



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 423 OF 2015 (O.S.)

UNITED BANK FOR AFRICA (TANZANIA) LTD.....JUDGMENT CREDITOR

-VERSUS-

METRO PETROLEUM TANZANIA LIMITED1ST JUDGMENT DEBTOR

BILL KIPSANG ROTICH2ND JUDGMENT DEBTOR

FLORENCE CHEPKOECH3RD JUDGMENT DEBTOR

PREMIUM PETROLEUM CO. LTD.....4TH JUDGMENT DEBTOR

FAMILY BANK LIMITEDGARNISHEE/INTERESTED PARTY

RULING

1. This dispute emanated from Tanzania. Judgment was entered in the High Court Tanzania Dar es salaam in Commercial Case No. 98 of 2015, on 15th October 2014, in favour of United Bank for Africa (Tanzania) Ltd (hereinafter UBA). That judgment was against Metro Petroleum Tanzania Limited, Bill Kipsang Rotich, Florence Chepkoech and Premium Petroleum Company (hereinafter the Judgment Debtors). This Court registered that judgment on 13th November 2017 under the Foreign Judgment (Reciprocal) Enforcement Act Cap 43. The Judgment Debtors filed a Chamber Summons application dated 20th December 2017. By that application orders were sought to set aside the registration of the foreign judgment on various grounds one being that the judgment was not one recognized under Cap 43.

2. This Court by its ruling dated 13th June 2018 dismissed that application with costs.

3. Following the registration of the foreign judgment various orders were issued culminating in the consent of 6th March 2019. This was an order made in the presence of UBA, the Judgment Debtor and the Garnishee/Interested Party, the Family Bank Ltd. The Consent Order was in respect of settling the terms of auction of the Judgment Debtors' immovable property, here in Kenya, in satisfaction of the judgment hereof and in payment of the Garnishee. One of the terms of sale of judgment debtors' immovable property was that the auction of it was to take place after 60 days. The auction date was set for 18th June 2019.

4. The Judgment Debtors move this Court by a Chamber Summons application dated 17th June 2019. That application was presented before the Duty Judge on 18th June 2019 the Duty Judge granted orders staying the execution of the Judgment herein.
5. That application was heard inter parties before me on 24th July 2019. It is one of the two application this ruling relates to.
6. By that application the Judgment Debtors seek the following orders:
- a. That the statutory stay of execution under Section 8(4) (b) of the Foreign Judgment (Reciprocal) Enforcement Act Chapter 43 of the Laws of Kenya) upon registration of a foreign judgment as a judgment of the High Court of Kenya on filing of an application for setting aside of the Order of Registration of the foreign judgment be and is hereby noted in the present case and Court filed;*
 - b. That as a consequence of the statutory stay of execution under Section 8(4)(b) of the Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43 of the Laws of Kenya) upon filing of the present application to set aside, an order be and is hereby issued staying all execution of the registration foreign judgment commenced herein, particularly the execution by judicial sale by auction of L.R. No 209/8192/2 Riverside Drive, slated for 18t June 2019, until the application is heard and determined;*
 - c. That the order of the Honourable Court of 13th November 2017 issued herein registering and adopting the judgment of High Court of Tanzania issued in Dare es Salaam High Court High Court Commercial Case No. 98 of 2014 United Ban of Africa (T) Limited Vs Metro Petroleum Tanzania Limited & Others, as a judgment of the High Court of Kenya, with all consequential orders be and are hereby set aside.*
7. That application is brought under Section 11(1)(a) and (b) and (2) of the Cap 43.
8. The application is supported by the affidavit of Bill Kipsang Rotich one of the Judgment Debtors. He deponed that he and his co-Judgment Debtors had been permitted by the Court of Appeal of Tanzania to file an appeal against the judgment of Tanzania High Court (Case No. 98 of 2014) which judgment was registered in this matter. Accordingly, and under the provisions of Section 8(4)(b) of Cap 43 they were entitled to statutory stay of execution until the application is determined.
9. The Learned Advocate Mr. Bwire, for the Judgment Debtors submitted that on the Tanzania Court of Appeal granting leaving to appeal the Judgment Debtors filed an appeal being Civil Appeal No. 147 of 2019 for the following orders:
- a. ‘To quash and set aside the whole decision of the High Court Commercial Division in Miscellaneous Commercial Application No. 96 of 2015, and to allow Chamber Summons application dated 24th July 2015.*
 - b. This Honourable Court be pleased to set aside the default judgment and decree made on 15th October 2014 in Commercial Case No. 98 of 2014.*
 - c. Upon setting aside the said default judgment and decree mentioned above, the Appellants be allowed to file their written statements of defences and the suit in Commercial Case No. 98 of 2014 progresses to its finality.*
 - d. Costs of this Appeal be in the main suit.*
 - e. Any other relief that the Honourable Court may see just in favour of appellants’.*
10. It is on the basis of those prayers that the Learned Advocate Mr. Bwire submitted that the Judgment

