



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 89 of 2007

ANN KATHIRUPLAINTIFF

VERSUS

RUSINGA INVESTMENTS CO. LTD.....DEFENDANT

RULING

By way of this Notice of Motion dated 24th January 2007 and expressed to be brought under Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya

ll enabling provisions of law, the Applicant seeks orders:-

1. In the first instance, this application be certified urgent and service of the same be dispensed with.
2. Upon certifying this application as urgent the Applicant be heard exparte.
3. Pending the hearing of this application, the court be pleased to order that the execution of the decree in this suit and all consequential orders be stayed.
4. Pending the hearing and determination of the Defendant's application dated 21st September 2006 and filed in court on 25th September 2006, the court be pleased to order that the execution of the decree in this suit and all consequential orders be stayed.
5. The court be pleased to issue such orders that may be necessary for the ends of justice or to prevent the abuse of the process of the court.
6. Costs of this application be borne by the Plaintiff in any event.

The application is based on the grounds:

- (a) That the execution of the decree is fraught with irregularities.
- (b) That the Plaintiff is not entitled to execute the decree.
- (c) That there is a pending application dated 21st September 2006 which ought to be disposal of before any execution can be contemplated.
- (d) That it is just and fair in the circumstances that the orders sought the granted.

The application is also supported by an affidavit sworn by CHACHA ODERA counsel for the Defendant

on 25th January 2007. The application is opposed by the Respondent who has filed grounds of opposition on the grounds that the application lacks in merit, is an attempt by the Applicant to further delay the final disposal of this suit and that it is an abuse of the process of the court. The issues in this application can best be approached by a recital of the proceedings up to date.

The suit was filed by the Plaintiff against the Defendant on 2nd August 2006 seeking judgment for:

- (a) A sum of Shs.22,808,248/=.
- (b) General damages.
- (c) Interest on (a) from the date of filing suit until final payment at commercial rates of 24%.
- (d) Costs of the suit and interest thereon.

The Defendant failed to enter appearance and as a consequence default judgment was entered. The Defendant filed the application dated 25th September 2006 to set aside that judgment. Mr. Chacha Odera counsel for the Applicant appeared before the court the same day and secured a temporary stay of execution and the application was fixed down for inter partes hearing on 9th October 2006. Counsel was ordered to serve the Respondent and service was effected. When the application came up for hearing inter partes on 9th October 2006. Mrs. Madahana counsel for the Respondent applied to be allowed to examine the deponent of the affidavit in support of the application dated 25th September 2006. She was allowed but on condition that she files a formal application. The matter was adjourned to 6th November 2006 to enable counsel for the Plaintiff file a formal application for leave to examine the deponent of the affidavit in support of the Defendant's application to set aside the default judgment and the interim orders were extended accordingly. The Plaintiff's counsel duly filed that application on 1st November 2006 and which was argued on 6th November 2006 and the ruling was reserved to 4th December 2006.

On 4th December 2006 the ruling was delivered and the Plaintiff's application was dismissed. Mr. Ogunde who held Mr. Odera's brief to take the ruling by oversight did not apply to extend the interim orders to a new date. The interim orders expired on 4th November 2006 and were not extended.

On 19th January 2007 counsel for the Plaintiff wrote to the Deputy Registrar seeking to withdraw the claim in respect of general damages. The letter read:

“Kindly mark the claim for general damages as withdrawn. Also draw the decree and certificate of costs. We undertake to pay your charges.”

On 16th January 2007 counsel for the Plaintiff wrote to the Deputy Registrar to certify costs under Rule 68A of the provisions of the Advocates (Remuneration) order as follows:

- (i) Instruction fees - Shs.382,124/=
- (ii) Disbursement – Sh.600/=
- (iii) Filing fees and summons – Sh.20,125/=
- (iv) Request for judgment and summons – Sh.675/=

The Plaintiff's counsel thereafter initiated execution process and warrants of attachment were issued on 22nd January 2007 which provoked the instant application. It is Mr. Odera's submission that the amendment was made without notice to the Defendant and therefore was irregular which made the entire process of execution irregular and the same should be set aside. While the Plaintiff submits that the withdrawal of the general damages was proper so that the sum of Shs.22,808,248/= being a liquidated

claim the execution was proper.

What is most disturbing in this case is that the withdraw of the claim for general damages was done while the proceedings to set aside the judgment was in the process and had been argued at length.

There was an interim stay of execution pending the hearing and determination of the application to set aside the default judgment which lapsed on 4th December 2006 but was not extended due to oversight on the part of the Defendant.

Due to this procedural technicality the Plaintiff seized opportunity to execute. This was not proper because the nature of the relief sought required formal proof since the claim arises out of a contract of employment which requires the Plaintiff to prove that she was employed, and the nature of the terms and conditions of service and whether the termination breached the terms of employment.

Where the employer and the employee enter into a service contract which stipulates a termination clause or notice to terminate the employment, the employer and the employee intend to be bound by the termination clause or notice regardless of the nature of the employment.

Following the unlawful termination of such service of contract there is the breach of that contract and the nature of compensation or indemnity or general or special damages call it what you may, is the loss the employee would incur during the stipulated period of the termination clause or notice.

There is no way such service of contract can amount to liquidated claim because the Plaintiff would be required to prove how the terms of his employment were breached and the measure of compensation if any.

A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be ascertained or capable of being ascertained as a mere matter of arithmetic.

If ascertainment of a sum of money even though it is specified or named as a definite figure requires investigation, then the sum is not a debt or liquidated demand but constituted damages which must formerly be proved.

A claim for termination of employment would require formal proof and therefore execution without formal proof was irregular.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. At all events it seems to me that the Respondent is merely standing on bare technicalities. Nobody has a vested right in procedure and a court must at least at the present day, strive to do substantial justice to the parties undeterred by technical procedural rules.

The Respondent was aware that the default judgment had been challenged and the application to set it aside had been heard almost to conclusion and yet when her application to examine the deponent of the affidavit in support of the application was dismissed and by oversight the interim orders were not extended, she went straight to initiate execution process. It is not to be interest of justice for an honest litigant to be defeated by any mere technicality, any slip or any mistaken step in his litigation.

The principles on which the court grants a stay are well settled. Two conditions have to be satisfied by the Applicant: first it must show that the pending application dated 25th January 2007 is arguable, and secondly, it must also show that if stay is withheld the application if successful will be rendered nugatory.

The Applicant has satisfied these conditions. This application is therefore allowed in terms of prayers 4 and 6 of the Notice of Motion dated 24th January 2007.

Dated and delivered at Nairobi this 15th day of May, 2007.

J.L.A. OSIEMO

JUDGE