



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1048 OF 1999

KAMALIZA SECURITY GUARDS PLAINTIFF

VERSUS

ZAKHEM CONSTRUCTION (K) LTD. DEFENDANT

RULING

This is an application for the stay of execution of an order made by this court on 8.12.2000 whereby it was decreed that the applicant who is the defendant in this matter do pay to the respondent (the Plaintiff) the sum of Shs.2,632,656.25 together with interest thereon at 18% per annum from 30.6.1997 till payment in full. The application is supported by an affidavit sworn by Adnan Annous, a director of the applicant and is based on the following grounds:-

- (a) That the amount claimed by the applicant in HCCC No. 1191 of 1998 can be used to set off the decretal amount in this suit;***
- (b) That the applicant will suffer substantial loss and damage if stay is not granted;***
- (c) That the applicant has a good case in HCCC No. 1191 of 1998 in which the applicant has sued the respondent herein; and***
- (d) That the applicant is ready and willing to compensate the plaintiff for (any) costs that may be occasioned by the delay in the determination of HCCC No. 1191 of 1998.***

In the affidavit in support of the application, Mr. Annous depones that the suit filed by the applicant (the plaint is annexed thereto) is for the recovery of Shs.7 million and that the advocates for the parties are proceeding to set the matter down for hearing. In those circumstances, he further depones, it would be fair and just to await the outcome of the decision in the suit so that the applicant can set-off the decretal amount issued in this suit against the award that may be made in HCCC No. 1191 of 1998.

The respondent opposes this application. In a replying affidavit sworn on its behalf by a certain Mr. Julius Mwangi, it is admitted that there indeed is another suit pending between the parties herein being Nairobi HCCC No. 1191 of 1998 but that suit is said to be wholly unrelated to the instant suit. To confirm the truth of that statement, Mr. Julius Mwangi further states that on 29.11.1999, the applicant herein had made an application in this court to consolidate the two suits but that application was dismissed by Hon. Commissioner Jean Gacheche on 22.3.2000 on the ground, inter alia, that the two suits were unrelated on both points of law and fact. Because of that ruling the Respondent contends that the issue of set off cannot arise and accordingly the applicant has not shown sufficient cause why execution of the decree should be stayed.

This application is made under two different Orders of the Civil Procedure Rules namely Order XXI

Rule 22 and Order VIII Rule 2. Order VIII Rule 2 deals with set-offs and counter-claims which a defendant may raise as a defence in the same suit and which have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit. Clearly the rule has no application in a situation such as the instant case where the parties are involved in litigation in two different suits filed in two separate courts. Given that position, I agree with the respondent that the issue of a set-off does not arise.

With regard to O.XX Rule 22 this court has power in suitable cases to stay execution pending the determination of another suit between the same parties. In that respect, it is my view that the case of *Halfani v. Hamisa Binti Athumani* (1962) E.A. 761 (which was cited by learned counsel for the applicant, Mr. Tindi, in support of his contention that a stay of execution should be granted pending the determination of HCCC No. 1191 of 1998) was based on O. XXI Rule 29 of the Civil Procedure Rules which said provision was repealed by Legal Notice No. 119 of 1975. The authority is therefore of no assistance to this court in the resolution of the issue at hand. However O. XXI Rule 25 provides:-

“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.”

The above is the relevant rule under which this application ought to have been made.

In considering whether or not to grant a stay under that Rule, I think the principles stated by the Court of Appeal in England in the case of *Burnet v. Francis Industries plc* are apt. The facts of that case were that:-

“The plaintiff obtained judgment against the defendants, his former employers, for £49,500 compensation for the premature termination of his contract of service. S, a company associated with the defendants, had an outstanding claim for over £2m against the plaintiff and eight other defendants for alleged negligence. The defendants accordingly applied under RSC Ord 47, r I(1) for a stay of execution of the judgment pending the outcome of S’s claim against the plaintiff. The judge refused to stay execution and the defendants appealed to the Court of Appeal.”

RSC Ord 47 r I(1) (a) which the Court considered provided that:-

“Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution - (a) that there are special circumstances which render it inexpedient to enforce the judgment or order ... then ... the Court may by order stay the execution of the judgment ...”

It is clear that the English Rule, just like our Rule 25 of Order XXI, conferred upon the court the discretion to stay the execution of a judgment if there were special circumstances which rendered it inexpedient to enforce the order. But in refusing to exercise its discretion to grant a stay of execution under the Rule, the English Court, however, held:-

“Where a plaintiff obtained judgment against a defendant and there was an unresolved claim against the plaintiff by a party associated with the defendant, the court had power under RSC Ord 47. r I(1)(a), on the application of the defendant, to grant a stay of execution of the plaintiff’s judgment to await the outcome of the other party’s claim against him if there were special circumstances and the relationship of the parties was such that a stay ought to be granted.

Furthermore in deciding whether special circumstances existed the facts to be

considered included (a) the nature of the plaintiff's claim, (b) the extent of identity between the defendant and the other party, (c) the interrelationship of the respective claims by the plaintiff against the defendant and by the other party against the plaintiff, (d) the strength of the other party's claim, (e) the size of the other party's claim relative to the plaintiff's, (f) the likely delay before the merits of the other party's claim against the plaintiff would be decided, (g) the extent of the prejudice to the plaintiff if he was denied the fruits of his judgment until the other party's claim was determined and (h) the risk of prejudice to the other party if the defendant were to make payment to the plaintiff under the judgment. The court went on to find that on the facts, there were no special circumstances which justified a stay of execution of the plaintiff's judgment pending determination of S's claim against the plaintiff. The appeal was accordingly dismissed."

In the instant case the plaint annexed to the affidavit sworn by Mr. Adnan Annous indicates that the applicant's claim against the respondent in HCCC No. 1191 is based on negligence whereby it is averred that the applicant lost property worth Shs.7 million through the negligence of the respondent's employees which said loss it is alleged is recoverable from the respondent pursuant to an undertaking contained in an agreement between the parties. That agreement is naturally not part of the pleadings; similarly the facts supporting the averment are not available at this stage of the proceedings. Accordingly, it is not possible at this stage of the proceedings to verify the assertion by the applicant that it has a good case. Whatever the merits of the applicant's case against the respondent are in HCCC 1191 of 1998 is clear; there can be no certainty that the suit will ultimately be decided in the applicant's favour and, speaking for myself and obviously without in any way attempting to prejudice the applicant's chances of success in HCCC No. 1191 of 1998, I cannot see how any damages can be granted if the plaint remains in the form it now is. The situation is not in any way improved by the fact that as of now, no hearing date has been taken and for all I know it may take several more years before the matter is finally finalised. Given all that it would be wholly unfair and unjust to deny the respondent the enjoyment of the fruits of its judgment by connecting the recovery of the decretal amount in this suit with another unrelated and unconnected suit which (speaking for myself) appears to have no hope of succeeding.

For all the above reasons, I do not think that there are any special circumstances or reasons which justify a stay of execution of the decree in this suit pending the hearing and determination of HCCC No. 1191 of 1998. The application is accordingly dismissed with costs.

Dated at Nairobi this 4th day of May, 2001.

T. MBALUTO

JUDGE