REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY COURTS

CIVIL CASE NO. 359 OF 2011

BANK OF BARODA (K) LTD.....PLAINTIFF

VERSUS

DANIEL OCHIENG OGOLA T/A

OGOLA OKELLO & CO. ADVOCATES.....DEFENDANT

R U L I N G

The Chamber Summons application before the court is dated 2nd August 2011. It seeks two prayers:-

(1) *That the Defendant do honour the professional undertaking dated 18th February 2010 and do pay to the Plaintiff, within seven (7) days of the order, the sum of Kshs.757,177.77 with interest at 13.75% p.a. from 24/06/2011 until payment in full.*

(2) *In default, judgement be entered against the Plaintiff in terms of the sum stated in (a) above.*

The application is supported by affidavit of David Nyaboga dated 2nd August 2011 with its annextures. The application alleges that on 18th February 2010, the Defendant issued to the Plaintiff professional undertaking one of the terms of which required the Defendant to immediately return all the documents released to him if the redemption amount of Kshs.15.0 million was not paid within 45 days from date the discharge of charge was delivered to the Defendant. A copy of the said letter is annexed as **DN 3**. On the strength of the said undertaking security documents were released to the Respondent. However, the Respondent failed to pay the said Kshs.15.0 million within the 45 days. It is alleged that the Applicant and the Respondent reached an agreement under which the said period of 45 days was extended on condition that the Respondent would increase the amount payable beyond the Kshs.15.0 million.

The Respondent has denied the said allegations vide a replying affidavit by Daniel Ochieng Ogola dated 28th October 2011. The Respondent specifically denies that there was an agreement to extend time and to pay the undertaken sum with interest. The Respondent states that the undertaking was for Kshs.15.0 million and no more.

I have considered the application and opposing affidavits. I have also considered the submissions of the parties. For me the issues to determine are:-

1. Whether the Respondent can pay an amount over and above the amount undertaken to be paid.

2. Whether there was an agreement between the parties to increase the amount undertaken to be paid by introducing interest.

To address the first issue, I hold and find it as the correct position that a party who has given an undertaking to pay a particular amount of money cannot, without the undertaking being varied, pay more than the amount undertaken. It is clear that the Respondent indeed made delayed payment. The delay was by 63 days. It is to be noted that the undertaking was given by one advocate to another. Both advocates were acting for their clients. The Applicant had acknowledged that the Respondent was acting for a client. Indeed by its advocate's letter dated 18th October 2010 addressed directly to the Respondent's client KCB, the Applicant's advocate's appeared to tacitly acknowledge that the delay was not caused by the Respondent but by Respondents' client. The Applicant's advocates in that letter threatened to sue both the Respondent and his client KCB. In my mind, any suit against the Respondent on account of a breach of an undertaking given by the Respondent is limited to requiring him to honour the undertaking and no more, or to return the documents, or for damages for breach of undertaking, where breach is proved. Therefore to claim a liquidated sum of Kshs.757,177.77 is not lawful. How was the said sum of Kshs.757,177.77 arrived at? What is it? Is it interest, if so, at what rate, and how was the rate agreed upon? This figure of Kshs.757,177.77 is an alien to the undertaking. Paragraph 4 of the letter of undertaking dated 14th February 2010 is very clear. If it was not complied with, there are remedies for breach. The remedy does not include the levy of interest which was not agreed upon *apriori*. That interest cannot be imposed.

Secondly, was there an agreement which increased the amount payable under the said undertaking? I find no evidence of such an agreement. The terms of the Applicant's letter dated 13th August 2010 and that of 22nd August 2010 are also imposed upon the Respondent. There is no evidence that the Respondent accepted those terms. Also, there is no evidence that the Respondent agreed to or accepted the terms contained in the Applicant's advocate's letters dated 15th September 2010 and October 18th 2010. It is a principle of contract law that silence does not constitute acceptance. The allegation that the Respondent accepted to pay increased sum over and above the said Kshs.15.0 million is not proved, and I dismiss it.

Further, it is my view that since the relevant undertaking was from one advocate to another, the only sum payable is Kshs.15.0 million and no more. This is so because a claim of interest in this application is on behalf of the bank, yet the undertaking was given to the bank's advocate. Unless it can be shown that the Respondent advocate kept the money in his account and had earned interest during that period, no claim of interest can be entertained.

I have considered the cases cited by the Applicant in support of the Applicant's case. The common threat in those cases is the fact that payment of interest in case of delay was agreed *apriori* and was part of the undertaking. In **NAPHATALI PAUL RADIER – VS – DAVID NJOGI & CO. ADVOCATES**, the interest rate was agreed at 18%. In **KENYA COMMERCIAL BANK LIMITED – VS – ADALA**, also cited by the Applicant, the Court of Appeal awarded interest at court rates on the basis that the Defendant had withheld the Plaintiff's money for a long period of time, and justice demanded that the amount be paid with interest. In the instant case parties never even directed their minds to interest, leave alone the rates. Also I see no reason to punish the Respondent to pay punitive interest as the delay was not inordinate.

But perhaps, more importantly, is to note that even after the said delay, the Respondent finally paid the sum undertaken to be paid the Applicant's advocates handling charges of Kshs.34,800/= and that appeared to have settled the matter. Further the claim for interest is inconsistent with the Plaintiff's own pleadings. According to the Plaintiff's own bank statement of account from 1st October 2010 to 30th October 2010 annexed to the originating summons as "**DN 10**", it is shown that on 29th October 2010,a

deposit of Kshs.15,000,000/= was made into the Plaintiff's account by RTGS from Blue Nile Wire Products. Upon receipt of the said monies the account balance as at 30th October 2010 was 0.00 and it is stated that the account was closed. The Plaintiff's record confirm that the balance was nil and closed the account as at 30th October 2010. However, the Plaintiff's advocates demand letter annexed as "**DN6**" in the originating summons claims the amount owed stood as Kshs.18,242,483.00 as at 21st August 2010 and accruing interest. The Plaintiff is not only inconsistent in its claim, but also appears to claim interest of kshs.757,177.77 long after the account was closed. If, as it appears, the Plaintiff closed the account on 30th October 2010 and declared "**nil**" balance, then on whose account is the sum of Kshs.757,177.77 alleged to be interest being claimed? Certainly, not on behalf of the Plaintiff, and if so, then it is plainly wrong. The undertaking was given by one advocate to another, and it cannot exceed Kshs.15.0 million. This being so in my Ruling, I have no option but to dismiss the application as I hereby do. I direct parties to bear own costs for the application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 10TH DAY OF MAY 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Gathu H/B Oyatta for the Plaintiff

N/A for the Defendant

Teresia – Court clerk