



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 232 OF 2016**

**CLEOPATRA KAMA MUGYENYI.....CLAIMANT**

**VERSUS**

**AIDSPAN..... RESPONDENT**

**RULING**

1. The applicant in cause number 219 and 232 both of 2016, sought from this Court that orders do issue directed at the respondent to deposit sums equivalent to their claims, in Court pending the hearing and determination of their claims against the respondent.
2. The applications were based on the main that the respondent is a foreign company operating in Kenya and that it had no known assets which could be attached in the realm. The applicants further averred that the respondent is in the process of closing down the Nairobi Office.
3. The claimants complained further that the respondent unlawfully and without giving any justifiable reason, refused to renew their contracts of employment yet continue to publish the claimants names in their official website as employees.
4. The respondent through one Sitati Olando refuted the claimant's allegations in her affidavit filed on 18<sup>th</sup> March 2016. She deponed on the main that
  - (a) That the Respondent is a going concern entity operating in Kenya with continued operations in 2016 and contrary to the Claimant's false allegations the Respondent does not intent on closing down its Nairobi Office nor intend to do so in the near future and has even secured new, more professional and central offices at Mirage on Waiyaki Way, Westlands.
  - (b) That due to present application seeking deposit a colossal amount of Kshs.10,958,000 there is grave danger that the Respondent will be unable to secure the new office premises and expose the Respondent to third party liability for breach of the lease agreement.
  - (c) That the Respondent has net asset in Kenya amounting to about USD 369,000 (Kshs.37,000,000).
  - (d) That the Claimant was employed as Senior Research Scientist vide a contract of employment

for a limited period commencing on 2<sup>nd</sup> January 2014 to 31<sup>st</sup> December 2015.

(e) That the Claimant's employment expired on 31<sup>st</sup> December 2015 pursuant to her employment contract renewal duly accepted and executed by the Claimant on 6<sup>th</sup> December 2013.

(f) That renewal of contracts of employment are not practice and norm in the organization but in accordance with Article 2 of the Claimant's contract of employment which states:-

The contract is renewable upon agreement in writing of both parties to this contract. Each party shall notify its intention to renew, if applicable, at least three months before the end of the contract.

(g) That the Respondent notified the Respondent three (3) months before the end of her contract that the contract of employment would be ending on 31<sup>st</sup> December, 2015.

(h) That the Claimant did not notify the Respondent of her intention to renew the contract of employment in accordance with Article 2.

(i) That via a letter dated 3<sup>rd</sup> December 2015 the Claimant together with other staff responded to the notification of transitional mechanism and staff hand-over by declining to carry out hand-over processes until the respondent addressed the issue of non-renewal of contracts.

(j) That the Claimant was not unfairly terminated but her contract of employment ended on 31<sup>st</sup> December 2015 as contracted by the parties, with no renewals.

(k) That on the 28<sup>th</sup> of January 2016 the Respondent's website company information on the staff page was updated and the Claimant's name removed.

(l) That the Respondent is a donor funded organization with money provided by donors used for specific projects which if forced to be deposited in an account awaiting hearing and determination of this claim will stale the Respondent's operations, lead to loss of donor confidence and ultimately collapse the Respondent to the amusement of the Claimant.

(m) That the Respondent is insured to cover employment practice claims up to US\$2,000,000 (Kshs.200,000,000) which includes any possible awards against it.

5. In her oral submissions before the Court, Mrs. Macharia for the claimants submitted that the claimants were apprehensive that unless the orders are made they may not be able to enforce any decree that the Court might issue against the respondent which is a US incorporated organization. According to counsel, the respondents were in the process of winding up operations and had laid off its members of staff. Further the lease for the premises the respondent operate from had been terminated. Mrs. Macharia argued that the letter of offer for lease attached to the respondent's affidavit had not been executed by the prospective landlord.

6. According to Counsel the claimant's services had been terminated and that they had not been given reasons for the termination. Further there were documents showing the proposal on continuity of services. Therefore according to Counsel there was likelihood that the claim may succeed. Concerning the insurance policy against legal claims, counsel submitted that it was speculative to say the insurer would honour the claim.

7. Mr. Odera on the other hand submitted that the claimants ought to have invoked the provisions of order 39 of the Civil Procedure Rules and not Order 27 and 40.

8. According to Mr. Odera, the Court cannot rewrite a contract for the parties. He submitted that the claimants were on a fixed term contract which expired on 31<sup>st</sup> December, 2015. According to Counsel the contracts were renewable in writing and that the intention to renew had to be communicated three

months prior to end of contract and that renewal was subject to further agreement. Counsel further submitted that the claimants' were relying on previous practice to demand renewal however renewal was to be done by agreement of the parties.

9. Concerning the orders sought, Mr. Odera submitted that the claimant in cause number 232 of 2016 is also a foreigner hence the mere fact that the respondent is a foreign organization was not reason enough to merit the grant of the orders sought. There must be evidence of absconding or disposing of assets.

10. Mr. Odera further argued that the respondent had not terminated the contracts. They had simply declined to renew them which was their right. According to Counsel, by seeking a freeze on the respondents accounts, the claimants wished that the respondent shut down simply because they had left the respondent's employment.

