

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0105-2008
(ARISING FROM HCT-00-CC-MA-074-2007)
(ARISING FROM HCT-00-CC-CS-432 and 536-2006)

DFCU LEASING CO. LTDAPPLICANT

VERSUS

NASOLO FARIDA RESPONDENT

BEFORE HON MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Notice of Motion brought under Section 39 (2) of the Judicature Act, Section 98 of the Civil Procedure Act and Order 52 Rules 1 and 3 of the Civil Procedure Rules for Orders that:-

- (a) The execution of the order made in respect of Misc. Application No 74 of 2007 be stayed till the full and final determination of Civil Suits 432 of 2006 and 536 of 2006 currently pending hearing before this court.
- (b) The costs of the application be provided for:

The grounds for the application are briefly that:-

1. the Respondent is indebted to the Applicant under a lease facility agreement in the sum of Ushs64,003,658/90
2. the issue of the Respondent' indebtedness is the subject of two suits before this Honourable Court.
3. the Respondent has threatened to execute against the Applicant to recover the costs granted under the order.
4. it is in the interest of Justice that this Application be granted.

The Application is supported by an affidavit sworn by Kenneth Akampulira, a legal officer of DFCU Leasing Co. Ltd, the Applicant. He therein avers that Misc. Application No 74 of 2007 was dismissed with costs against the Applicant. Following the dismissal costs for the Respondent were taxed at Ugshs2,000,000/=. He states that the Respondent has threatened execution against the Applicant to recover the taxed costs. He contends that the intended application for execution, if granted, would be unfair and prejudicial as the Respondent is indebted to the Applicant in the sum of Ugshs64, 003,658.90. He states that the indebtedness is the subject of two suits, namely HCCS No. 432 of 2006 Nasolo Farida VS DFCU Leasing Co Ltd and HCCS No. 536 of 2006 Nasolo Farida Vs DFCU Leasing Co Ltd. The two suits are still pending in Court. He further states that the said indebtedness is secured by a mortgage deed executed by the Respondent over land comprised in Kibuga Block 194 Plot 144 and Kibuga Block 14 of 294. Annexure A to the affidavit is a letter by the Respondent's Advocates to the Applicant's Advocates dated 21st February 2008 whereby the Respondent's Advocates are demanding payment of the taxed costs. It states;

"Pleases effect payment of the taxed costs of Ushs2, 000,000/= so that we don't have to resort to execution proceedings against your client. We are waiting for your response on this issue not later than 3rd March 2008."

Presentation was Ms Kyalimpa Olivia for the Applicant and Mr Tugume Moses for the Respondent.

In her submissions Ms Kyalimpa referred to the Applicant's defences in Civil Suit No 432 of 2006 and 536 of 2006 where the Applicant contends that the Respondent owes it a sum of Shs64,003,658/90 and argued that they have a high likelihood of success. She therefore submitted that payment of costs on Misc. Application No. 74 of 2007 should be stayed until the final determination of the suits whereby the taxed costs could be set off from the amount owed by the Respondent to the Applicant.

Mr. Tugume opposed the application. He argued that it was an abuse of court process meant to frustrate the Respondent from getting her costs where she had been a successful party. Further Counsel pointed out that in both HCCS No. 432 of 2006 and No. 536 of 2006 the Respondent is the plaintiff suing the Applicant. The Applicant had neither filed a suit nor a counter – claim seeking to recover the alleged sum of shs64,003,658/09. Counsel argued that in the event the Respondent loses both or any of the two cases the Applicant cannot have judgement in its favour for the above sum. Further counsel for the Respondent argued that the application was speculative, made in anticipation since the Respondent had not yet applied for execution.

On the issue whether an application for stay of execution can be sustained when instituted before an application for execution is made, counsel for the Applicant cited TMK vs Jack Businge and 2 others Misc. Appl No DR. MFP 2 of 1992 (1992) KALR 82. In that case an application of stay of execution was brought under section 101 (now section 98) of the Civil Procedure Act and Order 48 rule 1 (now Order 52) before an application for execution had been instituted. A preliminary objection to hearing of the Application was raised on the grounds that the application was premature and misconceived. Justice Mukanza held that there is nothing inherently irregular in applying for stay of execution where justifiable circumstances exist. See also Design Group Association Vs Bank of Uganda HCCS No. 34 of 1990. Once an award is made

it follows that it is open for execution. Therefore an application to stay the anticipated execution thereof cannot be premature.

As regards to pendency of the two suits, in both suits the Respondent is the plaintiff. The Applicant is the defendant. True the defendant in paragraph 5 (f) of its Written Statement of defence in HCCS No. 536 of 2006 states that the Respondent's loan with the Applicant was outstanding in the sum of Ugshs64,003,658/90. However, in none of the two suits is the above sum or any part thereof counter-claimed by the Applicant. In both Written Statements of Defence there is no counter-claim and the Applicant's prayer in each case, is merely for dismissal of the suit with costs. Though among the agreed issues is the issue:

“Whether the plaintiff was indebted to the defendant and if so to what level by the 17th January, 2001”

no award can be made in favour of the Applicant even if this issue were to be resolved in favour of the Applicant. It is trite that parties are bound by their pleadings. Therefore in such circumstances the issue of set off cannot arise.

Secondly, the order of this court in Misc. App No. 74 of 2007 was to the effect that:

“The application accordingly fails and is dismissed with costs to the Respondent.”

It was not the order of the Court that costs shall be in the cause of the two or either of the suits. In the circumstances this application is intended to make the decree holder wait indefinitely for the fruits of her success. The pendency of the two main suits or the likelihood of all or any of the two suits being resolved in favour of the Applicant is not good cause to justify the exercise of this court's discretion to grant a stay of execution.

In the final result this application is dismissed with costs to the Respondent.

Hon Mr. Justice Lameck N. Mukasa
Judge
19th August 2008