



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1738 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th October, 2016)

THOMAS MUKOYA.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 21st of July 2015 brought under Section 12(3) (viii) and 4 of the Industrial Court Act together with all the other enabling provisions of the law for Orders that:

1. The Claimant be ordered to furnish security for the Respondent's costs of the claim pending the hearing and determination of this cause.

2. That costs of this application be provided for.

2. The application is based on the annexed affidavit of Stephen Murithi and on the following grounds:

1. That the Respondent has settled all the Claimants' dues.

2. That the Respondent has a bona fide defence to the claim herein.

3. That the Claimants financial means are unknown to the Respondent since he left employment.

4. That the Respondent is therefore unlikely to be able to recover its costs should it successfully defend this claim.

5. That it is in the interest of justice that the orders sought herein be granted.

3. The Claimant/Respondent has not filed a response to the application.

4. The Applicant has filed written submissions. They submit that the termination of the Claimant was in accordance with the law and that the suit herein is merely a denial of payment that was duly effected to him. The Claimant signed the acknowledgement of payment and should therefore not deny any payment.

5. They submit that security of costs is well versed in our jurisprudence and rely on **Elloy Molinero vs. Par Properties Limited ELC No 8 of 2014** where Justice Okong'o quoted with authority the locus case of **Shah vs. Shah 1982 KLR** that provided that the test to be applied in applications for security for costs:

“the general test in an application of this nature is not whether the plaintiff has a prima facie case with a probability of success but whether the defendant has shown that it has a bona fide defence.”

6. They submit that they have raised triable issues and have a high probability of success. The Claimant has not shown that he is able to pay the costs of the Respondent should they be successful in their defense of this suit.

7. Further, they submit that they are unaware of the physical whereabouts of the Plaintiff and have no knowledge of his known assets, which could be attached to settle the defendant's costs in the event that the respondent is successful.

8. They submit that under Order 26 Rule 1 of the Civil Procedure Rules 2010, the Honourable Court has got unfettered discretion to order any party to furnish security for costs pending the hearing and determination of a suit.

9. They rely on the case of **Industrial Plant EA LTD vs. Stanbic Bank and Another, Nairobi HCCC NO 532 of 2006** where Justice Kimaru was guided by the England Order 23 of the Rules of Supreme Court Practice Rules which state as follows:

“Security for costs may be ordered where a party is resident out of the jurisdiction of the court, where the plaintiff is an insolvent company, where the company is based out of the jurisdiction of the court but has property in England, where a nominal plaintiff has filed suit, where a person under disability has filed suit through a next friend, where either the plaintiff or the defendant is a person of unknown residence, where the plaintiff has no visible means of paying costs and where it is established that the opposing party may be unlikely to recover its costs if the suit is determined in its favour. (Supreme Court Practise 1999 Vol. 1 at page 428 0 44 sweet & Maxwell London 1998)”

10. They submit that it is the Courts duty to protect the Respondent who has been sued by the Claimant where it is apparent that in the event the suit is dismissed, such a claimant may not be in a position to settle the costs of the Respondent.

11. They submit that Courts have exercised their discretion on whether or not to allow applications of this nature and rely on the case of **Ahmed Mohammed Ahmed vs. Ahmed Mohideen & Another (2012) eKlr** where Justice Odero formed the opinion that:

“that indeed was a case that warranted exercise of the courts discretion to order the plaintiff to furnish security for the 2nd Defendants costs, for the failure of the plaintiff tendering proof that he was in position to meet the anticipated costs.

12. Further in **Joel Kibiwott & 4 Others vs the Registered Trustees of Our Lady of Victory HCC 146 of 2004** Justice Luka Kimaru held that:

“where the plaintiff has failed to provide proof by way of an affidavit that they would be in a position to pay costs, then an application filed by the defendant seeking security for costs must succeed.”

13. They pray that the Court is guided by the above decisions and that the Claimant be ordered to furnish the said security for costs, failure to which this case must be dismissed.

14. They Claimant/Respondent in their submissions state the respondent has details of the Claimant including his national identity number which details his whereabouts as well as his advocates address.

15. He submits that although he may be a person with little financial capability that should not be a reason

used against him in pursuit of his legal right. They rely on the case of **Timothy Manyara and 144 Other vs. Pyrethrum Board of Kenya Civil Case No 108 of 2014** where the Court stated that:

“the fact that the plaintiff may be persons of little financial capability is no reason why they should be hampered in their pursuit of what they perceive to be their legal rights.” The Court further stated that the Plaintiffs place of abode and postal address have been disclosed in the verifying affidavits which have been filed in court, it would not be difficult for the plaintiffs to be traced.”

16. Further, the rely on the case of **John Kiare vs. Dyer Blair Investment Limited and Another** where the Court stated that:

“I think it is now settled that poverty of a plaintiff per se may not be sufficient ground for a court to order that he provides security pending the hearing of his case.”

17. They therefore submit that the Claimant is putting hurdles at the litigation path of the plaintiff in order to frustrate him from prosecuting his case to full hearing and as such must be dismissed with costs to the plaintiff.

18. I have considered the application filed herein plus the submissions of the Applicant and the replying affidavit of the Respondent. I note that though the Respondents aver that the Claimant’s case has no triable issues they never filed any response to this claim from which this Court can access the non-issues raised by the Claimant.

19. Further, the Claimant Respondent has in reply to this application stated he has an address which I believe exists and that is why they were able to serve him with this application for security of costs.

20. It is only through filing a response to the claim that the Respondent Applicant would have best articulated this application. In the absence of responding to the claim, I find that this Court is unable to assess whether or not the Claimant has a case or not.

21. In the circumstances, I find the application has no merit and I dismiss it accordingly with costs.

Read in open Court this 18th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent