



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 118 OF 2017**

**ALEX MUSYOKA KIMANZI.....CLAIMANT**

**VERSUS**

**ALIDI KENYA LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 16<sup>th</sup> June, 2017)

**RULING**

The claimant filed a notice of motion on 11.04.2017 through Waweru Macharia & Company Advocates and invoking section 13 of the Employment and Labour Relations Court Act Cap.234B, Order 39 rule 5 of the Civil Procedure Rules, 2010. The claimant prayed for orders:

- a) That the respondent or its agents, servants or otherwise howsoever be restrained from disposing, transferring, selling or otherwise motor vehicle registration number KBZ 709H until final determination of the suit.
- b) That the respondent be and is hereby ordered to provide security for performance of such decree as may be issued by the court in the sum of Kshs. 1,000,000.00 within 14 days.
- c) That the following motor vehicle that is KBZ 709H be and is hereby attached pending and this order be served upon the National Transport and Safety Authority.
- d) That the costs of the application be provided for.

The application was supported with the affidavit of the claimant attached thereto and the following grounds:

- a) The suit is for payment of the claimant's terminal dues which the respondent has neglected to pay.
- b) The respondent is summing up its business in Kenya by disposing of its assets as will close operations in Kenya.
- c) If the security is not provided as prayed for, the respondent will close business in Kenya and it will be difficult to satisfy the decree.
- d) Court orders should not be made in vain but must be executed.

e) The motor vehicle to be attached belongs to the respondent and its value would be sufficient to satisfy the decree.

The respondent opposed the suit by filing the replying affidavit of Charles Oketch Njeli, the respondent's business manager. It is the respondent's case that the claimant was its employee per letter dated 16.09.2016 and he was rendered redundant in October 2016 as the reason for redundancy was genuine. It is the respondent's further case that it is willing to pay the claimant's final dues in view of the redundancy but the claimant has failed to collect the sum of Kshs. 16, 800.00. That the claimant has failed to collect the same because the claimant owes the respondent Kshs.180, 000.00 being respondent's revenues collected by the claimant from a client but not remitted to the respondent. Further the motor vehicle to be attached is worth Kshs 1.4 million and it is way above the amount claimed by the claimant in the present suit. The respondent further states that it is a going concern with on-going business in Kenya and there is no fear of failure to satisfy the decree as may issue in the present case. The respondent urges that the claimant has not substantiated and justified the allegation that the respondent is closing its business operations in Kenya. Finally, the respondent is willing to deposit in court all amounts the claimant says is owed by the respondent pending the hearing and determination of the suit.

Under Order 39 Rule 5 of the Civil Procedure Rules, where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him – (a) is about to dispose of the whole or any part of his property; or (b) is about to remove the whole or any part of his property from the local limits of jurisdiction of the court, the court may direct the defendant within a time to be fixed by it either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the court when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

As submitted for the respondent, in the present case the claimant has alleged that the respondent is in the process of summing up its business in Kenya and is disposing of its properties but, the claimant has not provided evidence to establish that allegation. Thus, as submitted for the respondent, the claimant has failed to satisfy the test in the said Order 39 Rule 5. Thus the court returns that the claimant has not shown that the respondent is about to dispose of its assets or repatriate them from the local limits of the court's jurisdiction and the application would therefore fail.

However, the court has considered the respondent's willingness to deposit as security the amount claimed by the claimant and further considered the respondent's position that it is losing profits and it was unable to sustain some of its employees or cater for operational costs (per paragraph 4 of the replying affidavit). The court finds that such amounts to the respondent's admission in the likely delay in satisfaction of the decree as may be issued in the present case. The court considers that such deposit for security to satisfy the decree as may issue being limited to the liquidated claim should meet ends of justice for the time being pending the hearing and determination of the suit. While making that consideration, the court has been guided by the replying affidavit thus,

**“35. That in any event the claimant is willing to deposit in Court the amount duly owed to the claimant as his terminal dues as alleged pending the hearing of the main suit or any other orders the court may deem fit to grant in the interim and pray that orders issued against motor vehicle KBZ 709H, Lorry be set aside.”**

In conclusion, the application dated 05.04.2017 is hereby determined with orders as follows:

- 1) The respondent to deposit a sum of **Kshs.73, 500.00**, as part security for prompt satisfaction of the decree as may issue herein, in an interest earning account opened in the joint names of the parties' advocates and to do so by 01.08.2016.
- 2) Costs of the application in the cause.
- 3) Parties to take directions on further steps in the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 16<sup>th</sup> June, 2017**.

**BYRAM ONGAYA**

**JUDGE**