



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 189 OF 2015

IMTIAZ KHANCLAIMANT

VERSUS

FIVE FORTY AVIATION LIMITED.....1ST RESPONDENT

EAST AFRICAN SAFARI AIR.....2ND RESPONDENT

EXPRESS LIMITED (EASAX).....3RD RESPONDENT

RULING

1. The Applications before court are:

1. The Claimant's Notice of Motion Application dated 20th February, 2015;
2. The Claimant's Chamber Summons Application dated 31st March, 2015;
3. The Claimant's Notice of Motion Application dated 31st March, 2015;
4. 1st Respondent's Notice of Motion dated 12th May, 2015;
5. 2nd Respondent's Notice of Motion dated 12th May, 2014;

2. The Claimant's Notice of Motion dated 20th February, 2015, seeks for the suit to be heard within the shortest time possible and for the Court to give a hearing date of the main suit filed on 17th February, 2015. The Claimant also seeks for the Respondents to be restrained from transferring, wasting or vesting all assets of the 1st Respondent and from voluntarily winding up the Company pending hearing and determination of the said Application.

3. The Claimant's Application dated 20th February, 2015, is supported by grounds on the face of the Application set out as follows:

1. *That the Applicant was terminated unlawfully from employment by the 1st Respondent without written notice, and has in her Memorandum of Claim set out a good case for unlawful termination with a good chance of success;*
2. *That the Judgment was delivered by the High Court of Kenya which required the 1st Respondent to face up and pay Kshs. 101 Million owed to Kenya Revenue Authority;*
3. *The Respondents have since began transferring their assets to a holding Company and the Claimant will suffer irreparable harm of the Application is not heard on a priority basis;*
4. *That an official search form Company's Registry showed that the 1st Respondent is a sole proprietorship and yet the said Respondent in the Judicial Review Miscellaneous Application*

420 of 2012 sued on its own behalf as Limited liability Company whereas it only became a Limited Liability Company whereas it only became a Limited Liability Company on 16th January, 2015, when the said Judgment was delivered.

- 5. That a similar search on the 2nd Respondent had indicated no Results**
- 6. That the Respondents' actions are an attempt to evade tax and all liabilities;**
- 7. That the Claimant is terminally ill and the actions of the Respondent have caused the Claimant to lose her source of income hence she cannot acquire medical attention;**
- 8. That the Honourable Court has power under Rule 16b sub rule 2 of the Industrial Court Rules 2010 to issue an Order saving the Applicant from irreparable loss and mischief;**
- 9. The Court has power to direction for hearing within the shortest time possible;**
- 10. That the Respondents shall not be prejudiced.**

4. The Claimants Application dated 20th February, 2015, is also supported by the Affidavit of Jacqueline Munyaka an Advocate of the High Court seized with the Conduct of the matter.

5. The Applicant at 1st instance was granted prayer 3 of their Application which was valid for fourteen (14) days.

6. The Respondents have filed grounds of opposition dated 5th March, 2015, stating that:

- 1. That the Court lacks Jurisdiction to deal with the matter**
- 2. That the Application is incompetent, frivolous, obnoxious and otherwise an abuse of Court process;**
- 3. That the Application is speculative, malicious and in bad faith;**
- 4. That the Application does not disclose a reasonable cause of action against the 2nd Respondent;**
- 5. That the Application has failed to disclose material facts;**
- 6. That the Applicant has not made a case with a probability of success**
- 7. That the Respondents are a business and the Orders sought would hamper their business and thus the balance of convenience lies with the Respondent;**
- 8. That the Claimant's claim is for money and thus an injunction cannot be made;**
9. That the Orders sought lack justification and the restraining Orders sought are in vain.

7. The Claimant has also filed a Chamber Summons Application dated 31st March, 2015, seeking for Orders that the Notice of Motion dated 20th February, 2015, be heard on a priority basis during the vacation period for the reason that according to the information the Applicant had received from the Kenya Civil Aviation Authority the 1st Respondent had seven leased aircrafts and no other assets and should the Claimant succeed in her claim the fruits of the Judgment would be rendered futile. The Application is supported by the Affidavit of Imtiaz Khan the Claimant herein sworn on 31st March, 2015.

8. The Claimant also filed yet another Notice of Motion Application dated 31st March, 2015, seeking for orders that the Respondents jointly and severally deposit Kshs. 12,323,027 as security for the Claimant's claim and costs in the event that she is successful. The Application is based on the grounds on the face of the Application which are that the 1st Respondent does not have attachable assets to recover any award that may be awarded by the Honourable Court and as such the Judgment of the Court may be rendered fruitless.

9. The 1st and 2nd Respondent filed replies to the Applications of 31st March, 2015, both sworn on 12th May, 2015. The 2nd Respondent denies having any relation with the Claimant and is therefore wrongfully enjoined in the proceedings and thus prays for the Claimant's Application to be dismissed.

10. The 1st Respondent admits that the Claimant was its employee upto 2008 when she voluntarily resigned. The 1st Respondent offered her a consultancy contract for a period of six (6) months with effect from 1st June, 2008. On 3rd January, 2009, after the said consultancy contract had expired, the 1st

Respondent retained the services of the Claimant under an open contract for a period subject to a clean bill of health.

