



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1040 OF 2013

NJOROGE NJIHIACLAIMANT/APPLICANT

VERSUS

K-REP BANK LIMITED.....RESPONDENT

RULING

1. What is before me for determination is the Claimant/Applicant's Notice of Motion application dated 23rd September 2014. That application seeks the following orders:-
 - a. That this application be certified urgent and be heard ex parte in the first instance
 - b. That the Respondent be ordered to provide security to be determined by Court pending the hearing and determination of this Claim
 - c. In the alternative that an award be entered in favour of the Claimant for
 - i. Maximum compensation
 - ii. General damages for unlawful redundancy.
 - iii. A declaration that the rate of interest of the aforesaid mortgage be maintained at the staff rate of 6% as per the aforesaid agreement
 - iv. Costs be in the cause.
2. The Application was supported by the Affidavit of the Claimant Njoroge Njihia sworn on 23rd September 2013. The Claimant deposed that an official announcement was made to all the staff of the Respondent by the Managing Director on 31st July 2014 that the Respondent was being taken over by Centum Investment Company Limited. He further deposed that he was apprehensive that the Respondent will sell all its shareholding rendering his claim nugatory.
3. The Respondent was opposed to the orders sought and filed a Replying Affidavit sworn by Daisy Ajima the Company Secretary of the Respondent on 14th October 2014 and filed on 15th October 2014. In the Affidavit she deposed that the document the Claimant had annexed as NN1 headed Shareholding was an internal document addressed to all staff of the Respondent by the Managing Director on 31st July 2014 while the Claimant ceased being an employee on 28th April 2011. She sought the expunging of the document from the Court records. She further deposed that without prejudice to the foregoing she was aware that Centum Investments is already a shareholder of the Respondent and as at 31st December 2013 held 37,801 shares of the Respondent and that it was ordinary in business for any shareholder to sell or transfer shares. She deposed that in the ordinary course of business Directors of corporate entities change from time to time though of her own

knowledge there was no ongoing change of the Respondent's current directors. She deponed that there was no impending sale or winding up or liquidation of the Respondent and thus the prayer to deposit security is unmerited.

4. Parties filed submissions and the Claimant/Applicant in his written submissions filed on 7th November 2014 submitted that the application was necessitated by the ongoing process by the Respondent to transfer or change its shareholding to a third party. He submitted that if the Respondent succeeds in transferring its shareholding it will render the claim nugatory. It was submitted that once there is a sale of shareholding or part of it there will be change in directorship. He submitted that once there is change of ownership the Respondent will have been taken over and will not have the capacity to pay debts. He submitted that once the shareholding and directorships change the current Respondent shall become non-existent and the Claimant/Applicant will not enjoy the fruits of his judgment if he succeeds in his claim. The Claimant further submitted that the Respondent would be a subsidiary of a third party company. He submitted that change in directorships affects the ownership of the company as per the Company's Act. It was submitted that the Respondent has not fully indicated to what extent the negotiations have reached and it is important to appreciate the fact that the applicant is not privy to the details of the take over and there is possibility that the Claimant/Applicant may be surprised by the outcome thereof. The Claimant/Applicant placed reliance on the case of **Catherine M. Raini v CMC Holdings Limited** Cause No. 1411 of 2011 on the issue of takeover and an order for security granted by Mbaru J.
5. The Respondent's Submissions were filed on 27th November 2014. In the submissions the Respondent submitted that the party seeking to have security of costs has a burden to show that the other party is in the process of disposing of their business or property or is about to abscond from the Court's jurisdiction. The Respondent relied on the case of **Henry Kakai & 10 others v Debendra Kamat t/a Swadish Foods [2012] eKLR** where Mbaru J. held as much. The Respondent averred that Centum Investments is already an investor and was an investor as shown by the Annual Report and Financial Statement of 31st December 2013. It was submitted that the Claimant is not a shareholder and only shareholders who feel they may be prejudiced by the share transfer retain a right to challenge the share transfer. It was submitted there was no change in ownership in the Respondent. The Respondent placed reliance on the case of **Elijah Mugika Ombworo v Kisii Bottlers Limited [2013] eKLR, Meru Farmers Co-operative Union Limited v Abdul Aziz Suleiman (2) [1966] EA 422** and distinguished the case of **Catherine Raini v CMC Holdings** cited by the Claimant/Applicant.
6. What is before me is an application somewhat similar to the applications for attachment before judgment as this is not an application for security. I am in agreement with Mbaru J. who held that

“..where a party seeks to have security for costs, there are basic principles of law that must be observed for the Court to make such orders similar to the provisions 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 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.”
7. The Claimant has filed an application for security for costs and attaches for its support the Internal Memo and a press cutting indicating a sale of shares to Centum Investment. It is the Respondent's position that Centum Investment is an existing shareholder and the sale will not prejudice the Claimant in any way.
8. In the case of **Ombworo v Kisii Bottlers** above, Sitati J. held that

“The law is that a company is bound by the contracts between it and other third parties, and in the instant case, the contract of employment between the plaintiff/applicant and the defendant/respondent is binding between them so that should the plaintiff/applicant eventually

succeed on his claims, I have no doubt that he would still have the decree satisfied”

9. In the case of **Raini v CMC** above the disposal was of 100% of the holding of the company. That is quite distinct from the instant case where there is only a change in part ownership of the company.
10. The Claimant/Applicant’s suit is against the Respondent K-Rep Bank and it matters not who the directors or shareholders are. If a decree is passed by this Court the Respondent will be bound to honour it regardless of its internal structures or composition of shareholders and directors. It is trite law that corporations are distinct legal personalities and unless there is proof that the Respondent is seeking to dispose of its assets and property or altering its corporate legal personality to defeat this claim there is no basis for an order for security be it for costs or attachment before judgment. If there was any merit in holding as I am invited to hold then there would be interlocutory applications for each listed company as their shareholding fluctuates at the close of each business day. The upshot of the foregoing is that the Claimant/Applicant’s application is devoid of any merit and is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of February 2015

Nzioki wa Makau

JUDGE