



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1385 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 19th April, 2016)

SHYAM SUNDAR PANDE CLAIMANT/APPLICANT

VERSUS

COSMIC ENGINEERING LIMITED1ST RESPONDENT

SHOBA MULKI2ND RESPONDENT

BINA MULKI.....3RD RESPONDENT

RULING

1. This is a ruling on an application dated 12th February 2016 for orders:

1. ***That this Application be certified as urgent.***

2. ***That this Application be heard ex parte in the first instance pending hearing intrpartes.***

3. ***That the Respondents and/or their agents, servants and employees be and are hereby restrained from removing, selling, alienating or in any other manner disposing of the 1st Respondents property and assets at the Respondents premises in Industrial Area, Road A, off Enterprise Road, Nairobi or any other place that they may be held pending hearing and final determination of this application.***

4. ***That the Respondents and/or their agents, servants and employees be and are hereby restrained form removing, selling or in any other manner disposing of the 1st Respondents property and assets at the Respondent's premises at Enterprise Road, Nairobi or any other place that may be held pending hearing and final determination of the cause herein.***

5. ***That the Respondents be and are hereby ordered to show cause why they should not furnish security for their appearance and/or deposit in court of the sum of Kshs. 5,266,199.00 pending hearing and determination of the suit.***

6. ***That costs of this application be borne by the Respondent***

2. Which application is grounded on the following grounds and the annexed affidavit of Shyam Sundar Pande:

- a. ***The Claimant/Applicant is aware that the Respondent have removed from the business premises of the 1st Respondent in Industrial Area, Road A off Enterprise Road Nairobi and sold several machines and equipment that form the integral part of the business that has always been carried out by the 1st Respondent for the duration of over 26 years that the Claimant has worked there.***
- b. ***The Respondent having removed and sold the main assets of the 1st Respondent are clearly intent on avoiding or obstructing any decree that may be passed against the Respondent in favour of the Claimant.***
- c. ***It is probable, that the Respondent unless restrained by the Court, intend to dispose of the remaining assets of the 1st Respondent which will render nugatory or obstruct and or delay execution of any decree that may be passed against the Respondents to this suit***
- d. ***As it is probable that even what is still left at the premises may not satisfy any decree that may be passed in favour of the Claimant, it is only fair and just that the Respondent's be ordered to pay and have in deposit by the court the amount equivalent to the sum claimed by the suit.***
- e. ***It is in the interest of justice that the prayers sought be granted.***

3. The Claimant states that Prayers 1,2,3 and 4 have been overtaken by events seeing as the equipment and machinery have been sold but seek prayer No. 5 of the Application to be allowed and the Respondent be Ordered to deposit Kshs. 5,266,199/= pending hearing and determination of the suit.

4. Moreover, the Claimant states that all employees have been laid off, and they believe that the actions of the Respondent are tantamount to shutting down of the company. He prays for the prayers sought to be granted.

5. The Respondents filed a Replying affidavit on 4.3.2016 sworn by Bina Mulki a director of the 1st Respondent where he states that the 1st Respondent is in the process of restructuring its operations pursuant to which they have already disposed of its existing equipment and machinery with view of modernizing its operations. It is their contention that they have not acted in any way to frustrate execution of the decree likely to be obtained.

6. In their submissions the Respondents stated that the decision to restructure was so as to bring the 1st Respondent back to profitability and are not in any way intending to wind up. They are of the view that Prayer No. 5 has no merit as it is for furnishing of security in Court and reason has not been shown why it should not be granted.

7. I have considered the submissions of both parties. Order 39 Rules of the Civil Procedure Rules provide that:

“(1) 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 the 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”.

8. The Applicant contends that the Respondent has in fact disposed of his property and laid off all employees thus committing (a) above.
9. The Respondents on their part deny the averments of the Applicants and state that they only sold off the old machinery and replaced them with more modern machines. They also aver that not all staff have been laid off.
10. The Respondents merely deny the Applicants averments.
11. Having conceded the change in substratum of the Respondents premises stating that the reason is because of introduction of new machines, the Respondents are in fact agreeing that they have disposed of the whole part of their property at their work premises. The issue of termination of staff is not addressed by Respondent satisfactorily but they also state that not all staff have been laid off. This is agreeing that some staff have been laid off.
12. This Court finds that the Respondents action is tantamount to preparing to avoid any decree that may ultimately be passed by this Court and therefore the Applicants fears are real.
13. I find the application has merit and I allow it and order the Respondents to deposit before Court Kshs.2 million as security for costs in this suit within 60 days.
14. The case may be set down for hearing on priority at the registry.

Read in open Court this 19th day of April, 2016

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Wanyonyi for Claimant – Present

No appearance for Respondent