



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1375 OF 2014

JACKLINE CHEPKEMOI KIMETO.....CLAIMANT

VERSUS

SHAFI GREWAL KAKA.....1ST RESPONDENT

JULIE DABALY SCOTT.....2ND RESPONDENT

MOHAMMED WANYOIKE.....3RD RESPONDENT

FEMINA DAWOODIA.....4TH RESPONDENT

RULING

1. In the Notice of Motion dated 15th March, 2016 the claimant/applicant seeks orders among others that:-
 - a. That this Honourable Court be pleased to require the respondents to show cause why they should not furnish security or an acceptable undertaking for the due performance of any order or decree that may emanate from the proceedings herein in view of the impending changes and or reconstitution of the Kenya Association of Travel Agents.
 - b. That the Honourable Court be pleased to issue any other order and/or directions it deems fit for purposes of the proceedings herein.
2. The application is brought on the grounds inter alia that:-
 - (a) It had come to the attention of the applicant that the respondents had commenced a process of reconstituting Kenya Association of Travel Agents of which they were the registered officials.
 - (b) The applicant is reasonably apprehensive that the said changes and/or reconstitution are envisaged to change the very character and nature of Kenya Association of Travel Agents thus making it impossible to enforce any orders and or directions issued by the Court.
 - (c) Particularly, the changes will fundamentally affect, the legal status, capacity, character, and designation of Kenya Association of Travel Agents as currently constituted.
 - (d) Neither this Court nor the applicant was privy to the process of reconstitution of Kenya

Association of Travel Agents and therefore there is no way of ascertaining whether the sufficient safeguards had been put in place to ensure that this honourable Court does not act in vain hence the need for the notice to show cause.

3. The application was supported by the affidavit of the claimant who deponed among others that:-
 - a. That the respondents herein are the officials of Kenya Association of Travel Agents which was her former employer.
 - b. That she was employed as Chief Executive Officer by Kenya Association of Travel Agents between 1st November 2012 and 31st March 2015 when her employment was unfairly terminated.
 - c. That she had now discovered that the respondents had commenced a process of reconstitution Kenya Association of Travel Agents of which they were the registered officials.
 - d. That particularly, the respondents intend to amend the constitution of Kenya Association of Travel Agents in order to evade the outcome of the suit herein.
 - e. That undoubtedly the said changes and/or reconstitution were envisaged to change the very character and nature of Kenya Association of Travel Agents thus making it impossible to enforce any orders and or directions issued by the Court.
 - h. That the said changes in the form of a review of the constitution of Kenya Association of Travel Agents are scheduled to be effected any time in the month of March 2016.
 - g. That clearly the said changes of reconstitution are calculated to defeat the outcome of the proceedings herein and if the prayers herein are not granted there is a real likelihood that nay decree issued by the Court in her favour would be nugatory as there would be no way of enforcing it.
 - h. That in view of the above any orders, directions or decree issued by the honourable Court after the reconstitution of Kenya Association of Travel Agents would be issued in vain.
 - i. That moreover, neither this Court nor the applicant was privy to the process of reconstitution of Kenya Association of Travel Agents and therefore there was no way of ascertaining whether the sufficient safeguards had been put in place to ensure that this honourable Court does not act in vain hence the need for the notice to show cause.
4. The respondents opposed the application and filed a replying affidavit though one Nicanor Sabula who deponed among others that:-
 - a. She was advised by the Respondent's Advocates on record Mohammed Muigai which advice she accepts, that the applicant's contention that a change and/or reconstitution of the Association would make it impossible to enforce any Court Orders and directions issued against the Respondents, is farfetched and misconceived since any internal reorganization of the Association cannot, in law, affect external parties.
 - b. She was further advised by the advocates aforesaid which advice she believes was true that in accordance with the legal doctrine of succession-in-title any structural change of the Association cannot in any way negate any established liability of the Association as alleged, since any Court orders can be enforced against a successor-in-title.
 - c. She is aware that there had been suggestions to alter the constitution of the Association's board but so far no tangible steps had been undertaken to implement those proposals. As a matter of fact, the General Meeting of members which was the only competent organ of the Association empowered to approve or reject a reconstitution or change of status had not deliberated on the suggestion to reconstitute or change the Association or its Board.

