



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1515 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th November, 2016)

**KENYA NATIONAL UNION OF
SERVICE EMPLOYEES CLAIMANT**

VERSUS

**DIANI FLOWERS AND
LANDSCAPING LIMITEDRESPONDENT**

RULING

1. Before the Court is a Notice of Motion application where the Applicant seeks Orders for:

1. That the application be and is hereby certified as urgent and the same be heard exparte in the first instance.

2. That pending the hearing and determination of the application, this Honourable Court be pleased to order the Respondent to deposit Kshs. 22,533,246.00 to the Honourable Court being terminal benefits and remedies for unfair, unlawful redundancy and victimization of the Grievants as indicated herein below and as per the tabulation annexed and marked A 25.

Particulars as hereunder:-

- | | |
|--|----------------------------------|
| <i>a) Pay in lieu of notice
458,517.00</i> | <i>- Kshs.</i> |
| <i>b) Pay in lieu of pending leave days worked but not paid</i> | <i>- Kshs. 403,995.00</i> |
| <i>c) Severance pay
Kshs.1,786,701.00</i> | <i>-</i> |
| <i>d) Arrears arising out of underpayment of salaries and house allowances which were paid below Statutory Government Minimum Wages
-Kshs. 1,710,548.00</i> | |

e) Payment of damages for breach of contract and for loss of earnings arising out of unfair and unlawful terminations of the Grievants contract of service –Kshs. 5,693,208.00

f) Payment of full compensation for unfair and unlawful termination of the Grievants contract of service

- Kshs.5,585,042.00

g) Payment of unauthorized deductions from the Grievants Salaries without their consent - Kshs. 264,072.00

3. That pending the hearing and determination of this application, this Honourable Court be pleased to order Mr. URS Ringler the Managing Director of the Respondent and the wife be ordered to deposit their passports with the Honourable Court so that they don't leave the Country before settling the Claimants claim.

4. That pending the hearing and determination of this application, this Honourable Court be pleased to order the Respondent to remit to the Claimant deducted Trade Union Dues from the Grievants salaries for the month of July 2015.

5. That pending hearing and determination of this application, the Honourable Court be pleased to order the Respondent to pay nineteen Grievants each Kshs.500.00 being over deducted Union Dues for the month of June 2015.

6. That pending hearing and determination of this application, the Honourable Court be pleased to order any other relief the Honourable Court may deem just to grant.

7. That the costs of this application be met by the Respondent.

2. The application is supported by the annexed affidavit of Jacob Opiyo, other grounds to be adduced at the hearing and on the following grounds:

i. The Respondent has a contract with United Nations Office in Nairobi (UNON) where the Grievants used to work which will come to an end on 22nd August 2016.

ii. The Grievants contracts of service were terminated unfairly and unlawfully.

iii. The Respondent was aware that the Grievants were all members of the Claimant Union, failed to involve the Union in their termination.

iv. The Respondent without issuing statutory mandatory notices to the Grievants as required by law, went ahead to terminate the Grievants contracts of Service on 1st August 2015 without following the Rule of law.

v. The Respondent breached contract of service of the Grievants by not giving them enough termination notices as required by their terms of contract.

vi. The notice given by the Respondent on 13th July 2015 to the Grievants to re-apply for their jobs was a fate accompli.

vii. The Respondent contract with United Nations Nairobi office (UNON) was to expire on 22nd August 2015 yet the Respondent terminated contracts of service of the Grievants on 1st August 2015. The contract is annexed and marked as A10.

viii. The contracts of the Grievants were terminated before the UNON contract with the Respondent had expired.

ix. The Grievants were victimized for joining the Claimant's Union.

x. The worker's Representatives lost their jobs unfairly.

xi. The Grievants were unlawfully declared redundant.

xii. The Conciliator report and recommendation dated 4th December 2015 is unlawful as it is contrary to Section 67(1) (a) of the Labour Relations Act 2007 as it was done outside the statutory time set out in law.

xiii. The Respondent has refused to pay Grievants pay in lieu of notice, pending leave days and severance pay as required by law.

xiv. The Respondent has refused to pay Grievants arrears in salaries and house allowances arising out of underpayment of salaries and House allowances which were paid below the Statutory Government Minimum Wages.

xv. The Respondent has refused to pay Grievants unauthorized deductions from their salaries without their consent.

xvi. The Respondent locked out the Grievants outside their work place on 1st August 2015 without following the due process of the law.

xvii. The Respondent condemned the Grievants without being given an opportunity to be heard.

xviii. The Respondent has refused to give the Grievants Certificate of Service as required by law.

xix. That the Honourable Court has powers and authority to intervene and nullify the unfair and unlawful terminations of the Grievants contract of service

3. The Respondents have filed a Replying Affidavit dated 13th September 2016 deponed to by Urs Ringler the Managing Director of the Respondent Company.

