

1980 December 8

[TRIANTAFYLIDIS, P.]

THE SHIP "ALGAZERA",

Appellant-Defendant,

v.

JOHN FRENCH-PARIS AND OTHERS,

Respondents-Plaintiffs.

*(Applications in Civil Appeals
Nos. 6164-6171).*

*Civil Procedure—Practice—Appeal—Stay of execution pending appeal
—Order for sale of ship pendente lite—Stayed subject to compli-
ance with certain conditions within a specified period—No compli-
5* *ance with conditions within such period and no application for
its extension—Ex parte application to Court of Appeal, filed
after expiry of said period, for unconditional order of stay and
for interim order granting stay, pending determination of applica-
tion by summons, refused in the circumstances of this case—
10* *Order 35 rule 18 and Order 48 rules 3 and 8(1)(ee) of the Civil
Procedure Rules.*

On September 23, 1980, the Court made an order for the sale pendente lite of the defendant ship ("the order"). On October 7, 1980, the defendant appealed against the order and, also, applied for its review, under the procedure prescribed by rules 165 and 166 of the Cyprus Admiralty Jurisdiction Order, 1893. On November 19, 1980, the trial Court granted stay of execution of the order on condition that there should be furnished by the defendant security, in the form of a bank guarantee for C£100,000. This condition had to be complied with by December 4, 1980 but defendant has not complied with it due to inability to raise the necessary funds.

By means of *ex parte* applications ("the *sub judice* applications"), filed on December 5, 1980, counsel for the defendant sought an unconditional order staying the execution of the order pending the determination of the above appeal and application for review; but at no time during the period from November 19, 1980, when the trial Judge ordered stay of execution,

till the filing of the *sub judice* applications has he asked this Court to issue, in the exercise of its relevant concurrent jurisdiction, such an unconditional order nor has he filed an application to the trial Judge for an extension of the period within which to comply with the aforesaid condition. 5

Defendant had also filed applications by summons for stay of the order and by means of the *sub judice* applications there was sought, also, in the alternative, an interim order staying execution of the order for sale *pendente lite* until the hearing and determination of the applications by summons. 10

Held, that this is not a proper case in which to grant the present *ex parte* applications for stay of execution though it is correct that they could be made *ex parte* (see Order 48, rule 8(1)(ee) of the Civil Procedure Rules); accordingly it is directed that they should be made by summons (see rule 3 of Order 48). 15

Held (on the alternative application for an interim order) that in the light of the circumstances of this case the interim order will not be granted, especially in view of the fact that the whole period from November 19, 1980 until December 5, 1980, was allowed by the appellant to pass without taking in time any appropriate step. 20

Applications dismissed.

Ex parte applications.

Ex parte applications for stay of the execution of an order for the sale *pendente lite* of the defendant ship. 25

E. Montanios with S. Panayi (Miss), for the defendant.

TRIANTAFYLIDIS P. gave the following decision. By *ex parte* applications, which are identical and were filed on December 5, 1980, the appellant in these appeals applies for stay of the execution of an order made by a Judge of this Court on September 23, 1980, for the sale *pendente lite* of the defendant ship. The stay of execution of the said order is sought until the hearing and determination of these appeals, as well as of applications for review of such order, presumably by means of the procedure prescribed by rules 165 and 166 of our Admiralty Jurisdiction Rules of Court. 30 35

Each of the present applications is supported by an identical affidavit sworn by A. Montanios and dated December 5, 1980. They were heard on December 5, 1980, and my decision has been reserved until today. In the meantime I have duly perused 40

the applications and the affidavit in support of them and I have given careful consideration to all the arguments advanced by counsel in support of them.

It is useful to relate briefly the history of relevant proceedings:

5 The complained of order for sale pendente lite of the defendant ship was made on September 23, 1980, in admiralty action No. 271/79, as well as in admiralty actions Nos. 279/79 to 285/79, and the present appeals against such order were filed on October 7, 1980.

10 The said actions are already fixed for hearing on December 22, 1980, except action No. 271/79 which has been fixed for hearing on January 7, 1981.

15 After the order for sale pendente lite was made on September 23, 1980, notice was given, on September 30, 1980, that the appellant desired to apply for a review of the order and on November 1, 1980, it was agreed by all parties concerned that such review would have to be made by the Supreme Court in its appellate jurisdiction.

20 On October 24, 1980, *ex parte* applications were filed for stay of the execution of the aforementioned order of September 23, 1980; a stay of execution was granted until October 31, 1980, and it was directed that the applications should be made by summons. The applications by summons for stay of execution were opposed by the plaintiffs in the actions, who are the
25 respondents in the present appeals.

On November 19, 1980, stay of execution of the order for the sale pendente lite of the defendant ship, which was fixed to take place on November 21, 1980, was granted on certain terms, including a condition that there should be furnished
30 by the appellant security in the form of a bank guarantee for C£100,000 in order to cover the claims of the plaintiffs in the actions concerned. This condition had to be complied with by December 4, 1980, otherwise the sale pendente lite would be effected by the Admiralty Marshal.

35 As it appears from the aforementioned affidavit of A. Montanios, dated December 5, 1980, the said condition could not be complied with because it was not possible for the appellant to raise the necessary funds.

40 It is to be noted that these applications, under Order 35, rule 18, of the Civil Procedure Rules, for stay of execution

pending the determination of the present appeals, were made after the expiry of the period within which the condition for the furnishing of security had to be complied with.

At it appears from the material before me, counsel for the appellant complains, also, that the order of November 19, 1980, staying execution of the order of September 23, 1980, was made by the trial Judge conditionally upon the furnishing of security and he now seeks from this Court an unconditional order staying execution of the order of September 23, 1980, for the sale pendente lite of the defendant ship.

In this respect it is to be observed that counsel for the appellant during the whole period from November 19, 1980, till December 5, 1980, has not asked this Court to issue, in the exercise of its relevant concurrent jurisdiction (see the Supreme Court Practice, 1976, p. 883, para. 59/14/4), an unconditional order staying the execution of the order for the sale of the defendant ship pendente lite.

Also, from November 19, 1980, when the trial Judge ordered stay of execution as aforesaid, and till the expiry of the period for compliance with the condition imposed by the trial Judge regarding security no application was made to him for an extension of the said period.

In view of all the foregoing I do not think that this is a proper case in which to grant the present *ex parte* applications for stay of execution. It is, of course, correct that they could be made *ex parte* under Order 48, rule 8(1)(ee), of the Civil Procedure Rules, but, under rule 3 of the said Order 48, I direct that they should be made by summons.

The appellant seeks, also, in the alternative, an interim order staying execution of the order for sale pendente lite until the hearing and determination of the applications by summons for stay of execution of the said order for sale, or until such other time as this Court may deem proper.

I do not think that I should, in the light of the circumstances of this case, grant such an interim order, especially in view of the fact that the whole period from November 19, 1980, until December 5, 1980, was allowed by the appellant to pass without taking in time any appropriate step.

In the result, these *ex parte* applications are dismissed.

Applications dismissed.