



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 2449 OF 2012

HENRY KAKAI.....1ST CLAIMANT
ANTHONY PETER.....2ND CLAIMANT
SAIRUS ZIMULI.....3RD CLAIMANT
DAN CHOGO.....4TH CLAIMANT
JUSTINE TIMOTHY MATE5TH CLAIMANT
FRANCIS KITHENDU.....6TH CLAIMANT
JOHN KAKAI.....7TH CLAIMANT
JOHN KARANJA.....8TH CLAIMANT
ROBERT MUTHANGYA.....9TH CLAIMANT
DICKSON KEVOGO.....10TH CLAIMANT
BERNARD VUNDI.....11TH CLAIMANT

VERSUS

DEBENDRA KAMAT T/A

SWADISH FOODS.....RESPONDENT

RULING

This is an application dated 5th December 2012 presented under Certificate of Urgency seeking interim provisions pending the hearing of the main suit herein. The application by way of notice of Motion is

supported by the annexed affidavit of Anthony Peter the 2nd claimant herein and one of the employees of the respondent company Debendra Kamet who trades as Swadish Foods. There is a replying affidavit by the respondent sworn by Debendra Samat, which affidavit is undated.

The application came up for hearing on 17th December 2012 where the claimants advocate submitted regarding prayer No. 2 and 3 of the Notice of motion seeking that the respondent do deposit the sum of Kshs.4,151,674.80 being the claimant's terminal benefits and compensation for unlawful and unfair loss of employment. That due to the Notice issued to the claimants by the respondent on the intended closure of his business, the claimants are apprehensive that if their terminal dues are not secured with a security deposit in court, they may suffer loss and damage as the respondent may run away from the jurisdiction of this Court without paying the terminal dues and compensation for the loss of employment.

That the costs of Kshs.4, 151,674.80 will be a good security deposit vide the claim that has been attached to the application. It was further submitted that the respondent issued a Notice to the claimants for redundancy dated 1st November 2012 indicating that they were to close business on 30th November 2012 without first informing the Labour officer in charge of the areas of the respondent operations and that in the said notice it was not indicated how much was payable to the claimants as terminal dues.

It was submitted that the claimants have calculated their terminal dues owing all amounting to Kshs.4, 151,674.80 and fearing that the respondent will close their business and run away from the jurisdiction of this Court, they have come to court to help arrest the situation by ordering that there be a deposit of this sum of money to secure their possible claim.

Mr. Njuguna for the respondent and while relying on the replying affidavit of the respondent submitted that the respondent has been operating a business at the Nairobi Gymkhana Club (the Club) under a license Agreement where the Club has now issued a notice to vacate initially from December 2012 but the same has been extended to 5th January 2013 whereupon the restaurant business where the claimants were employed has to close. That based on the notice from the Club, the respondent took the step of also giving their employees notice as well as the labour Officer vide letter marked "DK2" attached to the replying affidavit.

That based on the Notice issued to the claimants, the respondent is desirous of abiding with the law on the terminal dues payable to the employees under the redundancy provisions of section 40 of the Employment Act. That as a Kenyan Citizen the respondent has no intentions of running away from the jurisdiction of the Court and that no evidence has been adduced to indicate that the respondent will run away. Further that the claim as submitted before Court raises several arguable point and raises a good defence which the respondent would wish to address before the orders sought are granted.

The respondent further admits that initially a notice was issued in November 2012 that was not copied to the Labour Officer but that has now been revoked and a new notice issued commencing 1st December to 31st December 2012.

What is before this Court is an application brought under Certificate of Urgency seeking a security deposit being for claimant's terminal dues benefits and compensation for unlawful termination and unfair loss of employment. A draft claim has been attached to the affidavit of the claimants praying for judgment against the respondent for the termination of the claimants employment on account of redundancy that is deemed to be unfair and terminal dues all amounting to Kshs.4,151,674.80.