Debtors have a pending appeal of the judgment which was registered hereof. The Learned Advocate sought to persuade me to follow the holding in the case **QUALITY CENTRE LIMITED V USL (T) LIMITED (FORMERLY KNOWN AS UCHUMI SUPERMARKET TANZANIA) LIMITED & ANOTHER (2017) eKLR** where Justice F. Tuiyott expressed himself as follows as he discussed the provisions of Cap 43:

“The Provisions of Stay of recognized Judgements as set out in paragraph 8(4) of The Act are in my view generous to a Judgment Debtor. In the wording of those Provisions the Court, unless it otherwise orders, is obliged to grant stay in the circumstances set out in subsections (a) and (b). So that as a General rule, in respect to subsection (b), stay will as a matter of course be granted once an application that the registration be set aside is made under Section 10 or Section 11, until the Application is finally determined.

The rationale would be, I suppose, that a Judgment Debtor would be prejudiced and unduly inconvenienced if execution which is eventually set aside, was to be allowed to proceed against him.

Now a Section 11 Application is wide and allows a Judgment Debtor to apply for setting aside of the registration of a Judgment where an Appeal is pending against the original Judgment (11 (i)(a)), or where there the Judgment Debtor is entitled to and intends to appeal (11 (i)(b)). And lastly where the matter in the original judgment is the same as that in respect to which proceedings were instituted earlier in Kenya and are pending (11(i)(c).”

11. I subscribe to that decision.

12. The second application under consideration was filed by UBA. It is dated 18th June 2019. By it UBA seeks the following orders:

a. That pending the hearing and determination of the Respondents’ Chamber Summons application dated 17th June 2019, and the Applicant’s application herein, the Ex Parte Stay of Execution Orders issued herein on 17th June 2019 be set aside Ex Debito Justitiae.

b. That the Respondent’s’ application dated 17th June 2019 be struck out, and the orders granted on 17th June 2019 for stay of execution be reviewed and or set aside.

c. That the costs of the Applicants/Decree Holder’s application dated 17th June 2019 and of the Applicant’s application herein be borne by the Respondents.

13. Those prayers are based on the grounds that the stay of execution granted to the Judgment Debtors on 17th June 2019 was based on false misrepresentation, the falsehood was that Judgment Debtors had been granted leave to appeal against the Judgment of Tanzania High Court; that what the Court of Appeal in Tanzania granted was leave for the Judgment Debtors to appeal against a dismissed application; that the application by the Judgment Debtors is similar to the one filed by them date 20th December 2017 for which ruling was delivered on 13th June 2018; that stay of execution granted on 18th June 2019 was without jurisdiction due to the doctrine of *res judicata*; and that stay was made in disregard of the previous consents in this matter between the parties.

14. By his submissions Learned Advocate for UBA, Mr. Mwangi stated that Section 8(4) and 11 of Cap 43 only applies when there is an application that the registration of the foreign judgment be set aside. Further that the Judgment Debtors had deliberately misrepresented to this Court that they were granted, by the Court of Appeal in Tanzania, leave to file an appeal against the judgment which was registered herein. Learned advocate Mr. Mwangi also submitted that the application before Court was *res judicata* due to the Ruling of 13th June 2018 of this Court which Ruling was of a similar application. In that regard he relied on the case **UHURU HIGHWAY DEVELOPMENT LIMITED V CENTRAL BANK OF**

KENYA & 2 OTHERS (1996) eKLR thus:

“Where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”

ANALYSIS AND DETERMINATION

15. I have considered both applications, the affidavit evidence and submissions.

16. Having done so I think the first port of call is to consider the opposition raised on behalf of UBA that the Judgment Debtors Chamber Summons application dated 17th June 2019 is res judicata.

17. The Judgment Debtors in making their application dated 29th December 2017, and in seeking, by that application, to set aside the registration of the judgment of High Court Tanzania relied on an order granted by Tanzania High Court granting them leave to appeal. It is not clear to me what became of that order.

