



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1266 OF 2017

AND

CAUSE NO.1267 OF 2017

JOYCE MUKUNDI

PURITY NJERU

ELIZABETH CHEGE

IRENE OGOL.....CLAIMANTS

VERSUS

SOUTH CAPE INVESTMENT LTD.....1ST RESPONDENT

ADVANCED INNOCATIONS LIMITED.....2ND RESPONDENT

ACES PALACE LIMITED.....3RD RESPONDENT

RULING

1. By application and Notice of Motion dated 12th July, 2017 brought under the provisions of section 12(2) and (3) of the Employment and Labour Relations Court Act, 2011, section 87 of the Employment act, 2007 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

This court be pleased to issue orders confirming that the respondents herein by themselves their servants, agents and/or employees whomsoever, be barred from removing, selling, alienating, charging, mortgaging, hiring/out, transferring, dismantling or together, relocating from the jurisdiction of the court or Kenya, pending the hearing and determination of the main claim.

That this court be pleased to issue orders by way of interlocutory-mandatory injunction restraining the respondents herein by themselves, their servants, agents and / or employees whomsoever, from withdrawing, closing down, sequestrating or in whatever manner, operating its bank account held at Habib Bank, Koinange Street Brank, A/c No.189 238 and Kenya Commercial Bank (KCB) Kipande House Branch, A/c Nos.132 066 638 and 123 066 738 respectively, ending the hearing and determination of this claim herein.

The respondents herein do furnish security to this court with ample security for costs or other

suitable security subject to such conditions as may be deemed fit and expedient in the circumstances of this court.

2. The application is supported by the affidavit of Joyce Mukundi and Purity Njeru and on the grounds that the claimants have since been summarily dismissed by the 1st respondent which dismissal is a case of retrenchment and or restructuring and hence a sham. The dismissal of the claimants notwithstanding, the 1st respondent has abdicated its statutory duty of paying the claimant their lawful entitlements and they are apprehensive that the respondents will quickly move to close and remove their business from the jurisdiction of the court so as to avoid their statutory obligations. The claimants have been subject to unfair labour practices by the failure to pay their terminal dues in accordance with the constitution and the law.

3. In their joint Supporting Affidavit, Joyce Mukundi and Purity Njeru avers that they were employed by the respondent and is missed in April, 2017. Before dismissal, on 13th March, 2017 the 1st respondent whose business is located at the Laico Regency alleged that the claimants had committed theft of money. This incident was deliberated upon between the respondent and KUDHEIHA and officers from Betting Control and Licencing Board. This incident arose within questions into the 1st respondent operations to avoid payment of taxes due to the government and that the claimants and other employees had opted to join the union, KUDHEIHA.

4. The claimants had raised concerns with the 1st respondent on obvious malpractice in tax returns whereupon the Chief Operating officer, Len Mathews launched witch-hunt against employs seeking to join the union. This created tension within the employee and management.

5. The summary dismissal of the claimant are meant as a cover-up to the tax returns, to remove the unionised employees and as a cover up to on-going plan to permanently closed on the respondent's business and move out of jurisdiction. The respondent has closed other centres in Mombasa, Naivasha, Kisumu, Nakuru and Nanyuki. The respondents have failed to pay the due terminal dues. This has resulted in loss of employment for the claimants who have not been informed of the closures taking place within the respondent business.

6. The manner and conduct of internal hearings of the claimant and leading to dismissal were unfair, there were no valid reasons for dismissal, and the owing terminal dues have not been paid are require din law.

7. The respondents are owned by foreign nationals, Bulgarians and therefore are likely to leave the jurisdiction of the court unless there is a restraining order or a security deposit. The 1st respondent and the respondents own several motor vehicles; imported Slot Machines located in Westlands, Nairobi, Nakuru, Meru and Nanyuki towns. The respondents have Sport Betting Machines; live game tables; and cash held in Habib Bank and Kenya Commercial Banks.

8. Unless the orders sought are issued, the suit herein will be rendered nugatory.

9. In reply, the respondents filed Replying Affidavit sworn by Josephine Njeri Muriithi the human resource manager of the 1st respondent and who avers that the claimants were employees of the respondent until 13th march, 2017 when they were captured on CCTV engaging in acts of gross misconduct and by letters dated 30th March, 2017 they were invited to a disciplinary hearing and which led to their summary dismissal on 29th May, 2017.

