



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 229 OF 2014

JACON JOSEPH ONYANGO

CLAIMANT

v

JOHN NDUNGU MUREITHI

RESPONDENT

RULING NO. 2

1. On 22 January 2016, the Court granted the Respondent's application seeking the setting aside of *ex parte* judgment and leave to defend on condition that half of the decretal sum (Kshs 1,403,261/-) be deposited into an interest earning account in the joint names of the parties counsel.
2. Barely four days later, the Respondent filed the motion, the subject of this ruling seeking a variation of the condition of depositing the stated sum into an interest earning account with a condition that he provides a bank guarantee.
3. The Claimant filed a replying affidavit opposing the motion which was taken on 3 February 2016.
4. The primary reason advanced by the Respondent is that his shop is undercapitalized after his spouse took away huge sums of money from the shop, and that he has adequate assets worth more than the security amount.
5. The Respondent also contended that because of his health, he is unable to run the shop.
6. The Claimant in opposing the motion contended that the Respondent's spouse had filed an application before the High Court in a suit for division of matrimonial property in which she deposed that the Respondent was getting over Kshs 1,000,000/- monthly rental income and that the Respondent had not shown that that deposition was not factual.
7. The Court has considered the positions asserted by the parties and the submissions urged on 3 February 2016.
8. The order sought by the Respondent is discretionary. A party seeking the exercise of a Court's discretion ought to make full, honest, sufficient and candid disclosure of relevant material.
9. The Respondent in the supporting affidavit has not even disclosed an estimate of the colossal amounts of money taken by the spouse and the period involved.
10. The money obviously was not being kept under a mattress. The Respondent should have made more

disclosure than he did of relevant material.

11. On the substitution of cash deposit with a bank guarantee, the Court notes that the guarantee would of course involve the bank giving the guarantee after satisfying itself that the Respondent's account with itself is worth the risk of providing the guarantee. Part of considerations may include risk exposure and credit worthiness of the Respondent.

12. The information placed before the Court as to the risks and creditworthiness' of the Respondent are assets/properties which have not been directly disclosed by the Respondent himself but by the spouse in a different forum.

13. The Respondent in other words has not confirmed positively that he owns either alone or jointly with the spouse, the properties enumerated by the spouse before the High Court.

14. In the view of the Court, the Respondent has not demonstrated that the orders sought in the motion are merited.

15. The motion is dismissed with costs to the Claimant.

Delivered, dated and signed in Nakuru on this 5th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Githui instructed by Githui & Co. Advocates

Court Assistant Nixon