



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

E & L R CAUSE NO. 119 OF 2015

(Before Hon. Lady Justice Maureen Onyango on 30th October, 2015)

JACKSON OBALE TEBAKORCLAIMANT

VERSUS

ALLIANCE ONE (K) TOBACCO LTDRESPONDENT

R U L I N G

Before me for determination is an application dated 27th July, 2015 filed by way of Notice of Motion under Certificate of Urgency. The Applicant seeks the following orders:-

- (1) That this application be certified urgent
- (2) That pending inter-parties hearing of this application the Honourable Court do order and direct that the Industrial Court Civil case Nos. 119, 120, 121, 123,124, 125, 126, 127, 128, 129, 130, 131. 132 and 133 all of 2015 be consolidated and case file No. 119 of 2015 be used to record the proceedings.
- (3) That pending inter-parties hearing of this application the Honourable court do issue an order requiring the Defendant to deposit into court a sum of Kshs.6 million as security for eventual damages, interest and costs in respect of the claims herein.
- (4) That the Honourable court be proceed to determine the suits on the basis of pleadings, affidavits, statements, documents filed and any submissions made by the parties.
- (5) That the Honourable court do fix a hearing date on priority basis of the suits mentioned herein above.
- (6) That costs of this application be provided for.

The application is made under Section 3, 12, and 20 of Industrial Court Act, 2011 and Rule 21 and 23 of the Industrial Court (procedure) Rules, 2010 and is supported by the affidavit of JACKSON OBALE TEBAKOR, the Applicant and on the following grounds;-

1. The Defendant is a foreign company which upon the Claimant filing this suits has shut down her Migori Factory and compensated the workers.
2. The Claimants/Applicants upon inquiring their fate were informed that the company (defendant) cannot do anything until the matters are finalized from court.
3. The Defendant is in its headquarters at Think awaiting the completion of processing of the last

- batch of tobacco before leaving the country.
4. In the event the Defendant leaves the territorial jurisdiction of this honourable court it will be difficult or impossible to enforce any decree that may be issued against her.
 5. That suits enumerated above as 119, 120, 121, 123, 124, 126, 127, 128, 129, 130, 131, 132 and 133 all of 2015 raise some common question of facts and law and it is practical and appropriate to proceed with the issues raised in the suits simultaneously.
 6. The total claim of the above mentioned suits amounts to Kshs.2,787,840 exclusive of costs and interest.
 7. There are no dates at the registry of this year and if these matters were to proceed in the normal way, the Claimants shall be greatly prejudiced.
 8. The Honourable Court has powers and jurisdiction to make orders sought to ensure that the end of justice are met.
 9. It is in the interest of justice that this application be allowed.

In the supporting affidavit the Applicant states that he has reliably learned from one of the employees of the Respondent by the name Daniel Nyakundi that the Respondent will be closing the Migori factory and laying off all its workers. He further states that the Migori office is closed and any person with a claim has to go to the Respondent's office in Thika.

He prayed that the application be granted to meet the ends of justice.

The Applicant filed a supplementary affidavit on 16th September, 2015 in which he depones that the Respondent's core business has ceased and he is afraid that the Respondent may get out of the jurisdiction of this court.

The Respondent filed a replying affidavit of DAVID PAPA, the Security and Legal Services Manager who states that the Respondent is not a foreign company as it is incorporated under the companies Act, Chapter 486 of the Laws of Kenya, that the Respondent does not own any factory in Migori which has been closed down, that the Respondent operates in many parts of Kenya including the former Rift Valley, Western and Central parts of Kenya and it is false and malicious for the Applicant to accuse the Respondent of moving out of the country to avoid the prospective decree. He states that the Respondent has its head office which is fully operational at Thika within both the territorial and pecuniary jurisdiction of this court and there is no basis for a deposit as prayed in the application.

Mr. DAVIS PAPA also states that there is no application similar to the present one nor is there consent by Claimants in Cause Nos. 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132 and 133 of 2015 and the prayers sought in respect of those claims cannot be granted in this file.

The application was argued on 29th September, 2015. Mr. Ombachi appeared for the Claimant and Mr. Abisai for the Respondent.

Mr. Ombachi submitted that Claimants in cause numbers 119 to 121 and 123 to 133 of 2015 were employees of the Respondent and were terminated without notice. The Claimants wish to have their claims consolidated and heard under this file.

Mr. Ombachi further submitted that the Claimants are seeking security from the Respondent on grounds that the Respondent has moved to cease operations in Kenya and has issued notices of redundancy to its employees in Migori County. That the Respondent has also ceased its field operations as at 1st July, 2015.

Mr. Ombachi submitted that the Claimants have a genuine apprehension that in the event the Respondent gets out of the jurisdiction of the court any orders that the court may grant to the Claimants may not be executed, hence the application for deposit of security to ensure justice is done to both parties. He submitted that the total claim in all the cases amounts to Shs.2,787,840 exclusive of costs and interest. That the Applicants have prayed for a deposit in the sum of Shs.6,000,000 to include eventual damages, interest and costs.

