



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1676 OF 2016**

**LIU CHING LIANG .....CLAIMANT**

**VERSUS**

**WEBWAVE ELECTRIC MANUFACTURING (K) CO. LTD..... 1<sup>ST</sup> RESPONDENT**

**WENG SHI FANG ..... 2<sup>ND</sup> RESPONDENT**

**PENG WAN NENG .....3<sup>RD</sup> RESPONDENT**

**RULING**

1.The Claimant through Notice o motion dated 22<sup>nd</sup> august 2016 and brought through the provisions of section 3(1) (2) and (3) and 20 of the Industrial Court Act [Employment and Labour Relations Court Act], Rules 16 and 36 of the Employment and Labour Relations Court (Procedure) Rules, 2016, section 1A, 1B, 3, 3A of the Civil Procedure Act, order 39 of the Civil Procedures Rules and all enabling provisions of the law and seeking for orders that;

1. ... *Spent.*

2. ... *Spent.*

3. *This Court be pleased to issue an order directing the Respondents to furnish security for appearance in this suit.*

4. *In the alternative, Court be pleased to issue such and/or further orders as it may deem fit to do so.*

5. *Costs of this application be provided for.*

2.The application is supported by the annexed affidavit of the Claimant and on the grounds that he was employed by the 1<sup>st</sup> Respondent as the Sales, Communication and Operations Manager on 12<sup>th</sup> August 2015 and issued with a contract of employment signed by the 2<sup>nd</sup> respondent. The Claimant is a foreign national holding a Foreign Certificate No.814402 issued by the government of Kenya and a Work Permit No.0029934 valid for 2 years from the date of issue on 9<sup>th</sup> October 2015.

3.Further grounds in support of the application are that the Claimant worked for the 1<sup>st</sup> Respondent from 12<sup>th</sup> august 2015 without rest day, holiday or taking leave until 28<sup>th</sup> aril 2016 when the 1<sup>st</sup> Respondent unilaterally terminated his contract by visiting him in his house an compelling him to sing a notice

indicating that there was no more work for him. For the entire duration of employment, the Claimant was never paid his salary or allowances. The Claimant made effort to get the Respondent pay his accrued salary and terminal dues which has been ignored.

4. Further grounds are that the 2<sup>nd</sup> Respondent assaulted the Claimant on more than one occasion when he visited him in his house and when the Claimant visited the respondent's business premises and while he was following up on his dues.

5. The Claimant is a foreigner with no income and means of earning a livelihood as his work permit is limited in scope and he has no family residing in Kenya. The Claimant having been issued with a Foreign Certificate and work permit by the government of Kenya, he deserves protection and aid of the law of Kenya and particularly protection of his labour rights by the court.

6. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the sole shareholders of the 1<sup>st</sup> Respondent and controls all running aspects of the business including the bank accounts and ownership of assets. There is a high probability that the Respondents may try to avoid the jurisdiction of the Court by disposing off their shares in the 1<sup>st</sup> Respondent and moving out of the jurisdiction of the Court before this matter can be heard and determined as they are foreigners.

7. The Claimant has a good case with a high chance of success and unless this Court issues orders sought, the proceedings in the suit will be rendered nugatory if the Respondents abscond Court and move out of jurisdiction, the contract of employment makes provisions for the resolution of disputes with regard to the claimant's employment, in Kenya. The Court has power to guard its reputation and honour in the face of foreign operators and there will be no prejudice suffered if the orders sought are issued.

8. In his Supporting Affidavit, the Claimant avers that he is a Chinese national on a Work permit in Kenya and upon his employment by the respondents, he was issued with a contract of employment and based in Kenya. On 28<sup>th</sup> April 2016, the 2<sup>nd</sup> Respondent visited the Claimant in his residence with a notice of termination and directed the Claimant to sign it stating that there was no more work for him.

9. The Claimant also avers that he signed the termination notice as he was convinced the 2<sup>nd</sup> Respondent was intent on getting rid of him unprocedurally after making desperate attempts not to be rendered destitute as he is a foreigner with no other means of earning an income. The Claimant had not been paid his salaries and allowances since he was employed as the 2<sup>nd</sup> Respondent asked him to bear with him to build up his business and the Claimant was acting in good faith. The Claimant made effort to lay a customer base in Kisumu, Eldoret, Mombasa and Nakuru when he worked day and night and over weekends. The Respondent breached the employment contract as no salary or allowances were paid.

10. The Claimant is apprehensive that the Respondents may make attempts at winding up or transferring its business and or disposing off its assets with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents disposing off their assets and shareholding in the 1<sup>st</sup> Respondent as they are the sole shareholders and moving away from this court's jurisdiction before the main suit is heard and determined and render the claim nugatory.

11. The affidavit is made to support the grant of orders sought.

12. The Respondent in reply filed Replying Affidavit of Weng Shi Fang the 2<sup>nd</sup> respondent, a Chinese national and director of the 1<sup>st</sup> respondent. He avers that the Respondents never engaged the Claimant in an employment capacity as its Sales, Communication and operations manager or in any other capacity and the contract produced by the Claimant is an agreement between the Claimant and a third party known as ***City xi city Excellent Electrical Equipment Co. Ltd Shijiazhuang Province.***

13. Mr Fang also avers that the Respondents are not privy to the employment contract relied upon by the Claimant to institute these proceedings and should enjoin the correct parties. The Respondents are not the Claimant employers and the Respondents are wrongly enjoined in this suit.

The claimant's employer, **City xi city Excellent Electrical Equipment Co. Ltd Shijiazhuang Province** has been intent of terminating the employment of the Claimant after he was found to have stolen company property and this has been reported at Kilimani Police Station under OB65/2/9/016. The Claimant has admitted he was properly notified of the termination of his employment and he was given reasons for the termination, this being redundancy of his position and therefore there was a proper and legal notice of termination. The Claimant was never assaulted and no demand for terminal dues has been made.

14. The Claimant has misled the Court by claiming that the Respondents may wind up or transfer the business and move from the jurisdiction of the court. The Respondents have a successful business in Kenya and do not intend on moving out of Kenya. The orders sought for a deposit of security should not be granted since the Respondent has demonstrated that they are not privy to the employment contract the subject matter of this application and claim. The 1<sup>st</sup> Respondent is a limited liability company registered in Kenya in accordance with the law and the claim cannot be lost by the mere fact that the 1<sup>st</sup> Respondent has been would up. The application should be dismissed.

15. Both parties made their oral arguments in court.

### **Determination**

Should attachment before judgement issue?

16. Before delving into the above issue, the Respondents have previously raised the question of the Court jurisdiction which is now settled. In settling the issue of jurisdiction, the Court also held that at paragraph 15 of the Ruling dated 3<sup>rd</sup> November 2016 that;

*... The Claimant is employed overseas in Kenya in Webwave Electric Manufacturing (K) Co. Ltd, the 1<sup>st</sup> Respondent. The contract further sets out that;*

*... The work place is Kenya, main responsibilities include;*

*...*

*1. The second party [the claimant] shall be the sales branch manager of the overseas Company Branch, the second Party shall work in the branch office for three years since day of signing of the contract. In the normal business operation of the branch, the First Party ["City xi city Excellent Electrical Equipment Co. Ltd Shijiazhuang Province"] shall guarantee the second party [the claimant] monthly salary amounting to 10 thousand RV, plus 10% reward. The salary shall be implemented according to the company's wage payment system.*

17. The Claimant was therefore contracted to work in Kenya for the Respondents and in the Ruling at paragraph 16 the Court held that;

*16. As such, the contract of employment is made in Kenya and the place of work is in Kenya. The Claimant was sourced by the third party solely for the benefit of the 1<sup>st</sup> Respondent and a company registered and or domiciled in Kenya.*

18. In the Replying affidavit of Mr Fang dated 2<sup>nd</sup> September 2016 at paragraphs 8 and 9 he avers;

*THAT the Respondents have been informed that the claimant's employers, **City xi city Excellent Electrical Equipment Co. Ltd Shijiazhuang Province**, were intent on terminating the employment contract between themselves and the Claimant as the Claimant was found to have stolen company property and he was reported at Kilimani police Station under OB No. OB65/2/9/016.*

*THAT the Claimant has admitted that he was properly notified of the termination of his employment contract and he was informed that the reason for this termination was the redundancy*

*of his position and therefore there was a proper and legal notice.*

19. On the one hand, the Claimant being an employee and serving the Respondents in Kenya as the Sales, Communication and Operations Manager, as such, he was entitled to be paid his salaries and allowances in accordance with his employment contract. The Respondents do not speak to this issue at all in their affidavit by Mr Fang or in the submissions.

19. Secondly, I take it that the report filed at Kilimani Police Station and within the knowledge of the Respondents was reported by the Respondents and not the alleged third party **City xi city Excellent Electrical Equipment Co. Ltd Shijiazhuang Province**. As such, the Respondents have the full knowledge of their employment of the Claimant at all material times.