11. In conclusion Mr. Odera submitted that the case as presented did not disclose a prima facie case and in any event there was an insurance cover sufficient to honour the claim if ultimately successful.

12. Attachment before judgment otherwise known as a freezing order is governed by different principles from those governing ordinary interim injunctions. The claimant must first of all show that they have a prima facie case based on a pre-existing cause of action, secondly, the respondent must have assets within the jurisdiction of the Court over which there is reasonable fear that will be removed from jurisdiction or dissipated if the freezing order is not made.

13. In making the order, the Court must be satisfied that the applicant is acting bonafide. Vague and speculative allegations are insufficient.

14. In the case of **of Kuria Kanyora t/a Amigos Bar & Restaurant v. Francis Kinuthia Nderu & Others (1985) 2KLR126** the Court observed that the power to attach before judgment must not be exercised lightly and only upon clear proof of mischief. The defendant must be shown to be about to dispose of his property or remove it from jurisdiction with the intent to obstruct or delay any decree that may be passed against him. In the case of **Savings & Loans Kenya Ltd v. Eustance Mwangi Mungai** Ringera J (as he then was) stated that:

**“...however grounded the plaintiff's apprehension might appear to be, it remains just that; well grounded apprehension. Without evidence that the defendant intends to do what is feared the Court cannot grant the order...”**

15. The claimants herein contend that they are entitled or had legitimate expectation for renewal of their contracts of service with the respondent based on what they called the norm and practice of the respondent. In order to secure any judgment they may obtain against the respondent they sought ex parte and obtain a freezing order to the extent of what they deemed to be a possible award the Court might make in their favour. The basis of the claimant's apprehension is that the respondent is a foreign organization having its Head Office in US and that the lease for the current premises had expired.

16. The respondent on the other hand had denied these allegations and exhibited a letter of offer of lease of new premises which they complain they could not complete because substantial funds had been affected by the ex parte freeze order. The respondent had further exhibited an insurance policy to extent of Kshs.200 million covering among others employment practice claims and claims alleging non-employment discrimination. This policy was issued by National Union Fire Insurance Company of Pittsburg.

17. As observed earlier in this ruling an interlocutory freeze order should not issue lightly. The applicant must show beyond peradventure that the respondent with the sole intent of defeating any decree that may be passed against it, is removing from jurisdiction, its known assets or otherwise dissipating them. The Court must further consider whether justice can be achieved by any other means than the interlocutory freeze order.

18. The case before me is not clear on both sides. The claimants have not shown beyond mere apprehension that the respondent might be moving or about to move out of jurisdiction. The basis of their apprehension is the expiry of the lease for premises currently occupied by the respondent and refusal by the respondent to renew their contracts. The respondents on the other hand had exhibited an offer of lease for new premises and an insurance policy covering claims such as made by the claimants. The lease had not been executed, although the respondent had blamed it on failure to access funds to pay the requisite rent due to the freeze order. The insurance policy exhibited was issued by a foreign company with no known local agents or intermediary. The claimant's fear of whether their claim if successful can be honoured and procedure and costs entailed claiming from the insurer is therefore plausible.

19. I have reviewed the pleadings as filed and noted that if the Court came to conclusion that the claimants were not entitled as a matter of course to a renewal of contracts upon expiry, then they would under clause 12.10.1 of the respondents Admin Manual not be entitled to any notice. If found otherwise, they would be entitled to one month's notice only. Further under clause B1 of the respondent's Staff Handbook the claimants were members of respondent's pension scheme and contributors to NSSF hence under section 35(6) they cannot claim service pay. Twelve month's salary as compensation for unfair termination of services is the maximum amount the Court can award and this will be awarded only in exceptional cases. The case before me does not present itself as such. In the circumstances the Court estimates that the most probable amount the Court may award if the claimants ultimately become successful would be approximately Kshs.16,315,200/=.

20. As was noted in **Kanyoko's case** cited earlier in this ruling, the Court should be extremely slow in ordering attachment of a defendant's property before judgment not only because it is hardly consistent with justice to exact punishment but also because of the time consuming process of the Courts, the rights and liabilities of the parties may be determined after a long time. Further as already stated interlocutory freeze order should only issue where justice cannot be achieved by other means.

21. Doing the best I can in the circumstances therefore the Court will lift the order freezing the respondent's accounts issued on 14<sup>th</sup> March, 2016 and substitute therefor an order that the respondent furnish and file with the Registrar of this Court a suitable guarantee from a financial institution or insurance company based in Kenya to the extent of Kshs.16,315,200/= as security for an award the Court might ultimately make in favour of the claimants if successful.

22. For avoidance of doubt, the substitution with a suitable guarantee shall be a pre-condition to lifting the freeze order made herein earlier.

23. The respondent shall have 30 days to comply with this order.

24. Each party be at liberty to apply.

25. It is so ordered.

**Dated at Nairobi this 15<sup>th</sup> day of April 2016**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 15<sup>th</sup> day of April 2016**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha Jorum Nelson**

**Judge**