



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 95 OF 2017

FRED WANGILA NYANGORI.....CLAIMANT

VERSUS

**CHURCH WORLD SERVICE (CWS)/RESETTLEMENT
SUPPORT CENTRE (RSC) AFRICA.....RESPONDENT**

Mr. Odawa for claimants/applicant

Mrs Omwenga for respondent

RULING

1. By a notice of motion under certificate dated 19th January 2017, the claimant/applicant seeks the following orders:

“2 The Honourable Court be pleased to order and direct the respondent to furnish security for payment of costs and settlement of the amount in the claim.”

2. The application is founded on the grounds set out on the face of the notice of motion as follows:

a) The respondent has commenced massive lay-offs of its staff with more than 200 permanent employees having been terminated and all the subcontracted/casual employees being terminated and carried out salary reduction/slashing of 25% and the remaining staff apply for voluntary redundancy.

b) The respondent with the change of regime in USA and the eminent abandoning of foreigners refugee placement in America is about to cease operations in Kenya.

c) The claimant will irreparably suffer should the respondents operations cease as it pulls out of Kenya and Africa prior to it providing security to settle costs and settle the claim herein since it has no fixed assets or tangible property in Kenya but is solely funded by the USA government to exclusively settle African refugees in USA and in the affidavit of **Fred Wangila Nyangori** that may be summarised as follows;

(i) That the respondent is on the verge of leaving Africa following the regime change in USA and the subsequent change of foreign refugees placement in America.

(ii) That the claimant/applicant will suffer irreparable harm once the respondent leaves the jurisdiction of the court before this case is heard and determined.

3. That claimant has also filed a memorandum of claim in which he states he was an employee of the respondent in the capacity of senior field team leader earning a monthly salary of Kshs.90,640 and was on 8th May 2015 unlawfully terminated from employment.

4. He seeks reinstatement to the job without loss of benefit and in the alternative compensation or damages for the loss of employment and service pay for five (5) years completed service.

5. The suit was filed on 20th January 2012, about two years from the date of termination.

6. The respondent filed grounds of opposition to the application as follows;

1. The application is bad in law and lacks merit as the prayer for deposit of security as sought is not founded on any provisions of law.

2. The application is frivolous and lacks merit as there are no justifiable grounds to warrant a prayer for deposit of the sum claimed.

3. The application is made in bad faith as the reliefs sought are calculated at impeding the respondent's right to defend itself.

4. The application is an abuse of court process.

Determination

7. The parties made oral submissions and the respondent filed a list of authorities on 6th February 2017. Both parties relied on the filed authorities.

8. From Halbury's laws of England 4th Edition vol.37 at paragraph 298, it is apparent that powers to order security for costs is granted to the plaintiff and not to the defendant where it appears to the court;

(i) That the plaintiff is ordinarily resident out of the jurisdiction.

(ii) That the plaintiff, not being a plaintiff who is suing in a representative capacity, is a nominal plaintiff suing for the benefit of another and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so.

(iii) That the address of the plaintiff is not stated in the suit papers unless the court is satisfied that was an innocent omission; or

(iv) That the plaintiff has changed his address during the course of the proceedings with a view to evade the consequences of the litigation.

9. Indeed under paragraph 302, thereof it is expressly stated "*a defendant cannot be ordered to give security for the costs of an action*" relying on the case of **The Barber, Burgess V. Vinni come (No. 2) (1886) 55 LS. Ch. 624; and Maatschappij Voor Fondsenbezit Vs. Shell Transport and Trading Co. [1923] 2 KB166, CA.**

10. The exception is where a defendant seeks and obtains leave to have conduct of a cause, or applies to be joined and is granted joinder to the suit. Such a defendant in replevin is in the position of a plaintiff and may be ordered to provide security.

11. In the High Court of Kenya at Eldoret; **Civil Appeal No. 122 of 2010 Amos Koech Kipyego Vs. Al-**

Hyder Trading Co. Ltd.; G. K. Kimondo relied on the Court of Appeal case of Kuria Kanyoko t/a Amigos Bar and restaurant Vs. Francis Kinuthia & 2 others [1985] 2 KAR 1287 – 1334 at page 127 where Nyaragi, Gachuhi and Apaloo JJA held that:

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at O 38 r 5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with the intent to obstruct or delay any decree that may be passed against him.”

(Note that O 38 r 5 referred to in the judgment is the current O 39 of the 2010 rules).

12. The present applicant did not cite any provision of the Civil Procedure Rules in his application even though in the grounds of opposition the respondent cites the application to have been brought under O 51 r 14 (1) of the Civil Procedure Rules, 2010. In fact, the application cites Section 87 of the Employment Act, No. 11 of 2007 which Section deals with “*Disputes settlement procedure*” and is inapplicable to this application.

13. This notwithstanding, the application lacks merit, is bad in law and is not founded on any provisions of law. No justifiable grounds have been disclosed to provide security for costs against the defendant or to order attachment of the defendant’s property before judgment.

14. The application is dismissed with no order as to costs.

Dated and delivered at Nairobi this 17th day of March 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE