



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

or damage; that the applicants have failed to disclose to the Court their financial standing and cannot therefore demonstrate any hardship; that the applicant as a firm has a professional insurance indemnity cover in existence and therefore this would cushion it from suffering the alleged hardship or loss and finally that what is involved is a money decree and the respondent is a reputable bank which is in a strong financial position to repay the decretal sum in the event of the judgment decree being reversed by the Court of Appeal.

When the application came up for hearing on 1<sup>st</sup> October, 2009 the learned counsel Mr Billing appeared for the applicant whereas the learned counsel Mr. A. Ojiambo appeared for the respondent bank.

In his submissions Mr. Billing contended that whereas the applicant firm maintains a professional indemnity cover it is limited to Kshs.8 million only. He urged the court to treat like cases alike and cited the now well known case of **Oraro & Rachier Advocates vs Cooperative Bank of Kenya Ltd (1999) 1 E A 236** as authority on this point and also stated that the financial position of the respondent was not rosy and asked us to take judicial notice that the bank had in the past been bailed out by the Government. He cited the case of **Trust Bank Ltd & Another vs Investec Bank Ltd and 3 Others C A Nai. 258 and 315 of 1999 (consolidated) unreported** to support the point that where a decree holder's financial position is uncertain or where the decree holder is not based in the country the inclination of the Court in the past has been to grant a stay.

Mr Ojiambo, on his part reminded the Court that the respondent had a money decree in its favour and therefore the enjoyment of its fruits should not be denied. He contended that this is the principle enunciated in the case of **Kenya Shell Limited vs Benjamin Kiburu & Another (1982 88) 1 K A R 1018**. He added that the applicant had failed to prove any hardship in that the affidavit in support of the application had disclosed nothing concerning the law firm's financial position. The learned counsel explained that the bank has in the past never been under any known threat and that on the contrary what the Government did was to offer a guarantee for a bridging facility for a temporary period and that the bank had since come out of that position and is currently in a much stronger financial position and that it would be in a position to satisfy the decree the subject matter of this application and the intended appeal, and as a result the appeal if successful was not likely to be rendered nugatory. He lamented that **Oraro & Rachier (supra)** was no longer good law in that the decision puts law firms in a special class of debtors and in future if the decision continues to be followed, law firms would for this reason be discriminated by business players including banks. He invited the Court to use the opportunity to depart from the holdings in **Oraro & Rachier case**. Concerning the point on arguability of the intended appeal he raised two main points; that the applicant had admitted that the verifying affidavit which set in motion the allegations of negligence against the applicant, violated Section 5 of the Oaths and Statutory Declarations Act and that the applicant had not filed a notice of appeal against the rulings of Mwera, J of 29<sup>th</sup> April, 2002 or 6<sup>th</sup> May, 2002 and therefore the applicant could not possibly have an arguable appeal.

We have carefully considered the conflicting claims of both parties, as set out above. On the point whether the intended appeal is arguable, our view is that the grounds set out in the draft memorandum of appeal are not frivolous. For this reason we think that the applicant does satisfy the requirement of arguability.

Regarding the second requirement on whether or not the appeal if successful would be rendered nugatory, we consider the sum of Kshs.27 million is relatively substantial seen from the context of operations of many law firms in this country. One of the cherished virtues of law is certainty and treating like cases alike and for this reason we reject the invitation to depart from the principle enunciated in the **Oraro & Rachier case**.

Thus, in the case of **Oraro & Rachier** this court considered the sum of Kshs.10 million as capable of causing hardship to that law firm at that point in time. We think that in the prevailing circumstances, a payment of Kshs.27 million has the potential of causing severe hardship on the applicant and for this reason the balance of convenience tilts in the applicants' favour. The additional factor we have taken into account are the provisions of Section 1 A and 1 B of the Civil Procedure Act and Section 3 A and 3 B of the Appellate Jurisdiction Act, which provisions came into force on 23<sup>rd</sup> July, 2009. The courts including this Court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of *equality of arms* is maintained and that as far as it is practicable to place the parties on equal footing.

We believe that in balancing the competing claims as we have done above we have also met the principal aims of the overriding objective as defined in the two Acts.

The upshot is that we grant an order of stay in terms of prayer (ii) of the application and further order that the costs of the application be costs in the appeal. It is so ordered.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of October, 2009.**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**