



**REPUBLIC OF KENYA**

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

**CAUSE NO 1351 OF 2016**

**WILLIAM ALUKU EKUMU.....CLAIMANT**

**VERSUS**

**McKINNEY ROGERS KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Claimant's application brought by Notice of Motion dated 27<sup>th</sup> June 2016 and filed in Court on 13<sup>th</sup> July 2016 seeks the following orders:

a) That pending the hearing and determination of the suit herein, the Respondent be ordered to deposit in court the sum of Kshs. 5,100,000 as security for appearance;

b) That alternatively, the Respondent be ordered to deposit in an interest earning account in the joint names of the parties' Advocates the sum of Kshs. 5,100,000 as security for appearance.

2. The application, which is supported by the Claimant's affidavit sworn on 27<sup>th</sup> June 2016 is based on the following grounds:

a) That the Respondent is a subsidiary of McKinney Rodgers, a global organization with its headquarters in London, United Kingdom;

b) That the Respondent is about to leave Kenya under circumstances affording reasonable probability that the Claimant will or may be obstructed and/or delayed in the execution of any decree that may be passed against the Respondent in the suit;

c) That the Respondent is in the process of winding up its operations in Kenya and/or is being positioned for sale;

d) That the Claimant has learnt that for the fore-stated reasons, the line manager and partner for Africa, Chris Stephenson has already relocated his family to London and has sold his assets;

e) That the Respondent Company has no known assets within the jurisdiction of the Court;

f) That the Claimant is apprehensive that a successful winding up and sale of the Respondent Company will be to his detriment and will render his claim nugatory;

g) That it is in the interest of justice that the Court allows the application since the Claimant stands to suffer irreparable loss and damage;

h) That no prejudice will be occasioned to the Respondent if the application is allowed.

3. In the Claimant's affidavit sworn on 27<sup>th</sup> June 2016, he depones that at a conference call held in December 2015, which was attended by all global employees of the parent company, McKinney Rogers, the Global CEO, Damian McKinney had announced that the company was being positioned for sale. The Claimant further depones that earlier in the year Chris Stephenson had communicated the same information to the Kenyan team.

4. The Claimant believes that his claim against the Respondent has a high chance of success and states that if the orders sought are not granted, any award in his favour would be rendered nugatory.

5. The Respondent's response is contained in a replying affidavit sworn by its Account Manager, Wamaitha Ngugi-Gitonga in which she depones that while the Respondent is part of a regional partnership, it is a distinct and separate legal entity registered and operating in Kenya.

6. Gitonga adds that the Respondent continues to operate in Kenya and there was currently no intention to wind up. The Respondent had various ongoing contracts with clients in Kenya and in the Region. It was on a long term lease for its office premises and its assets and property were within the office premises.

7. In Gitonga's words, the Claimant's allegation that the sale of the company and/or its winding up is imminent was false, alarmist, speculative and misleading. She further states that Chris Stephenson had not left the company because it was winding up or being sold. He had voluntarily resigned to pursue other interests.

8. It is the Respondent's case that the Claimant has not satisfied the conditions to warrant the orders sought and that the Respondent would suffer severe hardship were the orders to be granted. Specifically, it would negatively impact the Respondent's ability to get new clients especially because the Claimant was in competition with the Respondent.

9. The issue for determination in this application is whether the Claimant has laid a case for an order directing the Respondent to deposit the sum of Kshs. 5,100,000.

10. An order for security deposit is discretionary and the conditions under which it may be granted were restated by **Gikonyo J** in ***Saudi Arabian Corporation v Sean Express Services [2014] eKLR*** and by **Sergon J** in ***Jayesh Hasmukh Shah v Navin Haria & Another [2015] eKLR*** as follows:

- a) That the Respondent has no known assets and office within the jurisdiction of the Court;
- b) The general financial standing of the Respondent with particular focus on ability to meet financial obligations as they fall due;
- c) The *bona fides* of the Applicant's claim;
- d) The conduct of the parties.

11. Counsel for the Respondent made reference to the decision by the Court of Appeal in ***Kanyoko t/a Amigos Bar & Restaurant v Nderu & 2 Others [1988] eKLR*** where it was held that the power to attach before judgment is not to be exercised lightly and without clear proof of mischief.

12. The Claimant's application is premised on apprehension that the Respondent is divesting out of the jurisdiction of this Court meaning that any award in his favour would be unenforceable. In this regard, the Claimant states that the Respondent is winding up operations.

13. In his supplementary affidavit sworn on 26<sup>th</sup> July 2016, the Claimant asserts that the fact that the Respondent has a long term lease expiring in May 2017 does not offer any comfort on its continuing to operate in Kenya. Further, most of the ongoing business contracts have been paid for and do not extend beyond the month of October 2016, in any event. Additionally, the Respondent has no tangible assets in the country.

14. I have looked at the circumstances of this case in light of the legal standards for granting of an order for security deposit and find that first; the Respondent has a known office within the jurisdiction the Court. Second, there is evidence of ongoing business contracts and third, the Respondent has a sound financial capability.

15. On assets, I agree with the submission made by Counsel for the Respondent that being a service enterprise, the Respondent does not need to have tangible assets to demonstrate its presence. Finally, the Court did not find any evidence that the Respondent was engaged in acts aimed at defeating justice.

16. The Court must be careful not to tie up capital unnecessarily and having considered the circumstances of this case in their totality, I decline to grant the orders sought. I however direct that the main claim shall proceed to hearing on priority basis.

17. The costs of this application will be in the cause.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muyundo for the Claimant

Mrs. Wetende for the Respondent