



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A)
Civil Appli NAI 173 of 2005 (105/05 UR)

BETWEEN

NATIONAL BANK OF KENYA LTD.
APPELLANT

AND

EDWARD MAINA NJANGA T/A MAINA
NJANGA & CO. ADVOCATES
RESPONDENT

(An Application for stay of execution pending the lodging and hearing of an intended appeal from the ruling and order of the High Court of Kenya at Mombasa, (Mwera , J) dated 17th June 2005 in H.C.C.C.. No. 180 of 2004)

RULING OF THE COURT

This is an application by National Bank of Kenya Limited (Bank) under Rule 5(2)(b) of the Court of Appeal Rules for an order that the execution of the decree of the High Court of Kenya at Mombasa in H.C.C.C. No. 180 of 2004 given on 17th June, 21005 be stayed pending the hearing and the determination of an intended appeal against the decree.

The respondent is an advocate of the High Court of Kenya. He was retained by the Bank on various dates to offer legal services in two suits viz **Civil Suit No. H.C.C.C. No. 587 of 2001, National Bank of Kenya Ltd. vs. Mahesh Manubhai Patel t/a Coastal Services and Supplies and in Bankruptcy Cause No. 9 of 2002.**

There was no dispute that the Advocate rendered legal services as instructed but apparently there was a dispute on the legal fees payable. As a consequence the

Advocate filed two Bills of Costs, in Miscellaneous Application Numbers 583 of 2005 and 584 of

2003 seeking taxation of Advocate/Client Bills of Costs. The Bank applied for the setting aside of the two bills of costs on the ground that the Court had no jurisdiction to tax the bills as the parties had made an agreement fixing the advocate's remuneration.

The superior court found that an agreement was signed by the advocate and the Bank fixing the Advocate's fees to a maximum of Shs.200,000/- for both contentious and non-contentious work. The superior court however declared the agreement illegal because the agreement had fixed the Advocate's fees below the scale in the Advocates' (Remuneration) Order. The Court nevertheless ruled that it had no jurisdiction to entertain the application to set aside the two Bills of Costs and dismissed the application on 15th December, 2003.

The Bank filed a Notice of Appeal against that decision on 17th December, 2003.

The Bills of Costs were ultimately taxed on 14th June, 2004. The costs allowed in Misc. Application No. 583 of 2005 for legal services rendered in H.C.C.C. No. 587 of 2001 was Shs.10,457,880/- while Shs.6,442,077/- was allowed in Misc. Application no. 584 of 2003 for legal services rendered in Bankruptcy Cause No. 9 of 2002.

On 27th July, 2004 the Advocate filed Mombasa H.C.C.C. No. 180 of 2004 against the Bank claiming the legal fees in the two certificates of costs plus Shs.70,000/- being the filing fees of the plaint (total Shs.16,970,157/- less Shs.7,275,687/- paid on account). The Bank filed a defence raising various defences. The Bank averred in its defence, among other things, that the Advocate had been paid in terms of the agreement on remuneration – that the Ruling of Maraga, J that the agreement was illegal was the subject of an appeal; that the taxation was also subject to a reference; that the Taxing Master awarded enormous instructions fees in the Bankruptcy Cause for a simple and uncomplicated matters and also erred in giving more than the agreed fees for the suit.

Subsequently, on 20th August, 2004 the Advocate filed an application seeking summary judgment on the basis of the two certificates of costs. The Bank opposed that application mainly on the ground that the claim was not a liquidated demand, as the process of taxation was not finalized owing to the pending objection to taxation filed by the Bank. The superior court in entering summary Judgment against the Bank relied on section 51(2) of the Advocates Act, Cap 16, Laws of Kenya and held that the two certificates of taxation were final as to the amount of costs and that the intended references against the decision of the Taxing Master cannot be a bar to proceedings for summary judgment.