10. The Betting Control and Licencing Board were invited in the hearing and they established the conduct of the claimants as depicted in CCTV footage amounted to gross miscount. The summary dismissal was justified.

11. None of the respondents plan to relocate business from the country as alleged. There is a licence renewal to operate within the jurisdiction and with approval from the ministry and Betting Control and

Licensing Board. There is a deposit of Kshs.4.5 million for lease over the rented premises where the respondents are operating from. There is no evidence to show the respondents have relocated or intend to leave the court jurisdiction.

12. The claimant made oral submissions in court and the respondent filed written submissions to which the claimant filed replying submissions.

13. The claimant submits that the Employment Act, 2007 makes provision for the protection of wages where there is termination of employment and terminal dues are not paid in breach of the law. Section 17 of the Act there is protection of salaries and the court has jurisdiction to give suitable orders based on the circumstances of each case.

14. The respondents dismissed the claimants before payment of full salary which is in violation of article 41 of the Constitution, 2010. The defence that the respondents are not closing their business in Kenya is not supported by any evidence. There is a real risk that the respondent will leave the court jurisdiction to defeat the claimants' claim and thus leave them without a measure of protection.

15. The question of security of costs is herein necessary as without it the suit will be rendered academic. The claimants reply on the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR**.

16. In reply the respondents submit that the claim herein is based on allegations that the claimants were unfairly dismissed by the respondents from their employment in April and May, 2017. This followed summary dismissal following acts of theft within the respondents' business. The application in issue is seeking for a security deposit by the respondents to ensure they do not leave the court jurisdiction pending the hearing and determination of the suit.

17. The respondents also submits that the claimant was taken through a disciplinary process and found culpable and thus the summary dismissal. The evidence against the claimants is supported by the office of the Betting Control and Licensing Board which reviewed the matters between the parties and the actions of theft of the respondent property.

18. In the Memorandum of Claim, the claimants aver that they were employed by the 1st respondent. the employment letter is by the 1st respondent. the pay slips and pay statements are by the 1st respondent. the letter terminating employment is by the 1st respondent.

19. The linkages with the 2nd and 3rd respondents in view of the orders sought are not clearly set out by the claimants. The orders sought with regard to a security deposit and or assets set out in the joint affidavits of the claimants are not outlined as to who of the 3 respondents is in ownership.

20. The orders sought to restrain the respondents from leaving the court jurisdiction and the restrictions on the bank accounts are serious and the material before court and in the claimant's application not sufficient to warrant the issuance of such orders. The basis of the assets set out and bank accounts outlined having failed to state of which respondent is the owner, the court will be visiting great injustice to issue such orders without clarity by the applicants.

21. Where employment is established as having been between the claimants and the 1st respondent, reason then must be built as to why the two other respondents are enjoined herein. The relationship between the orders sought and the effect on third parties outside the employment relationship must be established. It is not sufficient that the respondents work closely or are associated. The respondents being individual entities, the legal relationship with the claimants must be established before restraining orders can issue.

22. The application as made by the claimant does not meet the threshold for the grant of the orders sought. To deposit the securities sought will cripple the respondents' business without any justifiable

cause where there is overwhelming evidence of theft by the claimants. The respondents business in Kenya is not due to close and the need for the deposit of security should not arise.

23. The issues in dispute noted in the Memorandum of Claim herein is that the dismissal of the claimants was unfair; issuance of certificates of service; payment of terminal due sin accordance with the law; and the transfer of the claimants' employment and or services. The remedies sought therein relates to the pay of notice pay; untaken leave days; compensation; severance pay; exemplary damages; damages for loss of employment; and house allowances.

24. The claim thus premised on the act of summary dismissal of the claimants by the respondents, the court must call for evidence and make a finding on every aspect of the claim and before making a judgment as to the nature of compensation, damages and or terminal dues are payable to each claimant, if any. The application for deposit of security on the basis that the respondents are likely to leave the jurisdiction must therefore be assessed and analysed on the background of the nature of claims made against the respondents.