20. Thirdly, where Mr Fang avers that the Claimant was terminated due to the reason of redundancy, section 40 of the Employment Act is implicated and with it various procedural and substantive issues must be addressed. For the Respondents to terminate the Claimant on the reason of redundancy, the context of the same and the circumstances leading to that reason must be gone into at the hearing of the claim. However, that averment by Mr Fang, a Chinese national and Director of the 1<sup>st</sup> Respondent carries with it a lot of weight. Termination of employment can only be effected by an employer and not any other party.

21. Without going into the merits of the main claim, with the employment status of the Claimant thus secured, the issue at hand with regard to finishing of security for appearance in the suit and or an order for attachment before judgement of the Respondents property as security must be addressed while the suit is pending.

22. The basic principles of law that must be observed for the Court to make orders of security deposit of attachment before judgements lie in the Civil Procedure Act under Orders 39. The burden is on the party claiming such an order to show that the Respondent party is in the process of disposing their business/property or moving that property from the jurisdiction of the Court or is about to abscond in either case with the object of defeating any decree that may be passed against him. See **Henry Kakai and Others versus Debendra Kamat t/a Swadish Foods, Cause No.2449 of 2012**. That evidence can only be tested in evidence where it is refuted by the respondent. In this case both parties, the Claimant and the Respondents have confirmed that they are nationals of China save for the 1<sup>st</sup> Respondent that is registered in Kenya under the Companies Act but the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the sole shareholders. Even though the subject matter of the suit is the employment relationship between the parties in Kenya, the fact of all the parties being Chinese and foreign nationals is obvious.

23. On the applicable law and Order 39 of the Civil procedure Rules, Rule deals with instances where the Respondent may be called to furnish security for appearance and provides as follows:-

*1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of [section 12](#) of the Act, the Court is satisfied by affidavit or otherwise—*

*a. that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—*

*i. has absconded or left the local limits of the jurisdiction of the court; or*

*ii. is about to abscond or leave the local limits of the jurisdiction of the court; or*

*iii. has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof; or*

*b. that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,*

*The Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance:*

*Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the court.*

24. Further Rule 5 of Order 39 sets out the conditions to be put into account where a Respondent may be called upon to furnish security for production of property as follows:

*5(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.*

*(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.*

*(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.*

25. Putting the provisions of Order 39 into perspective, the Court in **BGM HCCC NO 5 OF 2013 Kandunyi Holdings Limited versus Balm Kenya Foundation & another [2013] eKLR; held that;**

*...Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK....Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.*

26. The Claimant has invoked the provision of Order 39 and particularly section 3 of the Employment and Labour Relations Court Act. Under Order 39 rule 1 and 5 of the Civil Procedure Rules is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. The Respondents may be arrested or may be called upon to show-cause why they should not give security for appearance or satisfaction of the decree which may be passed against them. these provisions in my view have the rationale of stopping a Respondent from dissipating the subject matter before Court can determine the matter that such subject matter may become subject of Court execution and that to warrant the grant of such orders, the Claimant has a good case with high chances of success and the orders once granted is not with intent of unduly putting the Respondent into unlawful pressure.

27. Upon the Claimant filing his claim, the ruling of the Court with regard to settling the question of jurisdiction and the fact of employment of the Claimant settled, the Employment Act requires that where an employer has been sued, all work records with regard to an employee must be produced. Section 10 (6)

and (7) provides that;

*(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.*

*(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. [Emphasis added].*

28.The defence is therefore left bare without the work records which would assist the Court at this instance in establishing as to whether the due salaries and allowances were paid, whether the termination notice was issued and whether the reasons of redundancy as given adhered to the mandatory provisions of section 40 of the Employment Act. Without production of any such work records by the employer and the Respondent in this case, I find good basis to issue the orders sought by the claimant.

29.As set out above, I find good basis that the Claimant as an employee of the respondents, and as an employee who offered his labours to the Respondent within the territory of Kenya, and having been terminated from his employment on the grounds of redundancy and there being a claim of unfair termination; the parties being foreign nationals; the Claimant has a *prima facie* case that warrant the grant the orders sought so as to secure the subject matter pending hearing.

**From the foregoing, and in the interests of justice and noting the claim setting out dues owed at kshs.4,296,580.00 [295,334.00 Yuan],[1] the Respondents shall deposit with the Court such monies and sum within seven (7) days pending the hearing and determination of the main claim. On this basis, and noting the subsisting orders with regard to the Work permit and Stay of the Claimant within the jurisdiction of the Court, a hearing date shall be allocated on priority.**

**Delivered in open court at Nairobi this 18<sup>th</sup> day of November 2016.**

**M. MBARU**

**JUDGE**

In the presence of.....

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[1] Central bank of Kenya exchange rates, accessed on 17<sup>th</sup> November 2016.