11. The first respondent states that the new contract with the Claimant was a commercial contract and not an employment contract and therefore the Court does not have jurisdiction to hear and determine the Claim and the Court should dismiss the Claim with costs to the Respondents. The Respondent is of the view that the Claimant should ventilate her claim in the proper forum.

12. The 2nd Respondent also filed an Application seeking to be struck out from the proceedings for it was not privy to any contract between the Claimant and the 1st Respondent. The Application is supported by an Affidavit sworn by George Kivindyo the Chief Executive Officer of the 2nd Respondent. The 2nd Respondent states that the pleadings by the Claimant do not raise any triable issue against it and is only mentioned at paragraphs 3 and 17 of the statement of claim in which no cause of action is raised against it.

13. The 2nd Respondent also alleges that there is no suit filed on 17th February, 2015, served on them and the only suit they are aware of is the suit dated 16th February, 2015, and as such prayer 2 of the Notice of Motion dated 20th February, 2015, is untenable. Allegations that the 1st Respondent is transferring its assets to the 2nd Respondent are unsupported and have not been proved.

14. The Respondent avers that Kenya Civil Aviation Authority would not allow the transfer of assets to another company in order to evade liabilities. The pictures annexed to the Claimant's application are no indicator of transfer of assets and that the Claimant has not proved that SAX and ESSAX are in any way related.

15. The Application of 20th February, 2015, according to the 2nd Respondent is an abuse of Court Process because it is supported by an affidavit sworn by the Advocated seized with the conduct of the suit and prays for the Applications by the Claimant as well as the entire claim be dismissed with costs to the Respondents.

16. Having considered the submissions of all parties, the issues for consideration by this court are as follows:

1. ***Whether this court has jurisdiction to entertain the application before it.***
2. ***Whether the 2nd Respondent is properly enjoined in this suit.***
3. ***Whether the court can grant orders sought.***

17. The Industrial Court is a court where jurisdiction is to handle cases in relation to employer/employee relationship. The jurisdiction is set out at Article 162(2) of the Constitution which states:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

And Section 12(2) of the Industrial court Act which states as follows:

“(1). The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to

employment and labour relations including:

- a. **disputes relating to or arising out of employment between an employer and an employee;**
- b. **disputes between an employer and a trade union;**
- c. **disputes between an employers' organization and a trade unions organisation;**
- d. **disputes between trade unions;**
- e. **disputes between employer organizations;**
- f. **disputes between an employers' organisation and a trade union;**
- g. ***disputes between a trade union and a member thereof;***
- h. ***disputes between an employer's organisation or a federation and a member thereof;***
- i. ***disputes concerning the registration and election of trade union officials; and***
- j. ***disputes relating to the registration and enforcement of collective agreements.***

18. The question then is whether the application in court and by extension the claim are matters which fall within this court's jurisdiction.

19. I believe, this is the correct place to start because jurisdiction is everything and without jurisdiction I need not move an inch. This is the set principle in case law on this subject and especially in the celebrated case of "Lilian S".

20. The Applicant seeks orders to have the matter handled on priority and also an order to bar the 1st Respondent from voluntarily winding up the company pending hearing and determination of the claim. The averment of the Applicant is that she stands to lose if she succeeds in getting a judgment in this case because the 1st Respondent would no longer be able to meet judgment requirements having transferred all its assets to the 2nd Respondent.

22. Of course the claim by the Claimant Applicant in the 1st 3 applications relates to her relationship with her employer the 1st Respondent who she state unlawfully terminated her.

23. Issues of termination whether for commercial reasons are otherwise fall within the province of this court and I find that indeed this court has jurisdiction to hear and determine the applications before court.

24. On the 2nd issue, is the relationship between the Applicant and the 2nd Respondent? The 2nd Respondent has stated that they have no employment relationship or any other with the Applicant and should therefore be struck out of these proceedings.

25. I have looked at the claim filed by the Applicant. I am unable to discern how the 2nd Respondent affects the Claimant's rights if any. There is no employment contract between the Applicant and 2nd Respondent. It is my view that the 2nd Respondent is wrongly enjoined in this claim and I therefore strike out the claim against the 2nd Respondent with costs to the 2nd Respondent.

26. On the last issue concerning the orders sought, the issue of hearing this matter on priority will be dependent on the final orders of this court. The issue of preventing the 1st Respondent from voluntarily winding up however lies in the province of commercial law for which I will not address at this point. This issue can easily be covered by Applicants subsequent application dated 31/3/2015 where they wish

to have the Respondent asked to provide security for the Claimant's claim and costs to the tune of Kshs.12,323,027/=.

27. In this application, the Applicant has averred that the Respondent has only 7 leased aircrafts and has no any attachable assets should the Claimant Applicant succeed in her claim.

28. The Applicants have not in their application annexed any evidence to the effect that the Applicants have no any attachable assets nor have transferred their assets to any holding company. This evidence is only contained in the affidavit of counsel for the Applicant but is not supported by any appendixes. The quest to deposit 12 million by the Respondents cannot be a viable option in the circumstances.

29. The Respondents have averred that they are capable of meeting the Claimant's claim if any and there is no evidence to the contrary.

30. In the circumstances I find the Applicants applicant without merit and are dismissed accordingly.

31. The application to have the claim handled on priority will be considered by the Deputy Registrar according to the court's calendar. Costs in the course.

Read in open Court this 20th day of August, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Munyaka for Claimant

Mabonga holding brief for Kimetto for Respondents