REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2721 OF 1976

KENYA COMMERCIAL BANK ……………............................... APPLICANT

VERSUS

ADALA………………………………….............................. RESPONDENT

RULING

This is a very distressing case. For my part I think it can fairly be said that I have done everything I can to give Mr Adala an opportunity to pay some amount which will at least satisfy the plaintiff for the time being and stave off what can only be a disastrous event for an advocate of the High Court.

The history of the matter, with reference to certain correspondence, and in particular to Mr Adala's letter of February 13, 1976, is set out with abundant clarity in the affidavit of Mr Houston of Messrs Hamilton, Harrison and Mathews, the plaintiff's advocates in this case. Mr Adala's letter gave a professional undertaking in explicit terms, as required by Messrs Hamilton, to return the documents he had received from them on demand and to pay over Kshs 183,973.40 with interest and legal charges.

As Mr Fraser said, in earlier proceedings before me, Mr Adala must have had the means to comply with the undertaking, for Messrs Kaplan & Stratton sent him Kshs 182,678 in the same matter under cover of their letter of September 7, 1976. An express letter to Mr Adala was sent by Hamilton on October 6 and on October 7, Mr Adala offered, *inter alia*, to send the Kshs 182,678 which he had already received. Mr Fraser says that the Kshs 152,678 (ie Kshs 30,000 less than the amount sent by Kaplan & Stratton) was received in their offices on October 18, 1976. Mr Le Pelley, of Messrs Hamilton, then called upon Mr Adala to comply with his undertaking within 10 days or face the consequences.

The matter then came up on originating summons (as provided for in order LII rule 6A) before Sachdeva J on January 7, 1977. He gave Mr Adala sixty days grace, but ordered him to pay Kshs 45,587.70 the total outstanding including interest and legal charges thereafter. On February 8, 1977 leave was granted by Sachdeva J to Mr Adala to issue a third party notice against the vendor of the land in question (LR 209/3406, Highridge, Nairobi), but this part of the proceedings has come to nothing as yet. Then on July 29, Muli J ordered Mr Adala to pay the outstanding amount by monthly instalments of Kshs 5,000, and made an order for the issue of a warrant of arrest in default. No instalments were paid; hence the issue of the warrant of arrest and the application for committal now before me.

It is clear from the *Annual Practice* 1963 p 3078, and both Mr Onyango Otieno and Mr Masime who appear for Mr Adala have conceded, that the court does have inherent power to commit an advocate for breach of an undertaking. In *Re a Solicitor* (1966) 1 ELR 1604 Penayenick J referred to the earlier case of in *Re HA Grey* (1892) 2 QB 440 in which the Court of Appeal stressed the punitive and disciplinary

powers of its jurisdiction over solicitors as officers of the court, not for the purpose of enforcing legal rights, but for enforcing honourable conduct on the part of the court's own officers. I apprehend that the position is the same in Kenya by virtue of section 57 of the Advocates Act cap 16, under which any person entitled to act as an advocate is stated to be an officer of the court.

Penayenick J pointed out that neither counsel in the case before him had been able to point to a case in which an order for committal was actually made, as opposed to an order upon the solicitor to perform his undertaking. We are now, however, at the stage beyond that. The court has made an order, and it has not been complied with. Neither does it matter, so it seems, that there are other means of proceeding against the solicitor or advocates - see Lord Esher MR in *Re Grey* (supra) at p 444. Lord Esher continued:

"It appears to me that we can make the order asked for on the ground that the power of the court which is invoked is a punitive, disciplinary power to prevent breaches of their duty by its officers, quite distinct and separate from the client's legal right, and therefore unaffected by any alteration of such right."

Again at p 445 he said

"I doubt whether the power of the court would be suspended, even if a judgment had been recovered, and it were not known whether it would be effective. I am of the opinion that even in that case the court would, notwithstanding what had happened to the right of the client, have jurisdiction to make an order in the exercise of its disciplinary jurisdiction, and, if so, I know of no limitation with regard to the manner in which it is to be exercised. The matter, in my opinion, is one of discretion to be exercised according to the circumstances of the particular case, in which the court has to exercise its discretion. I do not say for a moment that the fact that judgment has been recovered by the client is not a matter to be taken into serious consideration in such a case. The court must see that the solicitor is not oppressed. The fact that such a judgment has been recovered is a fact which should cause the court to pause and consider whether the application against the solicitor is oppressive. The court should take into account, as it did in *Re Hall* (1), and in *Re Robinson* (2), the fact that a judgment had been recovered which might effectively be put in force."

In this case no such judgment has been recovered. Lord Esher concluded by saying that an order that the solicitor pay in four days might be oppressive, and gave one month in which to pay. Boren LJ put it even more clearly at p 447.

"I am of the same opinion. The solicitor in this case is in a situation which presents two aspects involving a double responsibility. He was a debtor, who owed a legal debt. He also owed a duty to his profession, and the Court of Justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the court as a person whose confidence has been abused by a person who is an officer of the court, and whom he would not have trusted unless he had been such an officer."

In the instant case Mr Fraser says he is instructed not to delay any further, and declines the offer of Kshs 7,000, which in any case is somewhat piecemeal, now being made. I cannot say he or his clients are not entitled to adopt this attitude and to press for committal. Mr Adala has obviously had a considerable period of grace, even though I can sympathise with him to some extent as to the predicament in which his undertaking placed him. The gravamen seems to me to be that having received Kshs 182,678 from Kaplan & Stratton, he paid over Kshs 30,000 less.

In the circumstances I make an order committing the advocate to civil gaol for 6 weeks, though I am bound to say I do so with very genuine regret, and I wish to thank both Mr Onyango Otieno and Mr Masime for the very considerable efforts they have both made.

Dated and Delivered at Nairobi this …………day of ………….1979

A.R.W. HANCOX

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JUDGE