



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

INDUSTRIAL CAUSE NO. 1411 OF 2011

CATHERINE M. RAINI CLAIMANT

VERSUS

CMC HOLDING LTD RESPONDENT

RULING

Mang'erere J. & Co. Adv. – for the Claimant

Igeria & Ngugi Adv. - for the Respondent

1. On 8th November 2013 the claimant through a Notice of Motion brought under section 12 of the Labour Institutions Act, seeking orders that the respondent CMC Holding Ltd to deposit Kshs.7, 275,717/- being the amount claimed by the claimant as security pending the hearing of the claim and in the alternative there be an award for the admitted claim amounting to kshs.7, 275,717/-this application is supported by the annexed affidavit of the claimant. The respondent through their Replying Affidavit sworn by Nelly Matheka dated 26th November 2013 opposed the application noting that even though there is an offer to purchase some shares/takeover of the respondent as reported to the Capital Markets Authority (CMA), the same has not been approved by CMA and does not in any way affect the running or existence of the respondent. Both parties filed their written submissions dated 17th December 2013 and 14th January 2014 for the claimant and respondent respectively.

2. The claimant's application is based on the grounds that the respondent is in the process of changing directorship and shareholding and the claimant is apprehensive that the respondent will sell off its shareholding in the company to third parties rendering this claim nugatory before the next hearing and therefore obstructing the course of justice. That the respondent has admitted that the claimant was its employee and thus should deposit Kshs. 7,275,717/- or any other security as determined by the court.

3. In support the claimant in her affidavit states that through daily papers on 20th September 2013 the respondent announced a takeover under the Capital markets Regulations. That the respondent is being taken over by al futtaim auto & Machinery Company LLs, a limited liability company incorporated in Dubai and thus change of ownership making the claimant apprehensive that this takeover will prejudice the claim herein. The court should therefore direct the respondent to deposit security of the claimed amount.

4. On the other hand the respondent in the Replying Affidavit state that the application by the claimant does not have reasonable grounds upon which the application should be granted on the basis that there is an offer to the respondent by al futtaim auto & machinery company to purchase some shares/takeover of the respondent company which was reported to the CMA and made public as required. The offer has not been approved. The offer for take-over does not affect the running of the respondent business as a company and as such there is no risk to the claimant in the event there is an award by this court. The offer if approved is aimed at injecting fresh capital in the business and turn around the fortunes of the respondent into a bigger and profitable entity thus financially capable of settling liabilities. The respondent as a limited liability company is separate from its directors and shareholders and does not affect the existence of the company and thus the change of shareholding does not affect the company or running of its business. The application by claimant is premature as the respondent has not received approval to the offer or approval by the various authorities to warrant the deposit of security herein. There is no admission of the claim as there is a defence and the apprehension has no basis to warrant the orders being sought.

5. In submission, the claimant stated that the respondent is at an advanced stage negotiating with a third party on a takeover to dispose its shareholding at 100% and without documents to proof the intricate details of the takeover the apprehension is justified. With the change of shareholding ownership also changes making the respondent non-existent and the claimant's claim will be rendered nugatory if not secured before the takeover.

6. The respondent submitted that the fact that there is an offer to the responded by a third party for sale of shares, the same is not approved by CMA and thus only a show of interest that should not be a ground for deposit of security. If there are approvals, the existence of the respondent will not be affected as the respondent is a legal entity separable from shareholders. There is no evidence submitted by the claimant to show that the respondent takeover is at an advanced stage and the media publication is a mere indication of an interest by the third party hence the application is premature. The respondent rely on the case of *Henry Kakai & 10 Others versus Swadish Foods Limited, Cause No.2449 of 2012* where the court held the duty is on an applicant to proof that the respondent was in a precarious financial position or is in the process of undertaking a particular business move which would have the effect of defeating any decree that may be passed against it.

Determination of the issue

Whether the application has good basis

Whether the orders sought can be granted in the interim

7. The application herein is based under section 12 of the Labour Institutions Act which sets out the jurisdiction of the Industrial Court. This section is better reinforced by the provisions as under section 12 of the Industrial Court Act, 2011 which consolidated the provisions of Article 162(2). To these statutes is the Industrial Court Procedure Rules which outline the rules of procedure on how parties are to conduct themselves and their claims before this court. Where the Industrial Court Act or the Labour Institutions Act or the Rules of procedure do not address any particular issue adequately, parties are allowed to rely on any other provisions of a written law especially the Civil Procedure Act and the rules thereto.

8. The claimant's application is seeking to have his claim secured by the respondent deposit of Kshs.7, 275,717.00 following a claim of unlawful termination and non-payment of terminal dues. Claims of unfair termination arise under section 45 of the Employment Act, and upon evidence and proof of the same, there are outlined remedies that the Court may grant as under section 49. A claim for unfair termination can however be traced through the tenets outlined under section 43 of the Act where an employer is under a mandatory duty to give reasons for termination in a case of dismissal or termination of an employment contract;

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the

employer to terminate the services of the employee. [Emphasis added].

9. In this case, the letter of termination issued to the claimant on 14th April 2011 stated;

RE: TERMINATION OF SERVICE

This is to advice that the Caretaker Board Committee resolved to terminate your employment with CMC Holding Limited as the Group Human Resource Manager in accordance with your contract of employment with effect from 18 April 2011.

...

10. Without going into the merits of the case, the letter of termination issued to the claimant is at the core of his claim to court, this cannot be ignored in the determination of the current application as to do so would defeat the very essence of a party approach to court to secure an interest that is formally before this court.

11. I will agree with the respondent with regard to the cited authority in Cause No. 2449 of 2012 to the extent that where a party seeks to have security of 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 the 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. That evidence can only be tested in evidence where it is refuted by the respondent.

12. However, unlined the cited case where the basis of it was an employer who was faced with a case of redundancy, the respondent herein if faced with a business takeover and or sale of its shareholding. In a case for redundancy, the law is clear and this far this court has established clear jurisprudence with regard to business takeovers or sale or as in other cases, transfer of the same. In *Elizabeth Washeke & 62 Others versus Airtel Networks (K) Limited & Another, Cause 1972 of 2012*, this court went into the issue what an employer should do in a case of business transfer, sale or takeover. Where there is no direct legal provision on how the process is to be undertaken, the yard stick applicable is as under Article 41 of the Constitution where there should be fair labour practice. In the above case, the employer was found to have undertaken unfair labour practice where there was a transfer of business without a transfer an outline as to how employee benefits and or liabilities were to be addressed.

13. It is noteworthy in this application that, the claimant filed her claim on 17th August 2011 and while this was pending for hearing, on 20th September 2013, the respondent issued through print media the announcement of *offer by Al Futtaim Auto 7 Machinery Company for 100% of the issued share capital of CMC Holding Limited* [the Notice]. This offer is stated in the Replying Affidavit of Ms. Nelly Matheka as awaiting the approval of CMA and other regulatory authorities. Based on the outlined provisions as under the Notice No. 6 there are various agreements with shareholders of the respondent specifically outlined. Under No. 7 of the Notice are the conditions of the offer. Therefore, where CMA was to give approval of the takeover for 100% issued share capital of the respondent, these would be the conditions precedent. These would be as it were the passed over obligations and or liabilities from one entity to the other.

14. In matters of business takeover, sale and or transfer of an interest from one entity to the other and in this case by an employer, there are obligations that must be cleared and or secured. This require due diligence on the part of an employer where all liabilities must be secured. In a case of a company business transfer, this due diligence would entail a confirmation as to whether the transfer or takeover is as a going-concern or otherwise. Without this assurance and factoring of liabilities that would arise to the employer were they to transfer their business interest, then an employee or former employee with a lodged claim has reason to be apprehensive.

15. In this case, the respondent has received an offer and by the public notice issued as under the Capital Market Act, where the offer is accepted that is said to be *has not been approved by the Capital Market*

Authority, or market regulators as required. Under clause 9 there is a timetable, a time plan which requires certain fundamental process commence after 30 days. The Notice was issued on 20th September 2013 and the 30 days have already lapsed. The respondents in their submissions have not updated this court on the status of the CMA approvals or the other regulatory authorities. This is their duty to so update this court as under section 73 of the Employment Act and as a matter of appraising the court on the subject at hand. Further, the respondent has the duty to indicate the threshold of success with regard to the offer that has been publicized and how far the negotiations have gone with the third party stated or other third parties. With the Notice being out, the respondent has the responsibility of oversight protection to its shareholders, debtors, employees and any other person with an interest such as the claimant. Once the offer is approved with the shareholder majority approval as under the Capital Market Act and the requirements as under the CMA regulations, the subsequent transfer, purchase or takeover to any third party without the protection of the claimant, her interests will be exposed in what would amount to negating the claim as presented. This is a court of justice and parties come before this Court to have their interests protected however remote. In the event there is no good claim, there is a sanction of costs that the court can award to the other party and in the event of success, and then the same should be secured through a conservatory order. This will be due diligence to factor the liability.

16. I therefore find the claimant's application has merit to the extent that the application before court is driven by the Notice published by the respondent. The same is for a takeover of 100% shareholding in the respondent business by a third party. There is a claim already lodged by the claimant and where it appears that a an arguable case as set out in the claim for payment of terminal dues, and there is a danger that the respondent as the former employer of the claimant is in the process of disposing assets so as to jeopardise the claim before judgment, the Court has jurisdiction in a proper case to grant a conservatory order. In this case, the Court is being asked to order for a deposit of terminal benefits and compensation for unlawful and unfair loss of employment, which are equitable remedies.

In this case I find it fair and just based on the circumstances of this case to direct as follows;

The application dated 8th November 2013 is allowed in the following terms; parties to take hearing date on priority basis for the hearing and disposal of the main claim herein; the respondent will deposit the sum of Kshs. 3,637,858.50 in Court within 14 days from the date hereof being ½ the total claim; and the deposit to remain so deposited until the hearing and determination of this case. Costs will be in the cause.

Dated and delivered at Nairobi this 30th January 2014.

M. Mbaru

JUDGE

In the presence of

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