



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO.432 OF 2003

HARRISON K. MUAMBI.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

RULING

This is an application (by Notice of Motion dated 12th July, 2004) for stay of proceedings herein pending hearing and determination of an intended appeal against the order of this court (Hon. Njagi, J) dated 2nd June, 2004 by which the Defendant's counterclaim contained in paragraphs 3D and 3E of its amended statement of defence and counterclaim dated 20th January, 2004 was struck out. The application is brought by the Defendant under rule 4 of Order 41 of the Civil Procedure Rules (the Rules) and also under Section 3A of the Civil Procedure Act, Cap.21 (the Act) upon the grounds that the Defendant obtained leave to appeal on 02.06.04 and filed notice of appeal on 04.06.04; that it has applied for copies of the proceedings and material ruling; that it would not be expedient for the Plaintiff's suit to proceed while the Defendant pursues its intended appeal; and that it is otherwise in the interests of justice that the stay sought be granted. Those grounds are set out more fully and argued in the affidavit of **SAID CHITEMBWE** sworn on 8th July, 2004 in support of the application.

The application is opposed by the Plaintiff upon the grounds set out in the replying affidavit sworn by **PHILIP M. MULWA** on 6th September, 2004. Those grounds are, mainly, that the Defendant has not demonstrated that it will suffer substantial loss unless the order of stay is granted; that the Defendant's counterclaim is in itself a distinct claim which has nothing to do with the Plaintiff's claim; and that the stay sought can only be granted under the order appealed from and therefore stay of the entire proceedings is unwarranted.

The arguments of learned counsel appearing were generally along the stated positions of the parties. However, the Plaintiff's counsel added that the Plaintiff's claim and the Defendant's counterclaim arose out of the same series of transactions; that in prosecuting his claim the Plaintiff will have to adduce evidence that must necessarily touch upon the counterclaim; and that if the intended appeal were to be successful and the counterclaim reinstated the court will be faced with a situation where it will have to rehear the same evidence again. Judicial time will thereby have been wasted. Counsel further submitted that the court's discretion to order stay of proceedings under rule 4 of Order 41 is unfettered, unlike the discretion to order stay of execution, which is fettered by sub-rule (2) of rule 4 aforesaid. Counsel sought to rely on the decision of this court (Ringera, J as he then was) in **Winding -up Cause No.43 of 200 0 (un reported), In the Matter of Global Tours and Travels Limited**, which was quoted with approval by Mwera, J in another case of this court, **HCCC NO.290 of 2002 (Unreported), JeremiaMatoke vs Kenya Commercial Bank**. Finally, learned counsel for the Defendant submitted that the Defendant's intended

appeal is arguable and not frivolous.

The position of learned counsel for the Plaintiff was that sub-rule (2) of rule 4 applied equally to applications for stay of proceedings as to applications for stay of execution, and the Defendant had failed to demonstrate that it stood to suffer substantial loss unless the order of stay was granted. He submitted further that the counterclaim was based upon a transaction different from that giving rise to his own action and that evidence in support of that action will not touch the Defendant's counterclaim. In the event that the counterclaim is reinstated if the intended appeal succeeds, it will not entail hearing the Plaintiff's action all over again.

I have considered the above submissions. It seems to me that sub-rule (2) of rule 4 of Order 41 has application only to applications for stay of execution and not to applications for stay of proceedings. The opening phrase of that rule is plain enough to preclude any other interpretation. But the greater concern as far as I am concerned is whether rule 4 aforesaid covers the proceedings sought to be stayed in this application. That rule opens in sub-rule (1) with the words –

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except.....”

The present application seeks stay of proceedings in respect to the Plaintiff's claim. Can those proceedings be said to be proceedings under the order intended to be appealed from herein? That order dismissed the Defendant's counterclaim. It did not concern or touch the Plaintiff's claim, which claim should be able to proceed independently of the order dismissing the Defendant's counterclaim or its intended appeal. Proceedings in respect to the hearing of the Plaintiff's claim therefore cannot be proceedings under the order of 2nd June, 2004 by which the Defendant's counterclaim was dismissed. I so hold. To my mind the phrase **“*proceedings under a decree or order a ppealed from*”** must surely refer to such proceedings as may be taken pursuant to or consequent upon the decree or order appealed against. To the extent that the application is brought under rule 4 of Order 41, it is incompetent, and I so hold.

But the application is also brought under Section 3A of the Civil Procedure Act. I think that the court can in a suitable case entertain under that Section an application for stay of proceedings if such an order will be necessary for the ends of justice and if the application cannot be made under any other provision. In that event the discretion of the court will be unfettered, subject to it being exercised judicially. I have perused the amended plaint dated 22nd August, 2003 and the amended defence dated 23rd January, 2004. There is no justifiable reason to keep the Plaintiff from prosecuting his action. Such prosecution cannot in any way prejudice the Defendant in its prosecution of its counterclaim should its intended appeal succeed. Failure or success of the Plaintiff's action will not impact upon the Defendant's counterclaim, should it be reinstated. And, ultimately, should the counterclaim succeed or fail, if reinstated, the Plaintiff's action, whether already successful or dismissed, will not be affected. The Plaintiff's action and the counterclaim appear to me to be founded on separate and distinct causes of action, though related.

In the premises I find no merit in the application. It is hereby dismissed with costs.

Order accordingly.

DATED AND SIGNED AT NAIROBI

THIS 6TH DAY OF OCTOBER 2004

H. P. G. WAWERU

JUDGE

