



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

**AT NAIROBI**

**CAUSE NO. 1024 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 12<sup>th</sup> April, 2016)**

**LEONARD LUSINDE MUKHAYA.....CLAIMANT**

**VERSUS**

**OXFORD UNIVERSITY PRESS EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. The Application before Court is one dated 17.12.2015, where the Applicant seeks the following Orders:

- 1. The Application be certified as urgent and service be dispensed with due to reasons of urgency.***
- 2. That this Honourable Court be pleased to make Orders compelling the Respondent Company to furnish such reasonable security that may be able to cover the Claimant's claims, interest and costs.***
- 3. That this Honourable Court do grant such alternative Orders that may be reasonable to meet the ends of justice.***

2. Which Application is based on the grounds that:

- 1. The Respondent's business assets are being disposed and staff laid off and it is likely that the Respondent may plan to relocate to another country.***
- 2. That there is a likelihood this matter may be rendered nugatory as the Respondent may close down business and relocate to another country.***
- 3. That any decree of this Honourable Court may be rendered futile for want of jurisdiction if the Respondent relocates to another country.***

3. The Application is supported by the Claimant's affidavit sworn on 17.12.2015 in which she states that the Respondent is contemplating closing down its business and relocate to another country which may render his claim and the decree of the Court nugatory. She has annexed copies of internal memos marked '**LLM 1**' as evidence of this contention.

4. The Respondent opposed the Application and filed a Replying Affidavit sworn by one Beth Kajuju the Respondent's Human Resource Officer where they state that the Application by the Claimant is an attempt to subject the Respondent to undue hardship. They also state that the Application does not meet the requirements of Order 26 of the Civil Procedure Rules 2010 in that the Claimant has not tendered proof that they will suffer substantial loss if Security for this claim is not granted.

5. They further state that the Claimant's interpretation of the internal memos attached to his supporting affidavit is erroneous for the reasons that the Respondent had put strategic measures for growth which included better controls of their financial and commercial operations which led to the introduction of shared service centers globally.

6. Further the Respondent contends that the Company is financially sound and is still running operations in Kenya and is not planning on relocating to another Country. They have annexed the Respondent's business permit for the year 2016, staff announcement for new recruits to the Company made in 2016 and an extract from the audited financial statement for the year 2015 in a bundle marked "**BJ 1.**"

7. The Respondent states that the memos referred to in the Claimant's affidavit are dated 27.2.2015 and 12.8.2015 whereas the Respondent was terminated on 31.1.2014. That the said memos were illegally obtained and the context in which they were written totally misunderstood.

8. The Respondent states they will suffer prejudice if the prayers sought are allowed.

9. The Parties elected to dispose of the application by way of submissions. The Claimant in his submissions reiterates the contents of the affidavit and prays for the application to be allowed as prayed for the reason that the Respondent's actions were deliberately orchestrated to deny the Claimant a source of livelihood and bring about financial loss. Should the Respondent close shop as alleged the Claimant states that he will be greatly prejudiced.

10. The Respondent in their submissions state that the Claimant has not offered any tangible evidence in support of his claim for security. The Respondent submits that in its Replying Affidavit they have allayed the fear that it is closing down its offices in Nairobi and relocating to another country.

11. The Respondent states that the application is clearly misconceived having been brought under Order 26 of the Civil Procedure Rules which deals with security for costs in favour of the Defendants whereas the instant Application prays for security of the Claim and costs for a Claimant under Order 39 of the Civil Procedure Rules 2010.

12. It is also the Respondent's contention that the Claimant has not meet the Requirements for seeking security of costs provided under Order 39 and in particular the requirement that he proves that he will suffer substantial loss if the prayers sought are not granted.

13. The Respondent rely on the case of **John Kipkemoi Sum Vs Lavington Security Guards Limited (1998) eKLR**; where it was held:

***"... the power to attach before judgment must not be exercised lightly and only upon clear proof of either mischief aimed at by Order 38 Rule 5 of the Civil Procedure Rules, namely, that the defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him. .. in an application under Order 38 Rule 5 of the Civil Procedure Rules, the onus of sowing a plausible cause for resisting the application can only shift to the defendant once the Plaintiff has fully satisfied the requirements under that Order."***

14. The Respondent states that furnishing the Claimant Security for the claim will prejudice them as the prayers are unfounded and urge the Court to deny the Application dated 17.12.2015.

15. I have considered submissions for both parties. Order 39 Rule 5 of the Civil Procedure Rules :

***“(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”.***

16. The twin provisions above elaborate circumstances under which the Court can order attachment for security of costs. It is therefore incumbent upon the Applicants to prove that the Respondents are actually in the process of disposing their property or moving it out of jurisdiction in order to avoid the results of the claim.

17. The Applicants aver that the Respondents intend to move their business out of the jurisdiction of this Court but no proof such is produced. Also there is no proof that they are disposing of their property.

18. I do not find the Applicants have established a prima facie case to warrant issuance of the orders sought. I find the application without merit and dismiss it accordingly.

19. The case may be set down for hearing accordingly.

Read in open Court this 12<sup>th</sup> day of April, 2016

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Matata holding brief for Michuki for Respondent – Present

No appearance for Claimant