REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 24 of 1995

SAMUEL KIAMBI RIMBERIA……APPELLANT/APPLICANT

V E R S U S

M'INOTI M'MWIRICHIA……..RESPONDENT

R U L I N G

1. The Application dated 22.2.2006 is premised on Order XX Rule 18 of the Civil Procedure Rules and the Applicant seeks orders as follows:

(i) …….

(ii) …….

(iii) That the court be pleased to make an order for set – off of the applicant's decree against that of the Respondent in Originating Summons No. 4 of 1985 and HCCA No. 24 of 1995.

(iv) That the Court be pleased to make such further orders as may meet the ends of justice.

(v) That costs be provided for .

2. The grounds in support of the Application are that:-

(a) The applicant obtained costs of Ksh.95,940/- in Originating summons No. 4 of 1985, against the Respondent of which todate has never been paid.

(b) The Respondent in HCCA 24 OF 1995, obtained costs of Ksh.103,204.50 cts against the Applicants, which todate has not been paid.

(c) That the two decrees comparing so closely and having emanated from the same dispute should be set-off against each other.

3. The same grounds are repeated in the short but precise supporting Affidavit of Samuel Kiambi Rimberia sworn on 22.2.2006.

4. The Replying Affidavit of M'Inoti M'Mwirichia gives a detailed history of the dispute and all the matters deposed to are conceded by Mr. Kibanga, Advocate for the Applicant, save paragraph 12 thereof

where the Respondent denies that he was ordered to pay the costs arising out of HCCC 4/1985 (O.S.). It is agreed however that the Applicants were ordered to pay the costs of the Appeal amounting to Ksh.85,197.00.

5. The only question before me is whether this court can make an order of set off in view of Order XX Rule 18 as read with Order VIII Rule 2 of the Civil Procedure Rules. In effect I agree with Mr. Kiogoa for the Respondent that the two must be read together for a fair decision to be made. Order VIII Rule 2 provides as follows:-

"A defendant in a suit may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof."

Order XX Rule 18 provides as follows:

(1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provision of this rule shall apply whether the set-off is admissible under Rule 2 of Order VIII, or otherwise."

6. Mr. Kioga argues that a set-off is in the nature of a counter-claim and it must be proved as a suit and Judgment pronounced on it under Order VIII rule 2 and then the decree is drawn in terms of Order XX rule 18. It is his argument further that the Applicant has not obtained a decree in this manner and he cannot be granted the orders for a set-off. Mr. Kibanga counters this argument by reference to Order XXI Rules 14 and 15 which are in respect of execution in case of cross-decrees which with respect I find totally irrelevant to the principle of set-off which is the subject of this application.

7. I have set out the two Rules relevant to set off and I am persuaded that Mr. Kioga is right. The opening words of Order XX rule 18 are;

"**Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff**…."

8. How is a defendant allowed a set – off? It is allowed a set-off by the procedure set out in Order VIII rule 2 since a set-off "**shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit."**

9. I do not understand Order XX Rule 18 to be itself the Rule to enable a court "**Make an Order for set-off**" as are the words used in the instant Application. Order XX rule 18 is to enable "**recovery of any sum which appears to be due to either party,+"** once a final judgment in that regard has been made. Cross-decrees can be satisfied under Order XX1 Rules 14 and 15 but that is not what the Applicant wants hence my insistence that it cannot apply to this Application.

10. Without the Applicant going through known procedures for obtaining a set-off I do not see how the Application as framed can be granted. Even if Order XX Rule 18(3) is invoked to save the Application, and it has not, I am still persuaded that since there is even no agreement that costs are payable in the manner emisaged in a set-off, this application is still incompetent.

11. Before I dismiss it, I should only add that whether or not there are in fact cross-decrees in separate suits is a matter for another forum. I say so because the Applicant says that each party has a decree for costs against the other, while the Respondent denies that there is a decree held against him by the Applicant a matter I cannot determine in the instant Application.

12. For my part and with regard to what is properly before me, I find that the Application dated 22.2.2006 is incompetent and misguided and must now be dismissed with costs to the Respondent.

13. Orders accordingly.

Dated, signed and delivered in open court at Meru this 11th Day of July 2006

ISAAC LENAOLA

JUDGE

In the presence of

Mr. Kimathi holding brief for Mr. Kibanga Advocate for the Applicant.

Mr. Ogoti holding brief for Mr. Kioga Advocate for the Respondent.

ISAAC LENAOLA

JUDGE