The Bank intends to appeal against the decision of the superior court and has duly filed Notice of Appeal. Before we can exercise our unfettered discretion in favour of the Bank the Bank is required to satisfy the Court that the intended appeal is an arguable one, that is, that it is not a frivolous appeal and that if the execution of the judgment of the superior court is not stayed the appeal, if it ultimately succeeds, will be rendered nugatory.

The Bank contends that it has weighty grounds of appeal, which have not been argued in our courts before. Those grounds of appeal are enumerated in the application. It seems that the main grounds of the intended appeal include grounds that, the claim was not a liquidated demand as the Bank had filed a Notice of Objection to the taxation, that the certificates of costs were not final as to amount of costs as they were the subject of an objection; that superior court misconstrued section 51 (2) of the Advocates Act and that in entering summary judgment the superior court deprived the Bank of its statutory right to challenge the taxation of the bills of costs. The respondent contends that the intended appeal is frivolous.

Thus the applicant will be contending in the appeal that summary judgment cannot be competently entered for an advocate on the basis of Certificates of Taxation on an advocate/client bill of costs before a pending objection to the taxation has been heard and determined by a Judge. In this case the two bills of costs were taxed on 11th June, 2004. The Bank states that it filed Notice of Objection pursuant to **rule 11 (1)** of the Advocates' (Remuneration) Order on 18th June, 2004 but that it has not received reasons for taxation from the Taxing Officer pursuant to **section 11 (2)** of the Order. By **Rule 11 (2)** of the aforesaid Order, the Taxing Officer is required upon receipt of the Notice of Objection to taxation to record the

reasons for his decision on the disputed items and forward them to the objector. Mr. Kassim Shah , the counsel appearing for the Bank informs us that the taxing officer has not so far forwarded his reasons for the decision to the Bank to pave way for filing a formal objection.

We have studied the matters raised in this application and on our part we are satisfied that the intended appeal raises several issues of law which are undoubtedly arguable.

The Bank further contends that if the execution of the decree is not stayed and the decretal sum is paid, the statutory right of the Bank to object to the taxation will have been defeated and the whole substratum of the appeal will be destroyed. The Advocate contends, on the other hand, that he is a man of means and that the Bank's fear that it will be unable to secure the refund if the appeal is successful are unfounded.

As this Court said in **RELIANCE BANK LTD. VS. NOR LAKE INVESTMENTS LTD. [2002] 1 EA 227** at page 232, para b what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The following part of the Ruling of the Court in that case at page 231 para e is relevant:-

“We do not understand the position to be that in decree for payment of money, for example, the only thing that would render the success of the appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it”

And in **THE STANDARD BANK LIMITED V. G. N. KAGIA T/A KAGIA & CO. ADVOCATES – CIVIL APPLICATION NO. NAI. 193 OF 2003** (unreported) this Court again said:-

“So the amount that the respondent is ultimately entitled to is not settled and will only be ascertained after the determination of the appeal. Although the respondent has several pieces of land, they may depreciate in value or may be disposed of or it may be difficult to sell them by the time the appeal is determined. If the applicant's appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”

The decretal amount in this case is a large sum of money. The Bank has already paid Shs.7,275,687/- of the disputed legal fees which is a substantial portion of the decretal amount. The fact that the Advocate has means to refund the decretal sum should the appeal succeed is not the only consideration. The house which the Advocate is building and which is now worth about Shs.10,000,000/- may not be in existence or may not be easily realized in the event that the intended appeal succeeds and the Advocate is required to refund the decretal sum if paid or part of it. This application is different from the common type of applications for stay of execution of money decree pending appeal from the decree in that the decree the subject matter of this application is based on certificates of taxation from which an objection is allowed by the law. The objection to taxation is indeed pending for determination and there is a possibility that the legal fees payable by the Bank may be substantially reduced.

In our judgment the appeal will not only be rendered futile if stay is not granted but also it would be unjust to require the Bank to pay the whole of the decretal sum before the determination of either the

appeal or the pending objection whichever is earlier.

In the circumstances, we allow the application and stay the execution of the decree as prayed. The costs of the application shall be costs in the appeal.

Dated and delivered at Mombasa this 29th day of July, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.