4. They aver that the Claimant has not given a reason why the Court should allow the deposit of his passport, or that of his wife who is not a shareholder or employee of the Respondent and not a party to the suit.

5. They aver that the application is bad in law and ought to be dismissed with costs as the Claimant has not disposed his burden of proving why the Respondent should provide security for the costs sought.

6. The Respondent is neither in the process of disposing its business, moving its property from the Courts jurisdiction, winding up or defeating any orders that may be issued by the Court, the filing of its defence is an assurance that it intends to argue its case. The company has previously defended the same claim before a Conciliator and throughout the process, there was never any claim or intimation that the Directors intended to abscond the Country or take any step to frustrate the process.

7. They aver that the Court should not punish a Litigant who willingly submits itself before Court on a claim that is yet to be prosecuted and decree issued. Each party should be allowed to argue its case upon which the Court can secure the rights if confirmed. Depositing the money is an unnecessary expense that would punish the Respondents by making it insolvent and render jobless other employees who depend on it for their livelihood.

8. They aver that the issues therein and the Grievants entitlement to KShs 22,533,246.00 can only be determined through evidence that can only be adduced at the hearing of the main suit.
9. They aver that the application has no merit and is a waste of judicial time, the Court in the first instance did not deem it urgent nor has the Claimant proven that it will be prejudiced if the orders sought are not granted. In addition, the Conciliator's report dated 3rd September 2015 which has been provided to Court held that the Claimants case has no merit.
10. They are opposed to the application and pray that the Court dismisses the same with costs and the matters therein be determined at the hearing of the suit.
11. In their submissions, the Applicant relied on their pleadings, and added that, immediately the Respondent received check off notices to deduct and remit trade unions dues to the Claimant Union they were victimized. When they refused to leave the union, they were served with notices that their current employment contract was to end by 30th July 2015.
12. The UNON contract was to expire on the 22nd of August 2015 and the Grievants had gate passes that reflected that date. In the notices they were told to re-apply for their jobs a fresh. This move was unlawful, illegal, null and void and it was inconsistent with section 35(1)(c) of the Employment Act.
13. They have refused to pay any terminal benefits, and the monies asked for are just to secure the case of the Claimants. Further, they want the Respondents to give them the Union dues that were deducted but not remitted.
14. In their submissions, the Respondents rely on their replying affidavits and added that there is no proof that the Director will flee the Country. There are other employees in this company and there is no evidence that Respondents are unwilling to have this matter concluded in a fair manner.
15. The issue of dues can only be cleared at hearing, after proper evidence has been given, they submit that the application is premature and should be dismissed.
16. Having considered the averments of both parties, I note that an application such as one before Court for security for costs can only be sought if there is evidence that the Respondents will be unable to pay any adverse awards that could be rendered against them. Evidence must therefore be given of the Respondent inability to satisfy the judgment.
17. Order 26(2) of the Civil Procedure:

“if an application for security for costs is made before a defence is filed, there shall be filed with the application as affidavit setting out the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged”.
18. My reading of the rule indicates that the person alleging any fact against the Respondent should prove these facts. In the case of the instant application, it should be proved that the Respondent indicates to avoid the judicial process by disposing of the property or even by transferring the proceeds abroad with the intention of fleeing the Court's jurisdiction.
19. The Applicant has not in this case presented before Court any evidence in that direction. There is no evidence that the Respondents are preparing to leave Court's jurisdiction nor are they disposing of or transferring their assets outside the Court's jurisdiction.
20. There is also no evidence upon which this Court can grant the orders sought as it has not yet been established that indeed the Applicants are owed the amounts claimed.
21. In the Court's mind, the Application made is premature and is not in any case supported by valid evidence. I therefore dismiss this application and order that costs will be in the cause.

Read in open Court this 14th day of November, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jacob Opiyo for Claimant – Present

Miss Lwandi for Respondent – Present