



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

**CAUSE NO. 886 OF 2015**

**LAWRENCE OMONDI.....CLAIMANT**

**VERSUS**

**CREATIVE EYE (K) LTD.....RESPONDENT**

**RULING**

1. The applicant who is the claimant in this suit seeks an order from this Court directed to the respondent to deposit a sum of Kshs.875,000/= in Court within 7 days pending the hearing and determination of the claim herein. In the alternative the applicant seeks an order of attachment and sale of the respondent's and its directors' property to realize the aforesaid sum and the same be deposited in Court pending the hearing and determination of the claim.
2. The application was premised on the reasons that the respondent communicated to the claimant who was its employee the decision to close the business. The applicant contended that if the respondent closes the business before paying he claimant his dues, he will be highly prejudiced and the claim rendered nugatory.
3. The respondent opposed the application through a replying affidavit sworn by the one Milly Sabwa who deposed in the main that:-
  - (a) That the claimant joined the company in August 2013 in the capacity of the Art Director where he was earning a gross salary of One Hundred and fifty Thousand (Ksh.150,000/=).
  - (b) That the claimant underwent an initial probation period of 3 months which started as per the terms of the contract subject to which he received employment upon completion of the 3 month probation for a term of 1 year starting from 01/8/2013.
  - (c) That it was expressly stated in the contract that upon the expiry of the said contract parties could renew the contract if they were in agreement. The contract lapsed on 0/8/2014.
  - (d) That on 29<sup>th</sup> October, 2014 the Respondent offered to renew the contract of employment and the terms were that the claimant take a pay cut of 30% of his gross salary which the claimant accepted by signing and returning the offer letter to the respondent.
  - (e) That the claimant never communicated to the employer that he was not satisfied with

the renegotiated package and continued to work under the new terms and draw the renegotiated salary.

(f) That the mutually agreed remuneration as per the offer that the claimant expressly accepted was a monthly gross salary of Kshs. One Hundred and Five thousand Shillings (KES 105,000/=) and upon statutory deductions, salary of Kshs. Seventy Nine Thousand One Hundred and Seven Shillings (KES.79,107.00/=).

4. It is noteworthy that the respondent's affidavit did not refute the claim by the applicant that the respondent had made a decision to close the business and that if that happened before the claimant was paid his dues, he would be prejudiced and the claim rendered nugatory.

5. As was stated in the case of **Kanduyi Holdings Ltd v. Balon Kenya Foundation & another (2013) eKLR**, our order 39 rules 5 and 6 could be said to be a statutory codification of an interlocutory relief known as Mareva injunction or freezing order in the UK. It should operate within known dimensions of the law and other precedents on the subject. It must not be used to put pressure on the defendant or as a type of asset stripping or a conferment of some proprietary rights on the plaintiff upon the assets of the defendant. The purpose of the order is to prevent the defendant 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.

6. The respondent in this matter has not denied closing down operations. Counsel for the respondent has however submitted that the applicant has not proved that the respondent is about to leave jurisdiction of the Court or dispose of whole or part of its property hence the Court cannot act on mere allegations.

7. A freezing order if made is tantamount to furnishing security for judgment or order that a Court may make in respect of a dispute before it. Therefore, before making the order, apart from the Court being satisfied on the evidence that the would be judgment debtor is about to leave jurisdiction or is dissipating his assets with a view to defeating the judgement or order the Court may ultimately make, the Court must be reasonably satisfied that the applicant has a prima facie case with probability of success.

8. The claimant herein avers that he was employed by the respondent on 1<sup>st</sup> August, 2013 and worked until 30<sup>th</sup> April, 2015 when according to him, his services were terminated without apparent reasons and without payment of his April salary. He further averred that from November, 2014 to March, 2015 the respondent had been depositing Kshs.79,102 into his account instead of the agreed sum of Kshs.150,000/=. The claimant therefore claims a sum of Kshs.875,000/= comprising of 1 month's salary in lieu of notice, severance pay, leave pay, unpaid April and May salary and underpayment from November-March.

9. The respondent on the other hand has refuted the claimant's claim averring that the contract the claimant was relying on had expired and that upon the expiry of the said contract, parties renegotiated new terms under which the claimant would earn a gross salary of Kshs.105,000/= per month subject to taxes.

10. The issue for trial would be whether the claimant's services were properly terminated by the respondent and whether the claimant having accepted a lower salary upon expiry of his initial contract can sustain a claim for underpayment. Further there will be an issue of the appropriate terminal entitlements the Court can award the claimant if he ultimately succeeds in his claim.

11. The respondent had communicated to the claimant of its intention to close the business indefinitely due to lack of clients/sales being generated to support the cash needs of the business. The respondent further offered to pay the claimant the sum of Kshs.189,704/= which comprised of salary for the month of April, one month's pay in lieu of notice, and leave days for the period.

12. If the Court were to make a finding that the claimant's services were improperly terminated he would be entitled to payment in lieu of notice as per the contract in absence thereof the Employment Act. He would further be entitled to salary for days worked and accrued leave if any. The Court can further compensate him up to a maximum of twelve month's salary if it is of the opinion that he was unfairly terminated from employment.

13. This however has not been pleaded by the claimant. The respondent has offered to pay the claimant the sum of Kshs.189,704/= which comprises of the claimant's April salary, one month's pay in lieu of notice and accrued leave. The Court will therefore order this amount paid forthwith to the claimant and invite written submissions on the issue of underpayments of salary and fairness or otherwise of his termination to enable the Court make a determination thereon.

14. As a result the claimant shall file and serve submissions on the respondent within 14 days of this ruling and the respondent to make a response within a similar period. The final judgment of this Court will be delivered on 6<sup>th</sup> November, 2015.

15. Regarding the application, the Court has not found sufficient evidence that the respondent is about to leave jurisdiction or that it is selling or dissipating its properties with a view to frustrating the judgment or order this Court may ultimately make.

15. The application is therefore dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 31<sup>st</sup> day of July 2015

Abuodha J. N.

Judge

Delivered this 31<sup>st</sup> day of July 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuoha J. N.

Judge