18. In the present application again the Judgment Debtors seek to set aside the registration of the Tanzania High Court Judgment in this matter on the ground that 14th June 2019 the Judgment Debtors were granted leave to appeal against a dismissed application, by the High Court, and to appeal against the judgment of Tanzania High Court. The Judgment Debtors have indeed filed that appeal, I have reproduced the prayers of that appeal here above.

19. It follows that although the prayers that the Judgment Debtors seek, the setting aside of the registered judgment, are the same as the previous application they are however based on very different orders one being based on the orders of Tanzania High Court and the other being based by the order of the Court of Appeal of Tanzania. To that end I find and hold the doctrine of *res judicata* does not apply.

20. I also find, having sighted the Judgment Debtors’ appeal filed in the Court of Appeal of Tanzania, that the Judgment Debtors are indeed appealing against the judgment registered hereof which judgment is in the process of being executed by UBA. The Judgment Debtors have not, therefore, perpetrated falsehood in this matter. I also find that the consent parties entered into in respect to execution are not a bar to the Judgment Debtors’ application.

21. The law relating to the applications before me is to be found in Cap 43.

22. Section 3 of Cap 43 provides the type of judgments which are subject to Cap 43. They are judgments of designated Court, either civil or criminal or an award of arbitration where payment is due or moveable property is to be delivered.

23. Section 3(2) of Cap 43 then provides:

This Act applies to a judgment referred to in subsection (1) if it—

(a) requires the Judgment Debtor to make an interim payment of a sum of money to the Judgment Creditor; or

(b) is final and conclusive as between the parties thereto,

but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the Courts of the country of the original Court.

It will be seen from those provisions that Cap 43 applied to judgments which are final and conclusive, which is the case here notwithstanding that an appeal is pending. It follows that even though the Judgment Debtors' appeal, against the judgment of High Court of Tanzania, is pending Cap 43 does indeed apply.

24. Section 8(4)(b) of Cap 43 provides under which circumstances a registered foreign judgment will be stayed. That Section states:

“(4) Unless the High Court otherwise orders, execution upon a registered judgment shall be stayed—

(a).....

(b)where an application that the registration be set aside is made under Section 10 or Section 11, until the application is finally determined.”

25. Section 11 of Cap 43, mentioned in Section 8 as the basis for staying foreign judgment, provides:

“Effect of appeals, etc.

(1) An application may be made by or on behalf of the Judgment Debtor to set aside the registration of a judgment on the ground that—

(a) an appeal is pending against the judgment; or

(b) he is entitled and intends to appeal against the judgment; or

(c) the matter in relation to which the judgment was given is the same as that in respect of which proceedings, instituted prior to the institution of the proceedings in the original Court, are pending in a Court in Kenya.

(2) Where the High Court is satisfied that the grounds specified in subsection (1)(a) or (b) are established, it may, on such terms as it thinks just, set aside the registration or adjourn the application until the expiration of such period as appears to the High Court to be reasonably sufficient to enable the proceedings, and any appeal therefrom to a competent tribunal, to be disposed of.” (Emphasis mine)

26. I am satisfied that the Judgment Debtors have lodged an appeal at the Court of Appeal Tanzania. To be precise it is Civil Appeal No. 147 of 2019 at the Court of Appeal of Tanzania at Dar es salaam Registry.

27. In my view stay of execution, in view of the above, is merited. I however decline at this stage to set aside the foreign judgment registered herein. I will however grant stay of execution of it. I will give, at the reading of this ruling a mention date for the parties to report to the Court on the status of the appeal at the Court of Appeal Tanzania.

28. I grant the following orders:

a. The Judgment of the High Court Tanzania Dar es salaam Commercial Case No. 98 of 2015 which was registered in this matter on 13th November 201 is hereby stayed until further

orders of this Court.

b. Each party shall bear their own costs of the application by Chamber Summons dated 17th June 2019 and the Notice of Motion dated 18th June 2019.

c. A mention date will be given for parties to report to this Court the status of the appeal in the Court of Appeal Tanzania at Dar es Salaam Civil Appeal No. 147 of 2019.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of NOVEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR JUDGMENT CREDITOR

..... FOR 1ST JUDGMENT DEBTOR

..... FOR 2ND JUDGMENT DEBTOR

..... FOR 3RD JUDGMENT DEBTOR

..... FOR 4TH JUDGMENT DEBTOR

..... FOR GARNISHEE/INTERESTED PARTY