



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

CIVIL CASE 573 OF 2004

PRISCILLA NYAMBURA NJUE (t/a NAIROBI MOSCOW AIRWAYS)
.....**PLAINTIFF**

VERSUS

COUNTRYSIDE SUPPLIERS LTD.....DEFENDANT

KENYATTA NATIONAL HOSPITAL.....GARNISHEE

R U L I N G

On 8th March, 2005 summary judgment was entered for the Plaintiff herein against the Defendant. On 13th September, 2005 a garnishee order *nisi* was issued; the same was made absolute on 26th October, 2005. It appears that the Garnishee has already paid the greater part of, or the full, decretal sum, to the Plaintiff.

The Defendant has now come to court by chamber summons dated 9th November, 2005 seeking two main orders:-

1.
2. **That the garnishee order absolute issued on 26th October, 2005 be stayed pending hearing and determination of HCCC No. 526 of 2005 between the Plaintiff and the Defendant filed on 23rd September, 2005, and which is pending before this court.**
3. **That in the alternative and without prejudice, the whole decretal sum herein be deposited in a joint account pending hearing and determination of the aforesaid HCCC No. 526 of 2005.**
4.

The application is said to be brought under Order 21, rule 25 of the Civil Procedure Rules and also under section 3A of the Civil Procedure Act, Cap. 21. All other, unstated, enabling provisions of the law are invoked. It is premised upon the grounds:-

- (i) ***that the Judgment/Debtor has duly filed suit against the Decree/Holder, being HCCC No. 526 of 2005, which has a high probability of success;***
- (ii) ***that the Decree/Holder has taken out warrants and may execute the decree herein;***
- (iii) ***that in the event that the Judgment/Debtor succeeds in the suit he will have been prejudiced by***

being denied the use and/or investment of his money;

(iv) that if the Judgment/Debtor succeeds in his suit the amount awarded to him can be off-set against the sum awarded to the Decree/Holder in the present suit;

(v) that the Decree/Holder's means of income are unknown and the Judgment/Debtor is therefore likely to suffer damage and loss unless stay is granted; and

(vi) that the stay sought will not prejudice the Decree/Holder in any way.

There is a supporting affidavit sworn by one JOHN MUTUTHO, the Managing Director of the Defendant/Judgment-Debtor. To this affidavit are annexed, *inter alia*, the plaint in HCCC No. 526 of 2005.

The Decree-Holder has opposed the application upon the grounds set out in her replying affidavit filed on 16th November, 2005. Those grounds are, *inter alia*, that the application is incompetent, res judicata, an afterthought and also an abuse of the process of the court. It is also pointed out that in HCCC No. 526 of 2005 the Defendant/Judgment-Debtor is claiming from the Plaintiff/Decree-Holder the very sum of money, KShs. 5,095,000/00, that was awarded to the Plaintiff/Decree-Holder in the present suit. It has further been pointed out that the latter suit raises substantially the same cause of action as in the present suit and that all the issues it raises were tried and determined in the present suit.

I have considered the submissions of the learned counsels appearing. Rule 25 of Order 21 provides as follows;-

“25. Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”

In the instant case the decree has already been substantially executed. Only a small portion of the decretal sum, if at all, remains to be paid. In these circumstances the court would be reluctant to grant an order of stay.

The history of this matter also militates against granting of the orders sought. Summary judgment was entered in favour of the Plaintiff on 8th March, 2005. The Defendant then filed an application to set aside that summary judgment. That application was refused on 8th April, 2005. The Defendant then applied under Order 20, rule 11 of the Civil Procedure Rules for leave to liquidate the decretal sum by installments. That application was refused on 1st August, 2005, the court having found that the Defendant was neither honest nor trustworthy. The Defendant then filed HCCC No. 526 of 2005 before this court on or about the 23rd September, 2005. In that suit it claims the very sum of money awarded to the Plaintiff herein against it. If it had a genuine claim against the Plaintiff it would have raised it in a counter-claim in the present suit. It did not do so. It seems to me that the intention of the Defendant in filing that suit is to obstruct the Plaintiff in realization of her judgment herein, something that it was unable to achieve in its many applications herein already referred to. This cannot be permitted. At any rate, as already observed, the decree is already substantially, if not wholly, paid.

Having considered all matters placed before the court I find no merit in this application. It is hereby dismissed with costs to the Plaintiff. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 2nd DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 3RD DAY OF MARCH, 2006.