Under the Employment Act, where an employer declares employees redundant for one reason or the other the provisions for the same under Sections 40 of the Act are *mandatory* in nature in that

An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

[Conditions outlined as]

This therefore makes it mandatory for the respondent upon establishing that his business is closing on or by the 5th of January 2013 to initiate a process that is envisaged under Section 40 of the Employment Act. Apart from these mandatory procedures outlined under Section 40, in the social dialogue of labour matters in Kenya, the role of the Labour Officer becomes absolutely indispensable in cases of redundancy as they largely assist the parties in the application of the current Wage Guidelines regarding the terminal benefits payable. This is a government officer that is called upon also by this Court to advice on what is payable in the eventuality of redundancy. This seems to have been an afterthought for the respondent who by revoking the earlier notice now issues a new notice dated 1st December 2012 copied to the Labour Officer. It has not been demonstrated in evidence or in the submissions of Mr. Njuguna for the respondent that there has been compliance with Section 40 (1) (a) and (b) of the Employment Act.

The above notwithstanding, I note 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. In this case apart from the apprehension of the claimants that the respondent will run away from the jurisdiction of this court, this has been denied vehemently in the reply affidavit as well as in the submissions during the hearing. I find the response of the respondent credible due to the fact that they have shown a willingness to engage the parties by initiating the issuance of Notice of closure of business and the fact that they have made appearance in Court.

There is no rule permitting attachment before judgement as the Court has no powers to protect a creditor before he gets judgement. This is to prevent the decree that may be passed from being anfractuious. An order that can be contemplated is that which unconditional one is directing attachments of property but one calling upon the respondent to furnish security or show cause why security should not be furnished. Where the respondent offers to give security, the Court should go into the questions of its sufficiency, before issuing a final order of attachment. Vague allegations are insufficient. In this case, the draft claim has not been put to evidence for the Court to confirm that indeed the sums claimed are the due terminal payments to the claimants and despite the submissions by Mr. Nyabena that if the claim is not confirmed the same will be returned to the respondent, this Court will not punish a litigant who willingly submits himself before Court on a claim that is yet to be prosecuted and a decree issued. For meeting the ends of justice it is only fair and just that each party be allowed to argue their case upon which the Court can secure the rights confirmed.

In the ***Case of Ngingu versus Mbugua et al, Civil Appeal No. 112 of 1984***, the Court stated that an applicant seeking security deposit must act bona fide and not punish a respondent as to push him out of business. If it appears that a debt was due as in this case terminal dues are due and payable to the claimants, and there is a danger that the debtor might dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant a conservatory injunction. 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 not confirmed by Court.

In the case of ***Meru Farmers Co-operative Union versus Suleiman (2) [1966] EA 442***, the Court found that in addressing the issue of securing costs for any party, Court should be extremely anxious to ensure that the due administration of justice does not cause unnecessary expenses. If in the course of action, which either litigant chooses to adopt, would result in unnecessary expenses, the Court should be zealous to ensure that course of action is not open. A Court should, above all, be most careful to ensure that it should not itself be used as a tool to incur unnecessary expenses where it is satisfied that such expense is unnecessary.

In this case I find by attaching the respondent's property [a money deposit of kshs.4, 151,674.80] before judgement, not only because it is hardly consistent with justice to exact "punishment" before the

defendant's liability to execution is established, but also because, in view of the nature of the draft claim, the rights and liabilities of the parties herein have not yet been determined.

This Court finds that the mere apprehension however well grounded without evidence that the respondent intends to do what is feared does not suffice. Before I can grant the orders sought for the deposit of the sums claimed, it must be satisfied that the respondent, with intent to obstruct or delay the execution of any decree that may be passed against him, is either about to dispose of the whole of his property or is about to remove his property from the jurisdiction of this Court. See the principles set out in the decision of Ringera, J. in the Case of **Satho Ahmed versus Ndiritu Kikwanya, Nairobi High Court, civil Case No. 538 of 2001.**

I however find that due to the intended closure of the respondent business, and the respondents lack to initially inform and or involve the labour Officer, the claimants are anxious to know their fate and or their terminal benefits paid and having come to Court under a Certificate of Urgency, I will grant an early hearing date within which they can prosecute their claim in full upon filing their draft Claim and serving the same and paying the court fees due.

For the reasons outlined above, I will not grant the orders sought but confirm the urgency of the claim. Costs in the cause.

These are the orders of this Court.

Dated and delivered in open Court at Nairobi this 21st day of December 2012.

Justice Monica Mbaru

Judge

Industrial Court of Kenya

Appearances:

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