Mr. Ombachi further submitted that the Claimant's further prayed that the case be heard under Rule 21 by way of documents and their affidavits which are exhaustive, and written submissions filed by both parties. He urged that in the event the Court determines that the case cannot be heard by way of documentary evidence the parties should be given a hearing date based on the circumstances of the case.

Mr. Ombachi submitted that the orders sought are not adverse against the Respondent but for end of justice to be met. He prayed that the application be allowed with costs.

Mr. Abisai for the Respondent opposed the application vehemently. He relied on the replying affidavit of DAVID PAPA sworn on 9th September, 2015. He submitted that consolidation of causes 120 to 133 of 2015 can only be applicable if similar applications have been filed in all the matters to be consolidated. He submitted that no application has been made in all those matters. He submitted that a party cannot consolidate that which is not in existence.

Mr. Abisai further submitted that this is not a representative suit and no application has been filed to make it either a representative or test suit. He further submitted that the files the Applicant wishes to be consolidated are not in court. He submitted that the Claimant has no capacity to plead on behalf of the Claimants in the other files.

On the prayer for deposit of security for performance pending decree Mr. Abisai submitted that the Applicant has not established a good claim to warrant consideration of probability for success of his claim. That in his claim there is no single document to prove that indeed the Claimant was an employee of the Respondent.

On the prayer that the claim be determined by way of submissions Mr. Abisai submitted that even though the law allows it, the same should be used sparingly in special circumstances, that in this matter the Respondent wishes that the Applicant and the Claimants in the other cases prove their cases individually.

Mr. Abisai further stated that it has not been proved that the Respondent is intent of delaying the proceedings in this case or absconding, or is moving out of the jurisdiction of this court to evade an impending decree.

Mr. Abisai submitted that the Respondent has shown through its replying affidavit that it is only scaling down its operations, that it is not closing down and does not own a factory in Migori County which it has closed down. He submitted that the Respondent assist farmers growing tobacco but does not process the tobacco. He submitted that the Applicant has admitted that the Respondent has an office in Thika where it carries on its business. That this supports the Respondent's contention that it is not leaving the jurisdiction of the court. That closing down a branch does not mean the entire operation is being wound up. He submitted that this court has wide jurisdiction and its decree can be executed in any part of the Republic of Kenya and there is no reason for the Applicant to be alarmed.

Mr. Abisai submitted that the notice of redundancy and the notices to farmers relied upon by the Applicant to prove his application are not properly founded while the document attached to the Applicant's affidavit that has been down loaded from the internet is not authentic and has no evidentiary value as it only states that the Respondent is scaling down its operations.

He submitted that there is no basis in law to require the Respondent to deposit security before the cases are heard, that such an order would injure the Respondents standing and condemn it before hearing.

He prayed that the application be dismissed.

I have carefully considered the application and taken into account all submissions by both counsel. To my mind the only issue for determination is whether there is any threat that the Claimant's decree, if granted by this court, would be incapable of execution due to the Respondent's flight from the jurisdiction of this court.

Order 39 of the Civil Procedure Act provides for arrest and attachment before judgement. Rule 1 provides for circumstances under which the Defendant may be called upon to furnish security as follows:-

1. "Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise

(a) That the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him-

(i) has absconded or left the local limits of the jurisdiction of the court: or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof: or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

2. Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1".

Rule 5(1) further states as follows:-

"Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him:-

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.

In the present case the Applicant alleges that the Respondent is a foreign company and is closing its Migori office where the Claimant alleges to have been employed and therefore likely to leave the jurisdiction of the court.

I do not find the evidence relied upon by the Claimant to support his contention. The Respondent is not a foreign company. It is registered under the Companies Act of Kenya as reflected in its title. It is not winding up. It closed the Migori office but is still present in Kenya with its head office at Thika. No evidence has been adduced to prove that it is winding-up or leaving the jurisdiction of the court.

For these reasons I decline to order the Respondent to furnish security deposit.

I have deliberately not dealt with the issue of whether or not the claim by the Claimant has any likelihood of success as there is no sufficient evidence on record at this stage for me to reach such a determination.

The Claimant further prayed for consolidation of this case with cases No. 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132 and 133 of 2015. This can only be done where all the files are in court and the court is able to determine that the causes of action in all the files are capable of consolidation. This is provided for under Rule 23 of the Industrial Court (Procedure) Rules. The Claimant can achieve this by setting down all the cases for mention on the same date and applying orally in court for consolidation.

The Claimant further prayed for determination of the claim by way of documentary evidence. Rule 21 of the Industrial Court (Procedure) Rules provides as follows:-

"The court may, subject to an agreement by all parties, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties."

In this case the Respondent has objected to the same. The court can only make such an order with the consent of all parties.

In the circumstances, the prayer is dismissed.

The prayer for fixing of a hearing date for the case on priority basis is granted. The parties are directed to take a hearing date in court at the time of ruling.

The upshot is that the application by the Claimant dated 27th July, 2015 is dismissed save for the prayer for fixing a hearing date on priority basis which is granted.

There shall be no orders for costs of this application.

Dated, signed and delivered this 30th day of October, 2015

MAUREEN ONYANGO

JUDGE