



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1769 OF 2015

ERICK KIMAIYO KIPLAGAT.....1ST CLAIMANT
PETER OPONDO OJWANG.....2ND CLAIMANT
KEVIN KITAGWA OLLOO.....3RD CLAIMANT
PATRICK MWANGANGI NGUNZU.....4TH CLAIMANT
JOSEPH MUCHINA MUNGERE.....5TH CLAIMANT
ALPHONCE BANJA.....6TH CLAIMANT
MWASARU DAVID SETH.....7TH CLAIMANT
NICHOLAS KIBETT SIELE.....8TH CLAIMANT
JACK ODHIAMBO ALIWA.....9TH CLAIMANT
COLLINS NYONGESA SIMIYU..... 10TH CLAIMANT
WILLIE WAIGANJO NJUGUNA..... 11TH CLAIMANT
GILBERT KIPLAGAT KIBICHI.....12TH CLAIMANT

VS

BAKER HUGHES EHO LIMITED (KENYA BRANCH).....RESPONDENT

RULING

Introduction

1. On 2nd September 2015, the Claimants filed a Memorandum of Claim by which they seek damages for unlawful termination and payment of accrued dues. The Claimants subsequently filed an application by way of Notice of Motion dated 17th December 2015 seeking orders to compel the Respondent to deposit the sum of Kshs.100,000,000 as a cash security in the claim.

2. By the time of hearing this application, a consent order for payment of the sum of Kshs.5,809,663.86 had been satisfied making the prayer for leave to execute unnecessary.

The Notice of Motion

3. The Claimants' application which is supported by the supporting affidavit and supplementary affidavit of the 1st Claimant, Erick Kimaiyo Kiplagat sworn on 17th December 2015 and 22nd January 2016 respectively is based on the following grounds:

- a. On diverse dates between 25th March 2015 and 2nd June 2015, the Respondent terminated the Claimants' employment on account of redundancy;
- b. By a Memorandum of Claim dated 30th September 2015, the Claimants filed a claim challenging the termination and raising various other claims;
- c. Following negotiations, the parties agreed to settle the claim in respect of certificates of service, unlawful termination and severance pay. By a settlement agreement between the parties, the Respondent agreed to pay the sum of Kshs.5,809,663.86;
- d. The claims in respect of overtime compensation, hardship and risk allowances as well as other individual claims remain pending;
- e. The Respondent's parent company has entered into an agreement for sale of the outstanding shares of Baker Hughes Incorporated to Halliburton in a stock and cash transaction worth Kshs.USD 35 Billion;
- f. The said sale is expected to be completed by the end of the year and Baker Hughes Incorporated and the Respondent have already laid off more than 70 employees in Kenya in anticipation of the expected buy out by Halliburton;
- g. The Respondent does not operate any bank accounts in Kenya and all major management decisions are made from the Headquarters of its parent company in Houston, Texas;
- h. If the Respondent is not compelled to furnish security for the claim there is reasonable apprehension that the Claimants will be obstructed or delayed in the execution of any decree in their favour;
- i. If the orders sought are not granted, the Claimants will suffer great prejudice as their claim will be rendered nugatory.

The Respondent's Reply

4. In a replying affidavit sworn by the Respondent's Country Operations Manager, Chike Uchendu on 15th January 2016, he depones that the Respondent is a company incorporated in Bermuda but is registered in Kenya as a foreign company with a local branch pursuant to Section 366 of the Companies Act. The Respondent's major shareholder is Baker Hughes Netherlands BV whose major shareholder is Baker Hughes Incorporated.

5. Uchendu states that the Respondent has a registered office in Nairobi at Wing A, Ground Floor, Westend Towers, Waiyaki Way, on LR No. 209/4497 and LR No 209/4498. Having commenced operations in Kenya in the year 2013, the Respondent continues to operate in the country to date.

6. In controverting the Claimants' allegations that the Respondent is in the process of winding up its operations in Kenya, Uchendu depones that the Respondent has long term goals and commitments in Kenya. He makes reference to the following documents:

- a. Lease between Northend Estates Ltd and the Respondent for a period of six (6) years from 15th November 2012 to 14th November 2018 under which the Respondent pays rent in the sum of USD 23,895 per quarter;

b. Ongoing contracts for provision of Casing and Tubular Running Services.

7. It is further deponed that the Respondent owns assets in Kenya including equipment worth hundreds of millions of Shillings. The Respondent also holds bank accounts in Kenya.

8. With regard to the sale of shares by Baker Hughes Incorporated to Halliburton, Uchendu depones that even though there are discussions on transfer of business, no agreement has been reached yet and the deliberations have not impacted on the Respondent's operations in Kenya.

9. The Respondent maintains that the transactions involving Baker Hughes Incorporated are of no consequence to the Respondent whose major shareholder is Baker Hughes Nederlands BV. Baker Hughes Nederlands BV remains operational and has not been sold. The Respondent denies having laid off any workers in anticipation or by reason of the expected takeover by Halliburton.

Determination

10. The issue for determination in this application is whether the Claimants have made out a case for a cash deposit in the sum of Kshs.100,000,000 as security in this claim. In granting orders for deposit of a cash security, the Court is called upon to strike a balance between securing a potential award in favour of the Applicant and the need to free up capital for use in the Respondent's operations.

11. As held by **Gikonyo J** in *Saudi Arabian Airlines Corporation v Sean Express Services [2014]eKLR* and **Sergon J** in *Jayesh Hasmukh Shah v Navin Haria & Another [2015] eKLR* an order for security deposit is discretionary and that discretion is to be exercised judiciously by taking into account the peculiar circumstances of each case. Overall, the Court must consider: lack of known assets and office within the jurisdiction of the Court, inability to meet financial obligations or the general financial standing of the Respondent, the *bona fides* of the Applicant's claim and the conduct of the parties.

12. While it is true that the Respondent in this case is a foreign company and is scaling down its operations in Kenya, the Court did not find evidence that it is divesting completely. Moreover, at the time of hearing this application, the Respondent had settled a substantial part of the Applicants' claim thus demonstrating good will and ability to meet its obligations.

13. For the foregoing reasons, the Court finds no reason to order security deposit at this stage. I however direct that the main claim be fixed for hearing on priority basis.

14. The costs of this application will be in the cause.

15. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF FEBRUARY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Mandala for the Claimants

Mr. Nyaburi for the Respondent