



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1436 of 2012**

**GEORGE KARIUKI NGUGI**

**CLAIMANT**

**VERSUS**

**BROLAZ EAST AFRICA LTD**

**RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion dated 21st August, 2012.

Prayers (a), (b) and (c) thereof were granted by Hon. Justice Nzioki Wa Makau on 22<sup>nd</sup> August, 2012 after he certified the applications as urgent and suitable for hearing during the vacation.

2. On 29<sup>th</sup> August, 2012, when the application was placed before Justice Mbaru, for hearing *interpartes*, the Judge ordered that 2 other Causes being Causes Nos. 1437 of 2012 and 1438 of 2012 be consolidated with this particular Cause for reasons which are on record.

3. In *Causes Nos. 1437 of 2012 and 1438 of 2012*, similar applications to the one under determination herein were also filed. In this regard, this ruling will apply to the applications in *Causes Nos. 1437 of 2012 and 1438 of 2012*.

4. This ruling therefore is in relation to prayers (d), (e), (f) and (g) of the

aforesaid Motion which seeks that the Respondent do furnish security to satisfy the decree that may be passed herein, alternatively the Respondent do place property of equivalent value at the disposal of the Court or deposit sufficient money with Court and costs.

5. There is one particular order issued on 22<sup>nd</sup> August, 2012 which is material to the present application. This is the order “*that the Respondent be compelled to show cause why it should not furnish security for satisfaction of any decree that may be passed against it*”.

6. Ordinarily in interlocutory applications the Court determines the

questions raised before it on affidavit evidence. Some facts are disputed in the instant case.

7. However, there are some facts which are not in dispute. One of them is that the Applicant herein George Kariuki Ngugi was summarily dismissed by the Respondent on 17<sup>th</sup> April, 2012. The Applicant in Cause No. 1438 of 2012, Francis Ndungu Ngugi was dismissed on 18<sup>th</sup> April, 2012 while the Applicant in Cause No. 1437 of 2012; Tirus Githimba Munene was dismissed on

11<sup>th</sup> April, 2012. It is also not in dispute that the Respondent placed an advertisement in the Daily Nation newspaper of 10<sup>th</sup> August, 2012 for the sale of some 10 motor vehicles belonging to it. However, the implication or import of the advertisement and proposed sale was strongly disputed by the parties.

8. The Motion on its face indicates that it is predicated on Sections 3, 12 and of the Industrial Court Act, Rule 16 of the Industrial Court (Procedure) Rules 2010, Article 159(2) of the Constitution and all other enabling provisions of law.

9. Article 154(2) of the Constitution provides for the principles which should guide Courts in the exercise of judicial authority. These principles permeate all types of adjudications entertained by the Courts, whether civil, criminal or labour/employment questions.

10. Section 3 of the Industrial Court Act, 2011 sets out the principal objective for the establishment of the Industrial Court, Section 12 sets out the jurisdiction of the Industrial Court while Section 13 relates to the enforcement of the orders of the Industrial Court.

11. In a nutshell, the Applicant did not mention expressly the specific statutory provision within the Industrial Court legal framework relating to the furnishing of security to satisfy a decree that may be passed, placement of property at the disposal of the Court sufficient to satisfy an anticipated decree or the deposit of sufficient money by a Respondent. I could not establish any and therefore because of the lacuna I will resort to the principles applicable within the civil proceedings framework.

12. A keen perusal of the prayers sought by the Applicants indicate that, their prayers are predicated on Order 38 rule 1 (a) (11)(iii) and (b) of the Civil Procedure Rules. I will therefore determine the instant application relying on the principles which have been developed on these provisions.

13. On the merits of the instant application, Mr. Gachugi for the Applicant reiterated and relied on the grounds on the face of the application and the supporting affidavit of Tirus Githimba Munene. He also relied on *Milimani No. 589 of 2007 Jerry Njuguna vs. J.H. Safaris Ltd., Nairobi, HCCC No. 212 of 2011, Clement Muturi Kigano vs. Shegli Engineering Construction Group Co. Ltd and, Daniele Scolaro vs. Fabio Marelli & others, Malindi HCCC No. 73 of 2009.*

14. Mr. Okeche for the Respondent relied on *HCCCA No. 5 of 2005. In the matter of ARMCO (Kenya) Ltd, HCCC No. 413 of 2009, Samuel Mtakai vs. Kenya Shell Ltd* and on the Replying Affidavit of Carl Van Vuuren sworn on 28<sup>th</sup> August, 2012 and filed in Court on 29<sup>th</sup> August, 2012.

15. I have perused the authorities relied on by respective Counsels. What emerges from the authorities is that the applicable principles are:-

(a) The power to attach before judgment must not be exercised lightly.

(b) There must be proof that the defendant is about to dispose of his property or removing it from the jurisdiction with the intent to **obstruct** or **delay** any decree that may be passed.

16. The second principle enunciated in the preceding paragraph is of relevance in making a determination on the Applicants application. The question is whether the Applicant has demonstrated that the Respondent is about to dispose of its property or remove such property from the jurisdiction of the Court with an intent to **obstruct** or **delay** any decree which may be passed against it.

17. The Applicant exhibited a press advert by the Respondent to dispose of some 10 vehicles. The Respondents contention is that it is not its business to deal in motor vehicles but to use the same in servicing its clients.

18. Similarly the Applicant has exhibited a Notice to vacate premises issued by the Respondent in respect of premises it had leased. In the said notice the Respondent has intimated that it may retain a satellite office in Kenya. In the same breath, it advises the Landlord that a new tenant may take over the

premise it had rented with effect from 1<sup>st</sup> November, 2012.

19. To my mind this sale advertisement and Notice to vacate indicate intent by the Respondent to dispose its property in Kenya but the Applicant has not sufficiently shown that these are meant to obstruct or delay any decree that may be passed in favour of the Applicant(s).

20. In the circumstances prayers (d), (e) and (f) are denied.

21. My finding is also buttressed by the fact that the applicants were terminated in April 2012 and decided to bring these Causes only in August 2012.

22. But mindful of the particular circumstances of the Causes herein and the provisions of Article 159(2) of the Constitution and to ensure the expeditious disposal of these Causes, this Court directs that *Cause No. 1436 of 2012*, *Cause No. 1437 of 2012* and *Cause No. 1438 of 2012* be set for hearing within the next 30 days.

23. Directions as to the mode of hearing will be given immediately after the delivery of this ruling.

24. Costs of the application will abide the outcome of the Causes.

Delivered at Nairobi this 12<sup>th</sup> day of September 2012

**Radido Stephen**

**JUDGE**

Appearances

Mr. Gachugi instructed by J.K.KIbicho & Co. Advocates for Claimant/Applicant.

Mr. Okeche instructed by Federation of Kenya Employers for the Respondent.