



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1965 OF 2011

ROBIN MWEBI MOMANYI.....CLAIMANT

VERSUS

CMC MOTORS GROUP LIMITED.....RESPONDENT

RULING

By a notice of motion dated 27th March 2014 filed under certificate of urgency the Claimant seeks the following Orders:-

1. That this application be certified as urgent, the need for service be dispensed with and the same be hard ex-parte in the first instance.
2. That the proposed merger or takeover and or share transfer ongoing as between CMC Holdings Limited, the Respondent's Parent Company and Al-Futtain Auto & Machinery Company LLC be suspended pending the hearing and determination of this application.
3. That the proposed merger or takeover and or share transfer ongoing as between CMC Holdings Limited, the Respondent's Parent Company and Al-Futtain Auto & Machinery Company LLC be suspended pending the hearing and determination of this suit.
4. That pending the full hearing and determination of the suit herein, the Respondent be ordered to deposit security in the sum or amount of not less than Kshs 11,815,223 plus interests and costs of the suit to secure the substratum of the Applicant's substantive suit herein within seven (7) days or to the satisfaction of this court.
5. That the substantive suit herein be heard on a priority basis.
6. That costs of this application be provided for.

The application is supported by the affidavit of the Claimant sworn on 27th March 2014 and on the following grounds:-

1. That following an advertisement that ran in the Daily Nation Newspaper on Friday 17th January 2014, Al-Futtain Auto & Machinery company LLC gave notice of its impending takeover of CMC Holding Company in control of the Respondent by purchasing 100% shareholding in CMC Holdings Limited thereby giving notice of a merger or takeover or share transfer.
2. That this suit is not disclosed as a potential pending liability in the share transfer documents or otherwise yet it is one of the potential and pending liabilities.
3. That the substratum of the suit herein stands to be defeated as it is highly likely that Al-Futtain

- may not assume any or all the liabilities of CMC Holdings Limited which extends to the liabilities of the Respondent, the current suit included thereby defeating the Applicant's suit.
4. That the Applicant stands to suffer irreparable loss should he succeed and be unable to realize the fruits of his judgment if the proposed merger or takeover and or share transfer between Al-Futtaim and CMC Holdings Limited is allowed to proceed as intended.
 5. That it is in the interests of justice that the proposed merger or takeover of share transfer between Al-Futtaim and CMC Holdings Limited be suspended or that the Respondent be ordered to deposit in court as a security a sum not less than Kshs. 11,815,223 together with interests and costs of this suit to secure the substratum of the Applicant's substantive suit herein.
 6. That it is further in the interests of justice that the application be allowed as prayed.

The Respondent filed a replying affidavit of NELLY MATHEKA, the Respondent's Group Company Secretary sworn on 7th April 2014.

The application was argued before me on the 7th of April 2014. Ms. Bonyo instructed by Obura Mbeche & Co. Advocates appeared for the Claimant while Mr. Ombati instructed by Kefa Ombati & Co. Advocates appeared for the Respondent.

Miss Bonyo submitted that there is an ongoing take over of the Respondent by Al-Futtaim Auto and Machinery Company LLC based in Dubai. The share holders circular does not recognize the applicant's claim under paragraph 7.3 on material litigation although the case was filed prior to commencement of the merger, that it appears that no provision has been made for the applicant's claim under this case. That the applicant is apprehensive that should his claim succeed he will have no way of satisfying the decree. That should this happen the applicant's claim would be rendered nugatory and the claimant would suffer irreparable loss. That the balance of convenience is also in favour of the applicant. That having been aware of this suit the Respondent is under a duty to disclose and make provision for this suit to the incoming owners. That it is for these reasons that the Claimant seeks deposit of the sum of Shs. 11,815,223 claimed in the suit together with costs and interest that may become due. That Al Futtaim is based outside the jurisdiction of this court, that the operations of the Respondent are fully controlled by the management of CMC Holding whose total shareholding is being taken over by Al Futtaim.

That the Respondent has in the replying affidavit indicated it's willingness to give security but only to the extent of Shs. 1,0777,120/- . That any security deposit should be based on the claim and not on what the Respondent deems to be suitable security.

Ms. Bonyo urged that in the event of the application not being granted the suit should be heard on priority basis.

Mr. Ombati for the Respondent submitted that the applicant seeks injunction to restrain the merger, take over or sale of shares in CMC holdings by Al Futtaim who is not a party to this claim. That an order cannot be made against a person who is not a party.

Mr. Ombati further submitted that although Al-Futtaim is purchasing 100% of CMC Holdings, CMC Motors Group Limited is not being sold as a company as it is the shareholders who are selling their shares. That the business of the Respondent will not be affected. That CMC holdings Ltd has committed to carry on the businesses in their ordinary course and not to undertake an action that may affect the value of the company, that

Al Futtaim has no plans to introduce immediate changes that would affect the management or employees. That it is not true that the liability of the applicant's case has been sold as there is a schedule of 122 cases involving shareholders who have sold their shares. That this case is in a separate schedule with 22 others and there is no obligation on the Respondent to disclose the cases as there is no requirement in law for shareholders to make provision for a case like the Claimants.

Mr. Ombati submitted that the Claimant has not established a prima facie case or that he would suffer irreparable loss if the orders sought are not granted. That any loss likely to be suffered by the Claimant

can be remedied by way of damages and the documents submitted by the Claimant prove that the Respondent is capable of satisfying his claim.

On the deposit of security in the sum of Kshs 11,815,222 Mr. Ombati submitted that the same is not merited as the Respondent is not leaving the jurisdiction of the court, is not winding up or being liquidated. That in any event the claim is on the face of it not likely to succeed in its entirety. That part of the claim is not capable of succeeding. That the only portion of the claim that is likely to succeed is Shs 1,785,223/-, that the bulk of the claim being Shs. 9,180,000 is a claim for earnings from date of compensation, that Section 49 of Employment Act provides for remedies for wrongful dismissal and unfair termination up to a maximum of 12 months' salary, that the Respondent is being asked to deposit security for which there is no provision in law.

It was further submitted that the Respondent has a counterclaim against the claimant in the sum of Shs. 708,102.63 so that the amount likely to be awarded to the claimant is only Shs. 1,077,120.37/- that should an order for security deposit be made, then it should be for the sum of Shs. 1,077,120.37 only.

I have considered the grounds in support of the application and in opposition thereof as pleaded in the application and deponed in the supporting affidavit and the affidavit in reply as well as the submissions of the parties, the documents and authorities relied upon by the parties.

The issue for determination is whether the Claimant has demonstrated that he is entitled to either an order suspending the merger, takeover or share transfer between CMC Holdings Limited who is the parent company of the Respondent and Al Futtaim Auto & Machinery Company LLC or in the alternative, to a deposit of security pending the hearing and determination of his claim herein. The issue of a priority hearing date is to be considered only if the substantive prayers are not successfully.

i. Is the Claimant entitled to an order suspending the manager, take over or share transfer between CMC Holdings Limited and Al Futtaim Auto & Machinery Company LLC?

It is a cardinal rule of natural justice that an order cannot be made against a person who is not a party to a suit and therefore has not been given an opportunity to defend itself. The Claimant herein has sued the Respondent whose parent company's shareholders are in the process of selling their shares in the company to Al Futtaim. The shareholders, the parent company and Al-Futtaim are not parties to this suit. This court can therefore not issue orders against them.

For this reason the prayer for the suspension of the sale of shares is declined.

ii. Order for security for costs.

The Claimant has submitted that the Respondent's parent company is in the process of being taken over by Al Futtaim who operates outside the jurisdiction of this court. In the shareholders circular, it is stated that Al Futtaim has no immediate intention of disposing of CMC's shares and intends to continue carrying on the business of CMC as a trading subsidiary, but future development will be determined by the CMC executive management. It is further stated that the board of directors will be constituted in a manner consistent with the operations of CMC as a subsidiary of Al Futtaim. As pointed out by Ms. Bonyo the Claimants case is not listed as one of the cases recognized under significant litigation.

The Respondents advocate stated that the Claimant's case is in a separate schedule with 22 others, and that there is no obligation in law for the Respondent to disclose these cases. Counsel for the Respondent further submitted that there is no provision in law for shareholders to make provision for the Claimant's kind of case.

Mr. Ombati submitted that the Claimant has not made a prima facie case, but concedes that part of the Claimants case in the sum of Shs. 1,785,223 has a likelihood of success. That should deposit for security be ordered it should not exceed that amount less the Respondent's counter-claim of Shs. 708,102.63 and that the security deposit should only be for the difference of Shs. 1,077,120.37.

The Respondent does not deny that the Claimant's case is not listed in the liabilities of CMC Holdings Ltd. There is nowhere in the shareholders circular where the incoming owners have agreed to take over liability of the Claimant's case. The Respondent does not deny that at least a portion of the Claimant's claim has a likelihood to success.

I therefore find that there is a real threat that should the sale of shares be concluded, the Claimant is likely to find himself with a decree that he cannot execute.

I agree with the decision of the court in **JIMMY R. KAVILU & 14 others Stanbic Bank Limited & 6 others [2008]eKLR** to the effect that where the plaintiff's liabilities have not been recognized by the merger the interest of justice calls for protective measures to be put in place to protect the interests of both parties so that the proceedings are not rendered nugatory.

The Respondent has argued that the only portion of the claim likely to succeed is Shs. 1,785,223/- . This may or may not be case. However at

this juncture it is not for the court to decide on the value of the claim or the success of the counter claim. That is a matter to be determined at the trial. At this juncture all I have to determine is the likelihood of success of the claim which the Respondent admits. Should the claim not succeed the Respondent's money will be returned. The Respondent has on the other hand not shown any apprehension about its counter claim as any successful part thereof is recoverable from the monies which the Respondent admits are due to the Claimant.

For these reasons I find that the Claimant has on a balance of probability demonstrated that he has a case with a likelihood of success and that should the sale of shares of CMC Holdings to Al Futtaim be concluded before his case is satisfied there is a likelihood of his decree being rendered incapable of realization and therefore nugatory as his case has not been recognized as a liability in the sale of shares.

I therefore order that the Respondent deposits the sum of Shs. 11,815,223 in an interest bearing account in the joint names of Obura Mbeche & Co. Advocates and Kefa Ombati & Company Advocates within 14 days from today.

Costs of this application will be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 7th Day of May 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Obiayo holding brief for Bonyo for Claimant

No appearance for Respondent