25. Another matter not raised by either party is that application and Notice of Motion is supported by the joint affidavit of the claimant. Rule 17(8) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that every application filed before the court must be supported by an *affidavit*. Affidavits in their nature are regulated under the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. The law set out how and by who an affidavit must be made. Such must relate to personal matters and facts known and to the knowledge of the deponent.

26. Though Rule 17 does not go to must details such as the Civil Procedure Act and the Rules thereto go, this court is well guided by such written rules of procedure and practice. Reliance herein is made to the Civil Procedure Act and the rules thereto.

27. in addressing the question of filing a *joint affidavit* in supporting an application and the import of the same, the court in **Edwin Asava Majani & 2 others v Telkom Kenya Ltd [2007] eKLR** held as follows;

A perusal of the record herein reveals that order 7 rule 1(1) of Civil Procedure Rules as regards the content lay out and or the format of the plaint has been satisfied. What has invited the court's attention to the plaint is the verifying affidavit. It is noted as stated earlier on that it is a joint verifying affidavit. The joint verifying affidavit is meant to meet the requirements of order 7 rule 1(2) of the Civil Procedure Rules set out above. A perusal of the same shows clearly that it talks of "an affidavit sworn by the plaintiff". The rule is therefore silent as regards the position where there are more than one plaintiff. Whether these are to swear a joint affidavit or each is to file a separate affidavit. This leads to the question as to whether a joint affidavit is provided for within the rules. The general provision regards affidavits is found in order 18 of the Civil Procedure Rules. ...

*In the case of **Meshack Riaga Omolo and 7 others versus Henry Michael Ochieng and 4 others, Nairobi, HCCC No. ELC. 30 of 2007.** ... it is evident from the record that the supporting affidavit is signed by four defendants. At line 3 from the bottom of the same page, the court observed "the applicant has argued that the defect is curable under order 18 Civil Procedure Rules". The court went on to observe thus "Rule 3(1) of order 18 Civil Procedure Rules provides that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. Rule 4 on the other hand provides that every affidavit shall state the description, the place of abode and postal address of the deponent". The court went on to make observations at line [] from the top at page 12 thus the operative words in rule 3(1) and 4, refer to "a deponent" and not deponents. In view of that construction, this court made this finding that "This being the case the proper construction of these two provisions is that the intention of the legislative or the rules committee is that there shall be one deponent to an affidavit and if there is need for more than one, then the additional parties swear supporting affidavits." The court was of the opinion that "if joint affidavits were receivable in evidence there would have been provision for words such as these "or deponents" in both rules 3(1) and 4 The court may receive any affidavit*

sworn for the purpose of being used in any suit notwithstanding any defect by mis-description of the parties or otherwise in title or other irregularity in the forms thereof. ... The affidavit herein which is made not in the name of the deponent but signed by 3 extra persons is not only an irregularity but an illegality which cannot stand. [underline added]

28. The Court above relied upon the decision in **Rajput versus Barclays Bank of Kenya Ltd and others Nairobi HCCC No. 38 of 2004** and held that;

One of the issues in the said cited case was whether a failure to comply with the provisions of the Oaths and Statutory Declarations Act Cap 15 and its rules is a matter of substance or of form and whether an affidavit which does not comply with the provisions and rules is incurable and should be struck out. The court held that such an affidavit is incurable and it should be struck out. On the basis of that reasoning this court struck out the joint affidavit and with it also went the application it was supporting as without a supporting affidavit the application would not be in compliance with the provisions of order 50 rule 1 and 3 Civil Procedure Rules.

29. Based on the findings above, where the claimants have filed *joint affidavits* in support of the application, this is irregular in terms of clear provisions of the law and the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. This is not a matter that the court can cure as being inconsequential as this goes to the root of the application where the irregularity affects the very foundation of the same. This is also not a technicality that can be cured by the general application of the objectives set out under section 3 of the Employment and labour relations Court Act, 2011 as without a proper affidavit being filed over matters that the claimants were personally conversant with, to allow the orders sought in their nature would go contrary to justice and defeat the very purpose of ensuring fair labour relations.

Accordingly, application dated 2nd December, 2016 shall not be allowed as prayed. The application is dismissed and costs in the cause.

Delivered in open court at Nairobi this 31st day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: David Muturi & Nancy Bor

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