d. She was further advised by the advocates aforesaid that the applicant's averments that neither she nor this Honourable Court was privy to the process of reconstitution of the Association were misleading since any information relating to the Association was open for inspection in line with the provisions of the Societies Act, Chapter 108 of the Laws of Kenya.

e. The applicant had not adduced any evidence to warrant an order to provide security for costs and neither had she demonstrated how the factors to be considered before granting the orders, which factors were well settled in law, had been satisfied. In any event, the applicant had not suggested that the association would be unable to satisfy any orders she obtains from this Honourable Court which was one of the primary factors to be considered before the orders sought were granted.

5. In the submissions in support of the application, Mr. Kago for the applicant submitted that an order for security for costs is an exercise of judicial discretion, it is made in view of the peculiar circumstances of each case. In this regard Counsel relied on the case of **Marco Tool & Explosives Ltd Vs. Mumujee Brothers Ltd (1938) KLR 730**. According to Counsel, the applicant in the instant case had demonstrated that indeed efforts are afloat to change the nature of the Kenya Association of Travel Agents.

6. Mr. Kago therefore submitted that the prayers sought were reasonable and modest and were meant to safeguard the integrity of judicial process and most importantly to ensure that the outcome of the applicants claim were not defeated as a result of the impending restructuring.

7. Mr. Ngige for the respondent on the other hand submitted that the allegations by the respondent were premature and speculative to the extent that they purport to pre-empt that the reconstitution would fundamentally affect the legal status, capacity and character of the respondent.

8. According to Counsel, the provisions relating to the amendment of a Society's Constitution are set out under section 20 of the Society's Act and that none of the steps contemplated in section 20 have taken place. While there have been suggestions to alter the Constitution of the Association's Board no tangible proposals have been undertaken to implement these proposals. Further the suggestion to amend the associations constitution would if they materialize only affect its members. The amendment cannot affect third parties in the manner suggested by the applicant or at all.

9. Mr. Ngige further submitted that under the doctrine of succession in title where a person takes over and continues the role of another person, the successor acquires the rights, responsibilities, and liabilities of the predecessors. By so doing the successor is vested with rights which otherwise they would not have, and a reciprocal obligation regarding existing suits against the predecessors. In this regard Counsel relied on the case of **Going Places Limited Vs. Mohammed Hatimy (2012) eKLR**.

10. Counsel further submitted that the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which they may never recover from the losing side. In this case the applicant had not adduced any evidence suggesting that she will be unable to recover costs in the event that she succeeds and neither has she demonstrated that the respondent shall be unable to recompense her in damages.

11. An order for security for costs is a matter of judicial discretion. It is a discretion which must however be exercised sparingly and in plain and obvious cases. That is to say tangible evidence must be presented to the Court about to decide the matter demonstrating either inability of the respondent to pay cost if the applicant becomes successful and an order for costs is made. Mere apprehension or speculation would not meet the threshold for making the order.

12. The applicant before the Court has expressed fear that the intended reconstitution of the respondent would make it lose its core character rendering an order that the Court may ultimately make unenforceable as against the newly reconstituted entity. The respondent has refuted these allegations and stated that the amendment of the respondent's constitution would not in any way excuse it from its legal obligations and liabilities under the principle of successor in title. The respondent has further stated none

of the essential steps required under section 20 of the Society's Act has been commenced by the respondent hence the applicants' concern remain largely speculative.

13. As observed earlier an order for security for cost will be made in exceptional circumstances where sufficient material is placed before the Court to vouch for the same. In the application before me, I am not persuaded that the applicant has met this test. Apart from apprehension, no material has been laid before me to show that the respondent has taken steps to reconstitute itself and such reconstitution if carried out would result in a different entity completely removed and excused from the legal obligations of its predecessor.

14. The application is therefore found without merit and is hereby dismissed with costs.

13. It is so ordered.

Dated at Nairobi this 23rd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge