



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1191 OF 2014**

NAKIA J. WHITE .....CLAIMANT

VERSUS

FLAME TREE LIMITED .....1<sup>ST</sup> RESPONDENT

RED-HERRING LIMITED .....2<sup>ND</sup> RESPONDENT

TIM SMYTH.....3<sup>RD</sup> RESPONDENT

**RULING**

The claim herein was filed by the Claimant against the Respondent on 2<sup>nd</sup> July, 2013. The Claimant Nakia J. White alleging unfair termination and non-payment of salary. She prays for the following orders in the Memorandum of Claim:

- i. Outstanding salary arrears amounting to Kenya shillings one million, seven hundred and twenty one thousand five hundred and fifty (Kshs.1,721,550/=).
- ii. Interest of 18% on (i) above from the date of filing suit until payment in full.
- iii. Pay for all days worked in May
- iv. Damages for wrongful termination
- v. Costs of this suit
- vi. Any other relief that his honourable court may deem fit and just to grant.

On 4<sup>th</sup> August 2014 the Claimant filed a notice of motion under certificate of urgency in which she seeks the following orders:

1. This application be heard ex-parte in the first instance and the same be certified as urgent.
2. Pending the hearing and determination of this application the 3<sup>rd</sup> Respondent be ordered to deposit his passport in this honourable court. This order be served upon the director of immigration directing him to bar the 2<sup>nd</sup> Respondent from leaving the jurisdiction until further directions of this court.
3. Directions be given as to an early hearing date in respect of prayer 4 and 5.
4. That the 3<sup>rd</sup> Respondent do pay Kshs.2,000,000/= being the principal sum, interest and estimated party to party costs into an interest earning account in joint names of the Advocates for the claimant and the Respondent on account of security for the eventual decretal sums, costs and interest.

5. That the said sum be held in deposit by the said respective advocates until determination of this suit or until further orders.

The application is supported by the affidavit of the claimant sworn on 4<sup>th</sup> August 2014 and the grounds on the face of the application.

The Respondents opposed the application and filed a replying affidavit of Timothy Jason Smyth the 3<sup>rd</sup> Respondent, on 27<sup>th</sup> August 2014 in which he depones that he lives and works in Kenya and does not intend to leave the jurisdiction of the court. He annexed a copy of his passport to demonstrate that he has in the recent past exited and re-entered the country. He further states he does not intend to move his children from the country. He depones that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are solvent and capable of paying any liabilities under this case and that he is also capable of paying any decretal sums with costs and interest. He denies that there is sale, disposal or transfer of assets or business from the 1<sup>st</sup> to the 2<sup>nd</sup> Respondents and states that both companies are operational. Mr. Smyth avers in the affidavit that there was no employment relationship with the Claimant, that he does not intend to defeat the course of justice and that the Claimant's application is filed in bad faith. He prays that the court should not grant the orders sought.

The application was heard interpartes on 7<sup>th</sup> October 2014. Mr. Wandabwa instructed by Wandabwa Advocates appeared for the Applicant while the Respondents were represented by Mr. Wambasi instructed by Wambasi & Company Advocates.

I have considered the application and the affidavits as well as the grounds in support thereof. I have also considered the replying affidavit and the pleadings in totality.

Before a party can be ordered to deposit security before judgment the applicant must in the first case demonstrate that it has a prima facie case. It must then prove that the Respondent is likely to liquidate or take away from the court's jurisdiction its assets so that the applicant would be unable to liquidate any decree that may be awarded by the court.

In the present application the Applicant has demonstrated that she has a prima facie case by producing both her employment contract and the email terminating her employment. These facts are admitted in the statement of the 3<sup>rd</sup> Respondent filed with the statement of defence.

The court however has to determine whether the applicant has proved that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are disposing off assets and the 3<sup>rd</sup> Respondent is making arrangements to leave the country in order to avoid, delay or defeat execution of any eventual decree, costs and interest that may be ordered by the court against them should the claim be successful.

The only evidence before me is the affidavit of the Claimant in which she alleges at paragraphs 6 and 7 that it has come to her knowledge that the 3<sup>rd</sup> Respondent is in the process of selling and disposing off and transferring the 2<sup>nd</sup> Respondent to a 3<sup>rd</sup> party and that the 3<sup>rd</sup> Respondent is planning to leave Kenya and has so far taken his family outside jurisdiction. No proof has been tendered other than her allegation. No disclosure of the source of the information has been made as required in affidavits where the deponent is pleading matters from other sources.

The constitution provides for both freedom of movement and protection of property. For the court to deny a person the use of property by depositing money in court or freedom of movement by requiring them to deposit their passport in court there must be justification. The mere allegation in an affidavit without proof of the allegation cannot form justifiable grounds for denial of these rights.

For these reasons I find that the claimant has not proved the allegations in support of her prayers for security before judgment. The application is therefore dismissed. The costs will be in the cause.

**Dated in open court this 17<sup>th</sup> day of October, 2014.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

Mayaba for Respondent

Kasiani holding brief for Wandabwa for Claimant