



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 409 of 2008**

**SAJJADHUSAN HASSANALI**

**GULAMHUSEIN KHAKI.....1<sup>ST</sup> PLAINTIFF**

**ABDULKASSIM HASSANALI**

**GULAMHUSEIN KHAKI.....2<sup>ND</sup> PLAINTIFF**

**MAHMOOD HASSANALI KHAKI.....3<sup>RD</sup> PLAINTIFF**

**- VERSUS -**

**ANIL BHARMAL SHAH.....1<sup>ST</sup> DEFENDANT**

**BLUE SEAS FOREX BUREAU LIMITED.....2<sup>ND</sup>**

**DEFENDANT**

**R U L I N G**

By a notice of motion dated 9<sup>th</sup> September 2008, the defendants moved this court pursuant to the provisions of **Sections 3, 3A and 63** of the **Civil Procedure Act** seeking orders of this court to stay the proceedings in this suit pending the hearing and determination of claim No. HQ04X04118 (*hereinafter referred to as the UK Suit*) filed in the High Court of Justice, Queens Bench Division, United Kingdom. The defendants contend that the subject matter of the present suit is the same as the suit filed in the United Kingdom between the same parties. They further contend that the UK suit was filed in 2004 and was set to be heard on 8<sup>th</sup> October 2008. They state that all the preliminary issues, including the settlement of issues for determination, had been concluded and therefore the UK suit shall be heard as scheduled. The application is supported by the annexed affidavit of Anil Shah, the 1<sup>st</sup> defendant.

The application is opposed. Sajjadhusan Hassanali Gulamhusein Khaki, the 1<sup>st</sup> plaintiff swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the court had jurisdiction to hear and determine the matters in dispute and was not bound by the pendency of the UK suit. He deponed that the 1<sup>st</sup> defendant, by his own admission, had ceased to be a director and shareholder of the 2<sup>nd</sup> defendant and therefore he could not purport to act or swear any affidavit on behalf of the 2<sup>nd</sup> defendant. He deponed that the parties to the suit, who were all ordinarily residents in Kenya, conducted their respective businesses in Kenya. He swore that the present suit raised serious questions regarding the legality of the defendants' claim which issues could only be addressed by the Kenyan courts. He urged the court to dismiss the plaintiffs' application with costs.

At the hearing of the application, I heard rival arguments made by Mr. Marube for the defendants and

Mr. Chacha for the plaintiffs. The said counsel, apart from citing several decided cases, basically reiterated the contents of the pleadings filed by the parties in support of their respective opposing positions. I have carefully considered the said arguments presented before me. The issue for determination by this court is whether the defendants established sufficient grounds to enable this court stay proceedings herein pending the hearing and determination of the UK suit. The defendants invoked the inherent jurisdiction of this court in their bid to stay the proceedings herein pending the hearing and determination of the UK suit.

There is no doubt that the subject matter of the UK suit and the present suit, apart from the absence of some of the parties, are substantially similar. Indeed, in their plaint, the plaintiffs have made references to the UK suit. In essence, it appears that the plaintiffs are raising issues regarding the legality, under Kenya law, of the transactions that form the subject matter of the suit. The premise of the defendants' application is that this court should invoke its inherent jurisdiction to stay the proceedings herein pending the hearing and determination of the UK suit which is scheduled to be heard as from 8<sup>th</sup> October 2008.

It is apparent from the pleadings filed that the parties to the suit are all resident in Kenya. They also have connections in the United Kingdom. It was not clear to this court why the defendants chose to file suit against the plaintiffs in the United Kingdom while there is no dispute that the cause of action arose in Kenya. It is the plaintiffs' contention that the defendants filed the UK suit to avoid issues which shall be raised regarding the legality of transactions that are the subject matter of the two suits, which according to the plaintiff are in breach of the Kenyan law. The plaintiffs have raised the said particulars of illegality or breach of law in their present suit.

The complaint raised by the defendants regarding the timing of the filing of the present suit by the plaintiffs, a few weeks prior to the hearing of the UK suit, is meritorious. It was obvious that the plaintiffs filed the present suit to forestall or somehow frustrate the hearing of the UK suit. However, the propriety regarding the timing of the filing of present suit is not an issue that is before this suit for determination. The issue that is before this court for determination is whether the defendants placed before this court sufficient grounds to enable this court stay proceedings herein pending the hearing and determination of the UK suit.

Although the defendants anchored their application on **Section 3A** of the **Civil Procedure Act**, the applicable law is **Section 6** of the **Civil Procedure Act** which provides that:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

**Explanation.** – *The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”*

It is therefore clear that the pendency of a suit in a foreign court involving the same subject matter and the same parties cannot constitute a bar to this court hearing and determining the matter in dispute between the parties. In invoking the inherent jurisdiction in this court, the defendants sought to circumvent the application of **Section 6** of the **Civil Procedure Act**. It is trite that where there is a specific provision of the law governing a particular aspect of a dispute that a party is seeking to have determined, such a party cannot invoke the inherent jurisdiction of the court.

In the present application, it is clear that the fact that there is a pending suit in England between the plaintiffs and the defendants, is not a sufficient ground for the proceedings in this suit to be stayed. Further, as pointed out by the plaintiffs, the defendants either inadvertently or deliberately, failed to annex a copy of the statement of claim to enable this court reach a determination whether the UK suit and the present suit are similar. This court was therefore denied the opportunity of forming an informed opinion based on all the available and necessary documents. Further, this court has jurisdiction to hear and

determine the matters in dispute between the plaintiffs and the defendants since the cause of action arose in Kenya and further since all the parties to the suit are resident in Kenya.

Furthermore, when allegation of breach of Kenyan law has been pleaded by one of the parties, it is only just and fair that a Kenya court hears and determines the issues in dispute. The existence of the present suit is no bar to the parties continuing with the UK suit. In the circumstances therefore, I hold that the defendants established no basis in law to enable this court stay proceedings in the present suit. The application is hereby dismissed with costs to the plaintiffs.

DATED at NAIROBI this 2<sup>nd</sup> day of OCTOBER, 2008.

**L. KIMARU**

**JUDGE**