



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 738 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th December, 2016)

SAMMY MURERE BIKETI.....CLAIMANT/RESPONDENT

VERSUS

INSTEEL LIMITEDRESPONDENT/APPLICANT

RULING

1. The Application before Court is the one dated 11.11.2015. The Application was filed through a Notice of Motion filed on 29.1.2016 by the Respondent/Applicant herein and brought under Rule 16 and 28 of the Industrial Court (Procedure) Rules 2010 and any other enabling provision of the law.

2. The Applicant sought the following orders:

1. That the Claimant/Respondent do within a time fixed give security for costs in the sum of Kshs.500,000/= for the Respondent/Applicant cost in this cause.

2. That if the Claimant fails to give security for the Respondent's costs as aforesaid then the Memorandum of Claim be struck out with costs to the Respondents. Alternatively proceedings be stayed until security is provided.

3. That the costs of this application be awarded to the Respondent/Applicant.

3. The Application is supported by a supporting affidavit sworn by one Anthony Muring'u Kung'u, the Respondent/Applicant's Corporate & Legal and Compliance Manager and also supported by the following grounds:

1. This Court has the jurisdiction to grant the prayers sought.

2. The Claimant was terminated from employment at the Respondent's Company.

3. There is no evidence that the Claimant has since found other employment.

4. Further there is no evidence the Claimant has any assets or employment in the Republic of Kenya sufficient to satisfy any judgement for costs that may be entered against him.

5. There was a judgement entered against the Claimant for Kshs.1,490,688.55 in CMCC No. 2888 of 2014 which the Plaintiff has failed to pay after the defence of the Claimant was struck out and judgement entered on admission.

6. That the issues in CMCC No. 2888 of 2014 are similar and related to the same issue of this industrial case.

7. It is in the interest of justice that this application be allowed.

4. The Respondents have deponed that the Claimant does not have any maintainable claim against them and they believe that costs of defending this claim will amount to approximately 500,000/=. They also state that the Claimant has an unpaid judgement of Kshs.1,490,685.50 due to the Respondent after his defence was struck off and judgement entered against on admission as per Annex (AMK 7).

5. It is their claim that Claimant was their employee but was fairly terminated due to misappropriation of funds and absconding from duty. They also aver that the Respondent does not have any assets or any financial resources within the Republic of Kenya that could satisfy any judgement on costs against him that they know of.

6. The Application is opposed by the Claimant Respondent. Claimant filed his replying affidavit on 26.2.2016 where he denies the allegation in the supporting affidavit. He avers that he was coerced into signing the deed of settlement with a promise not to be terminated and that the Applicants having reneged on their promise and sacked him, they do not deserve the prayers sought.

7. The Respondent has also averred that he has property known as Mavoko Town Block 3/1274 which title of the property is being held by the Respondent/Applicant and therefore insinuation of inability to meet any lawful obligation is baseless and lacks merit.

8. I have considered the averments of both parties and their submissions herein. The Applicants have submitted that the orders being sought are discretionary and they cited **Nextech Limited vs. Bedan Ochege T/A, Bedanauctioneers Services & Another 2015 eKLR** cited in HCCC No. 4616 of 1993 **Pan African Bank Limited vs. Jasop Limited Abraham Kiptanui & Another** where it was held that:

“A decision whether to order a party to furnish security for costs or to decline an order is in the discretion of a

judge. The discretion is a judicial one, exercised on sound principles in the light of the circumstances of a

case the object is clearly to provide the protection of defendants in certain case where in the event of

success they may have difficulty in realizing their costs of the suit”.

9. They also cited **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR** which was quoted with approval in Noormahamed Abdulla vs. Ranchhodbha 3 – Patel & Another (1962) E.A 448, where it was held:

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs, of the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.”

10. It is true that this Court can only grant the orders sought upon being coerced that the Respondent would be left bear upon the case being finalised in terms of contention for costs or any charges due to him in case the Claimant loses. I must therefore be convinced that the grounds upon which this application is

sought are reasonable. The Court must therefore look at the grounds and do a balancing act for both parties. I have to consider the Claimant prospect of success.

11. The Applicant's main ground in this Application is that the Respondent has previously failed to settle a decretal sum in Nairobi CMCC No. 288/2014 in favour of the Applicants amounting to Kshs.1,490,688.55.

12. They aver that the Respondent has not explained why he has not paid the said amount and he has not also appealed against the judgement in the said cause.

13. To this, the Claimant has submitted that the proceedings in CMCC 288/2014 are not conclusive and do not render the claim herein incompetent nor is it a bar to the claim herein.

14. Whereas the 2 proceedings are entirely different, the Claimant has not really explained why he has not rendered the decretal sum due to the Applicants herein in the CMCC 288/2014 nor why he has not appealed against the said judgement. This therefore shows the Respondents inability to meet his financial obligations.

15. For me to consider to grant this order, I should however in prospects of the Claimants success in this case. In considering the prospects of the Claimants success in this case, I am guided by the general principle of access to justice, and fair hearing wherein a man should not be condemned and prevented from accessing the Court service on account of his inadequacies.

16. I take note that the issues leading to the judgement in Cause CMCC 288/2014 are different from the current case which I should also consider on its own merit.

17. I will therefore exercise my discretion and reject the application for security of costs and direct that this case proceeds on its own merit without any conditions.

18. Costs in the cause.

Read in open Court this 6th day of December, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kibatha holding brief for Michuki for Applicant – Present

No appearance for Respondents