



REPUBLIC OF KENYA



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**I & M Bank Limited v Buzeki Enterprises Limited (Civil Case E375 of 2019)
[2022] KEHC 11602 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E375 OF 2019
WA OKWANY, J
MAY 26, 2022**

BETWEEN

I & M BANK LIMITED APPLICANT

AND

BUZEKI ENTERPRISES LIMITED RESPONDENT

RULING

1. This ruling is in respect to the application dated 23rd April 2021 wherein the applicant/defendant seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. There be an order for stay of proceedings pending hearing and determination of Nairobi Milimani Civil Suit E134 Of 2018, Randon S.a.implementors Eparticipacoes Vs Rt (east Africa) Limited.
 - d. Costs
2. The application is supported by the affidavit of Mr. Dennis Wanyonyi and is premised on the grounds that: -
 - a. By an application dated June 3, 2019, the Assignor sued as Defendant in Nairobi Milimani Civil Suit No E134 Of 2018 Randon S.a. Implementors Eparticipacoes Vs Rt E.a Limited (the Earlier Suit), sought and obtained orders on 11th July, 2019 to enjoin the Defendant herein as 3rd Party therein on account of the instant suit Promissory Note.



- b. The suit herein was instituted by a Plaintiff dated and filed on 18th October, 2019 claiming from the Defendant on account of the suit Promissory Note.
 - c. The instant suit and the aforementioned suit Nairobi Milimani Civil Suit No E1 34 Of 2018 Randon S.a. Implementors Eparticipacoes Vs Rt E.a Limited are premised on the same Promissory Note, from which the alleged liability of the Defendant stems.
 - d. The suit Promissory Notes are material, are directly and substantially in issue in the instant suit and the aforementioned Nairobi Milimani Civil Suit No E134 Of 2018 Randon S.a. Implementors Eparticipacoes Vs Rt E.a Limited; where both the Plaintiff and the Assignor have laid claim to the benefits arising from the Promissory Notes
 - e. The existence and subsistence of the prior suit has been acknowledged by the Plaintiff, even to the extent that it has threatened the Assignor with untold legal consequences for exercising its rights over the suit Promissory Note.
 - f. The suit therefore offends the sub judice principle as provided for in section 6 of *Civil Procedure Act* and must therefore give way to the prior proceedings since the same relief is claimed from the Defendant by the Plaintiff herein and the Assignor therein.
 - g. The application is brought in the interest of justice to avoid a miscarriage of justice towards the Defendant and to avoid the patent abuse of court while saving on judicial time.
 - h. The prayers sought shall spare the Defendant a great injustice and irreversible prejudice but the Plaintiff shall suffer no such unmitigatable prejudice
3. The plaintiff/respondent opposed the application through the replying affidavit of it Head of Business Development Mr. L.A. Sivramakrishnan who avers that the earlier suit is already concluded as judgment was entered against the Defendant as shown in the following applications:
 - a. Notice of Motion dated May 20, 2019 filed by the objector Multiple Hauliers (EA) Ltd seeking a stay of execution of the decree passed on January 15, 2019.
 - b. Notice of Motion dated June 3, 2019 filed by the judgment debtor, RT (East Africa) Limited, seeking the issuance of Third Party Notices to enjoin Kipro Bundotich and Diana Jepchumba Bundotich in the suit after entry of judgment on January 15, 2019.
 4. The respondent states that the Promissory Notes were assigned to the Plaintiff on October 24, 2016 before the filing of the earlier suit and that on January 30, 2020, this court delivered a Ruling in which the application for stay of execution was partially allowed. The respondent contends that judgment having been entered in the earlier suit, there is nothing pending determination in the earlier suit save for the execution of the decree.
 5. It is the respondent's case that even though the Promissory Notes were exhibited in the earlier suit, they are not the subject of the proceedings in the said case and that the Third Party Notices do not concern the current Defendant.
 6. The respondent contends that there are no pending proceedings between the parties herein in the earlier suit and that the Defendant in earlier suit sought indemnity from the directors of Buzeki Enterprises Limited, a separate legal personality from its shareholders. The respondent denies the allegation that it was enjoined in the earlier suit as a Third Party.



7. The application was canvassed by way of written submissions. I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders of stay of the proceedings herein.
8. The decision on whether or not to grant stay of proceedings is discretionary and is ordinarily sought where there is a pending appeal. The court's powers to stay proceedings pending an Appeal is provided for under order 42 rule 6 (1) of the Civil Procedure Rules which stipulates as follows: -

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

9. *In Re Global Tours & Travel Ltd* HCWC No.43 of 2000 it was held that:-

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

10. In order to obtain orders for stay of proceedings pending appeal, the Applicant must establish that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory. It is noteworthy that there is no pending appeal in this case.
11. The applicant seeks orders to stay these proceedings on the basis that it deals with the same Promissory Notes that are the subject of the earlier suit. The applicant argued that the instant suit offends the sub judice doctrine and ought to be stayed pending the determination of the earlier suit. It was further, the applicant's case that the earlier suit should take priority over this suit.
12. It was not disputed that the subject matter of this suit and the earlier suit are Promissory Notes. In the earlier suit, the assignor claims the benefits arising from the promissory notes while the plaintiff herein similarly claims the same. I therefore find that the Promissory Notes are directly and substantially in issue in both suits. It is however instructive to note that the parties in this suit are not the same as the parties in the earlier suit.
13. It was also not disputed that the earlier suit has already been determined and is at the execution stage.



14. *Black's Law Dictionary* (9th edition) defines sub judice as pending before Court or Judge for determination. The principle of sub judice is provided for in section 6 of the *Civil Procedure Act* as follows:-

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having Jurisdiction in Kenya to grant the relief claimed.

15. In *Kenya Union of Commercial Food and Allied Workers Union vs London Distillers (K) Limited; Central Organisation of Trade Unions Kenya (Interested Party)* [2021] eKLR, the court held that the sub judice rule cannot apply where the other suit is concluded. The court rendered itself as follows: -

“Cause No. 1639 was concluded vide two rulings delivered on May 26, 2017 and December 19, 2017. The parties have however not stated what the issue in dispute in the suit was. Suffice to state that in view of the fact that the suit is concluded, it cannot be sub judice as alleged by the respondent. [Emphasis added]

16. In the instant case, it was not disputed that judgment was entered in the earlier case on January 15, 2019 and that there is currently no pending issue in the said case save for execution of the decree. It was further not disputed that the parties in the present case are not the same as the parties in the earlier suit.
17. From the above undisputed facts of this case, I find that the plea of sub judice is not applicable in this case. The order for stay of proceedings is also not available for the applicant herein as there is no pending appeal upon which the court can exercise its discretion to grant the stay orders.
18. In sum, I find that the application dated 23rd April is not merited and I therefore dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kiguta for Gichuhi for Plaintiff.

Court Assistant:- Sylvia

