



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 11 OF 2009
BLUE SHIELD INSURANCE CO.PLAINTIFF
VERSUS
GACHIRI KARIUKI TRADING AS
GACHIRI KARIUKI & CO.
ADVOCATES.....DEFENDANT

RULING

I have before me two applications for hearing. The first application was lodged by the plaintiff and is by Notice of Motion dated 15th January 2009. By the application, the plaintiff seeks three main orders, namely a stay of proceedings and execution in all enforcing suits filed by the defendant pending final orders in the cause; determination that SRMCCC No. 2302 of 2008 at Mombasa be a test suit with respect to all other matters arising between the parties herein and an injunction restraining the defendant from filing and/or proceeding with the enforcing suits arising out of the Advocate/Client Bill of Costs between the parties herein until final orders herein or until determination of the Originating Summons filed by the plaintiff. The application is expressed to be brought under the provisions of Sections 3 and 3A of the Civil Procedure Act, Order XXXVII Rule 1, Order XI Rules 1 and 2, Order L Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law. The application is supported by an affidavit sworn by one Francis Odalo, a Manager of the plaintiff based at Mombasa. The same manager has also filed a further supporting affidavit.

The defendant has opposed the application and has filed two affidavits in response thereto.

The second application is by the defendant and is dated 3rd February 2009. It is also by Notice of Motion and seeks one primary order that the plaintiff do deposit in an interest earning account with the Standard Chartered Bank Treasury Square, Mombasa Kshs. 18,350,992/= in the joint names of the parties' advocates to act as security for the payment of the defendant's costs against the plaintiff in respect of all matters subject of the Originating Summons. The application is expressed to be made under Order LII Rule 4 (3) of the Civil Procedure Rules. There is a supporting affidavit sworn by Gachiri Kariuki, the proprietor of the defendant firm of Advocates. Mr. Kariuki filed a further affidavit in response to the further affidavit sworn on behalf of the plaintiff.

The main reason why the plaintiff has moved the court is that it has had a long client/advocate relationship with the defendant spanning over many years. Over that period, it has paid the defendant more than Kshs. 12,000,000/= on account of their fees but before the defendant furnished an account of payments made by the plaintiff, it has, *inter alia*, filed various enforcement suits and is in the process of execution. Those acts of the defendant have precipitated the filing of the Originating Summons herein wherein the plaintiff seeks, *inter alia*, an account of monies it has paid to the defendant.

The gist of the defendant's application is that the enforcement suits and the resultant execution arose out of final certificates of costs lawfully issued, which certificates have not been set aside, reviewed, varied and/or altered. The sum claimed are therefore lawfully owed and it is in the interest of justice that the plaintiff deposits the said Kshs. 18,350,992 as security for those costs especially as the world's current economic slump may adversely affect the plaintiff.

The defendant's application has somewhat determined the order sought by the plaintiff. The plaintiff seeks a stay of proceedings and execution. The defendant by its application is suggesting that stay may be ordered as long as there is security. That is not altogether unreasonable in view of the long client/advocate relationship the parties have enjoyed and the conflicting affidavit evidence. The central issue in both applications is therefore on what terms stay should be ordered. The defendant has admittedly provided legal services to the plaintiff over a long period of time. The defendant has in its favour unchallenged certificates of costs and is entitled to have its costs taxed with respect to bills yet to be taxed. There is in my view no serious challenge to the defendant's right to its costs for services lawfully rendered to the plaintiff.

On the other hand, the plaintiff is entitled to an account. It alleges substantial payments having been made to the defendant. In its Originating Summons, there is a prayer for balance to be paid to it after deduction of sums lawfully payable to the defendant. A determination of who owes what and to who, in my view, cannot be made at this stage. Prima facie, therefore the plaintiff's claim cannot be said to be frivolous. Prima facie also, it is clear that the defendant is entitled to its lawful costs. So both parties are entitled to an adjudication of their respective claims by the court. However, the court is always mindful of the possibility that an order for security can become a weapon of oppression (See **Lindsay Parkinson Limited – v – Triplan Limited [1973] 2All ER 280**). The plaintiff in this case is not alleged to be impecunious – the world economic recession notwithstanding. Currently therefore there will be no difficulty in the defendant recovering its costs in the event the Originating Summons is dismissed or it is eventually established that the plaintiff owes the defendant any sums. It is settled that whether to grant stay of proceedings or further proceedings is a matter of judicial discretion to be exercised in the interests of justice. Ringera J, as he then was, in **Re Global Tours and Travels Limited: HCC Winding Up Cause No. 43 of 2000 (UR)** held that the discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question being 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 this case, the matters sought to be stayed are proceedings and execution in all enforcing suits arising out of the Advocate/Client Bills of Costs between the defendant and the plaintiff until final orders are made in this cause. If a stay is not granted, those suits and applications for execution will be completed and if accounts will show that the defendant owes the plaintiff the alleged sums, its indebtedness to the plaintiff will rise to astronomical levels which event need not occur if the Originating Summons is heard expeditiously. Fortunately, it is within the power of the parties to finalize the Originating Summons with dispatch. In that event it would not be necessary to have a test case because the Originating Summons will deal with all disputes between the plaintiff and the defendant arising from their client/advocate relationship. In the same breath it will not be necessary for the defendant to file further proceedings to recover costs arising out of its relationship with the plaintiff.

In the premises, I allow the plaintiff's application by Notice of Motion dated 15th January 2009 in terms of prayers 2 and 5 thereof. The orders are granted on condition that the plaintiff files a banker's guarantee in the sum of Kshs. 6,000,000/= within ten (10) days from the date hereof failing which the plaintiff's application shall stand dismissed with costs. The defendant's application dated 3rd February

2009 for deposit of Ksh. 18,350,992 at security is refused.

The parties are ordered to expedite the hearing and final determination of the Originating Summons herein which should be heard on the basis of priority. Each party shall bear its own costs of the defendant's application.

Each party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mogaka and Ouma.

F. AZANGALALA

JUDGE

13TH MAY 2009