dairy Company Export Department, Iran which payment would include salary and emoluments during the period of secondment. The assignment was for the claimant to research on possible

collaboration for a business joint venture.

b) The claimant in his research found that there would be a viable business venture in horticulture. The claimant then requested to be officially employed by the respondent. The respondent then entered into an employment contract with the claimant dated 27.06.2017. The contract also enabled the claimant to apply for a work permit as his special pass was expiring on 08.08.2017. The features of the contract of employment included effective date of 01.06.2017; terminable per terms of the contract; the claimant was designated General Manager with clear job description; and to terminate automatically if the claimant was permanently recalled by Solico Group Food Industries (SGFI). The claimant worked researching for the respondent on horticulture and avocado export business and it is alleged for the respondent that the claimant was paid by Kalleh, SGFI throughout the service until SGFI recalled the claimant on 19.10.2017 and the claimant reported to SGFI offices in Kuwait.

c) The claimant has by email of 03.07.2018 indicated that his salary was paid by SGFI which stopped the payment about 21.04.2018. The respondent's managing director one Sameer Naushad Merali has conveyed to the claimant that there was no communication that the respondent was to pay the claimant's salary from 21.04.2018.

d) The claimant's contract of service had been terminated on 19.10.2017 by the recall.

e) SGFI has confirmed by the letter dated 30.08.2018 that the claimant's employment was terminated on 22.05.2018; SGFI had paid all salaries during the time the claimant was seconded to the respondent; there were no salary arrears due to the claimant; the respondent's responsibility to the claimant during the secondment was to meet accommodation and travel costs within Kenya; and upon termination of the contract of service the claimant was paid his benefits and entitlements in full and he acknowledged that fact.

f) The respondent therefore denies that it owes the claimant monies in terms of accumulated salaries, reimbursements or related expenses as was alleged for the claimant.

g) The respondent never assigned the claimant a business trip to Dubai.

h) The legal fees for defending the suit will be around Kshs.500, 000.00.

i) If order for security for costs is not made the respondent may fail to recover its costs from the claimant for its defence of the claim.

The claimant has opposed the application by filing his replying affidavit on 07.11.2018. The main grounds of opposition as urged in the affidavit are as follows:

a) It was true that he is currently resident in the Islamic Republic of Iran.

b) He worked for the respondent from February 2017 and his services were not terminated.

c) His monthly salary was USD 5, 000.00 payable by the respondent and which was not paid throughout his service.

d) Solico Group Food Industries (SGFI) never paid him as alleged for the respondent and had no duty to pay him under the contract of service. In the circumstances he is not able to deposit the amounts as was claimed. He cannot afford the security.

e) The application should not be used to deny the claimant access to justice.

In **Shah –Versus- Shah [1982] KLR** (Law, Miller JJ.A, and Kneller Ag. JA), it was held that the general rule is that security is normally required from the plaintiffs resident outside the jurisdiction – however, a court has discretion to be exercised reasonably and judicially, to refuse to order that security be given. Further, the test on an application for security for costs is not whether the plaintiff has established a *prima facie* case but whether the defendant has shown a *bona fide* defence. In the instant case, there is no dispute that the respondent employed the claimant as per terms and conditions of service in the letter of appointment dated 27.06.2017. There is no established basis that the claimant was to be paid by SGFI under the terms and conditions of that service and as is now alleged for the respondent. Further there is no exhibit by the respondent that the claimant was paid the salary as per the contract of service between the parties and as claimed from 21.04.2018. Further there is no evidence as at this stage to show that the claimant's trip to Dubai was not official and in the respondent's best business interests as claimed by the claimant. The respondent relies on the letter dated 30.08.2018 by Kalleh Dairy Company being part of Solco Group but the letter is not categorical that the claimant was paid the money in dispute by the said Kalleh Dairy Company being part of Solco Group and the evidence of such payment and acknowledgement has not been exhibited. The Court finds that in such circumstances, it cannot be said that the defence is *bona fides* or genuine at this stage of the proceedings. On the test in **Shah –Versus- Shah [1982] KLR** the Court finds that the discretion would be exercised in favour of not ordering the claimant to deposit security for costs.

In **Ocean View Beach Hotel –Versus- Salim Sultan Moloo & 5 others[2015]eKLR** (Tuiyott J) it was held thus, “**The purpose for an order for security of costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the plaintiff from pursuing.**” In the present case, the claimant says that he was not paid and he has no resources to deposit in Court as security for costs. The Court finds that as submitted for the claimant, it would deny him access to justice if he is ordered to deposit the security for costs as a precondition for prosecuting the suit. The Court follows **Sammy Murere Biketi –Versus- Insteel Limited [2016]eKLR**, (Wasilwa J) where it was held that the Court should be guided by the general principle of access to justice and fair hearing wherein a man should not be condemned and prevented from accessing the court service on account of his inadequacies.

In view of the foregoing findings, the application will fail.

In conclusion, the application by way of the notice of motion dated 17.09.2018 and filed on 18.09.2018 is hereby dismissed with costs in the cause and with orders that the parties will take steps to prosecute the suit on priority basis.

Signed, dated and delivered in court at Nairobi this Friday 7th December, 2018.

BYRAM ONGAYA

JUDGE