



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1715 OF 2014**

**LILIAN AGOLA WOOD.....APPLICANT**

**VERSUS**

**MARKETING COMMUNICATION LIMITED.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 16<sup>th</sup> February, 2015 the claimant sought orders among others that the respondent company be ordered to deposit/furnish security to this Honourable Court in sum of Kshs.1,339,219.19 the same being the amount claimed by the applicant pending the hearing and determination of the suit. The claimant further sought Mareva injunction restraining the respondent from selling or disposing off its assets pending the hearing and determination of the suit.
2. The application was supported by the affidavit of the claimant who deponed on the main that:-
  - (a) That on or about the 16<sup>th</sup> day of July 2014 I handed his resignation letter to the Respondent Company and its Board of Directors as per his Employment Contract.
  - (b) That the said Resignation letter was duly accepted by the Respondent Company's Chairman.
  - (c) That at the time of his resignation the Respondent Company owed him arrears in salary amounting to Kshs.1,339,219.19 which she requested the Respondent Company to pay on numerous occasions but to no avail.
  - (d) That after her requests were not accede to by the Respondent, she instructed her Advocates at the time Havlock, Nduati & Co. Advocates to demand from the Respondent Company a total of Kshs.1,339,219.19 being payment of his salary arrears.
  - (e) That despite demand letters being issued together with an intention to sue, the Respondent Company has failed or neglected to settle her outstanding salary arrears.
  - (f) That she has come to know that the Respondent is winding up its business in Kenya through a letter dated 15<sup>th</sup> day of January 2015 addressed to one of the current employees of the Respondent Company. The said letter categorically states that the Respondent company is shutting down its operations in Kenya by the 31<sup>st</sup> day of January 2015.
  - (g) That she has also come to know that the Respondent is disposing off its assets in order to

evade attachment and/or payment of any would be Judgment and/or decree that may be issued against the company in the event that she was successful in her claim.

(h) That her Advocates on record filed an application on the 22<sup>nd</sup> of January 2015 restraining the Respondent Company from commencing voluntary winding up proceedings pending hearing and determination of the suit.

(i) That she was informed by her Advocates on record that the said application was heard ex-parte by Honorable Justice Nzioki Wa Makau on 22<sup>nd</sup> January 2015 wherein interim orders were granted.

(j) That despite the existence of the order restraining the Respondent for winding up the company is still disposing off its assets in order to evade any attachment in the event that Judgment is delivered in her favour.

(k) That the Respondent Company's actions are meant to deprive her from what is duly and justly owed to him.

(l) That in the event that the Respondent Company disposes all its assets she may be permanently deprived of the fruits of any Judgment that he may be granted from the suit herein since the said company would not have any moveable property that she will be able to attach in order to secure payment of the decretal amount.

3. The respondent filed Grounds of Opposition to the application stating that the application was an abuse of the Court process and that there was no decree to be secured by provision of security. The respondent further stated that the only security envisaged by the Civil Procedure Act was security for costs.

4. In his submissions in support of the application, Mr. Dar for the claimant submitted that the Court has powers to grant the orders sought. In this respect he relied on the cases of **Jimmy R. Kavilu & 14 Others v. Stanbic Bank Ltd & 8 Others – (2008) eKLR, Robin Momanyi v. CMC Motor Group Ltd (2014) eKLR and Absalom Ngilimani & 21 Others v. Rift valley Textiles Ltd (In Receivership) (2001) eKLR.** These cases counsel submitted, had striking similarity with the case before the Court hence if the Court failed to direct the respondent to deposit the claimed amount in Court, there is real danger that the proceedings against the respondent would be rendered nugatory. According to counsel, the claim before the Court is a straight forward one for unpaid salary arrears amounting to Kshs.1,339,219/=.

5. The respondent's counsel Mr. Nyaosi on the other hand submitted that the application purported to have been brought under section 12 of the Labour Institutions Act should be dismissed since the cited section had been repealed hence non-existent. Counsel further submitted that the rules of the Court do not provide for deposit of security. The Court however in exercise of discretion under section 12(2) of the Industrial Court Act has ordered parties to deposit security on several occasions. But in those occasions, the Court has invoked the provisions of the Civil Procedure Act and the Act only two securities are recognized namely security for decree under Order 46 rule 6 and security for costs. None of these have been sought in the instant application.

6. Mr. Nyaosi further submitted that the purpose of the security is not to punish the respondents but rather to ensure that the claimant is sufficiently protected. According to Counsel the authorities relied on by the applicant indicate that such orders have been issued in situations where there is a likely takeover or merger. He submitted that there was no threat of merger, takeover or winding up hence an order for deposit of security should not issue.

7. This Court's jurisdiction is derived first from the Constitution and second, the Industrial Court Act. Under article 159(1), in exercising judicial authority the Court shall be guided by among others, the principle that justice shall not be delayed and that it shall be administered without undue regard to

procedural technicalities. Therefore in appropriate cases the Court has power to make an order to secure its judgment where it is sufficiently shown that the respondent is likely to go out of jurisdiction or dissipate its assets with purpose of defeating a judgment that the Court may ultimately award.

8. In this claim, the claimant seeks salary arrears. These are salaries earned and no good reason has been advanced why they cannot be paid. Further by a letter dated 15<sup>th</sup> January, 2015 marked as LAW 4 in the claimant's affidavit sworn on 21<sup>st</sup> January, 2015, the respondent has clearly indicated that it intended to close its business with effect from 31<sup>st</sup> January, 2015 and therefore notified its staff of the redundancy with effect immediately.

9. The Court is therefore persuaded that this is a proper case to grant the orders sought.

10. The respondent is therefore directed to deposit in Court the sum of Kshs.1,339, 219/= within 30 days of this order, as security for a decree that this Court might ultimately issue in this cause. In default, execution to issue. The matter will therefore be heard on priority basis.

11. It is so ordered.

Dated at Nairobi this 2<sup>nd</sup> day of October 2015

Abuodha J. N.

Judge

Delivered this 2<sup>nd</sup> day of October 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge