



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Tunoi, Lakha & O’Kubasu JJ A)

CIVIL APPEALS NO 286 OF 2001 & 15 OF 2002 (CONSOLIDATED)

UHURU HIGHWAY DEVELOPMENT LTD

& 3 OTHERSAPPELLANTS

VERSUS

CENTRAL BANK OF KENYA

& 4 OTHERS.....RESPONDENTS

(Appeal from a Ruling of the High Court of Kenya at Nairobi

(Aganyanya J) dated 12th day of July, 2001 in

HCCC No 589 of 1999)

JUDGMENT

At the outset we must point out that we have not at all enjoyed the hearing of this interlocutory appeal, which like many others concerning the subject matter in issue in the past and now, have continued to clog this Court and yet the main suit lies intact and unheard and has been so for the last ten years. We remind ourselves that on 12th November, 1996, we observed and ordered as follows:-

“When will the saga of the Grand Regency Hotel come to an end? Since the suit in its respect was first lodged in court on 6th January, 1995 it has landed in this Court three times, once for an interlocutory injunction pending appeal and twice on substantive appeals against interlocutory orders. The suit, however, remains unheard in the Superior Court and there is no indication that it will ever be heard on merit in the near future. It is common knowledge that the matters involved in the suit are of great public importance and we are of the view that it is in the best interests of all the parties concerned that the suit in the superior court be heard and disposed of expeditiously. We hereby direct that the parties conclude their preliminaries as regards issues within 60 days hereof and that the Superior Court do thereafter hear the suit on a day to day priority basis before any judge who has not previously handled the matter.”

It would appear that our prediction was actually quite correct for despite this order the parties have sidelined the main suit; and many more endless, sometimes irrelevant applications have found their way into the courts.

Consequently, vital judicial time continues to be wasted and the parties are condemned to pay millions and millions of shillings in terms of fees.

It is our pious hope that something will be done to enforce our order alluded to above.

These proceedings arise from yet another action in the long- running battle relating to the ownership of a building complex in Nairobi now popularly called “Grand Regency Hotel”. They are by way of an appeal by the unsuccessful plaintiffs, now the appellants, from an order by the Superior

Court, Aganyanya, J and by his leave both dated 12 July, 2001.

The proceedings were commenced by a notice of motion dated and filed on 5th June, 2001 and sought orders of the Court, apparently under the

Advocates Act, Cap 16, and rules made thereunder and several rules under the Civil Procedure Act, Cap 21 in respect of matters in relation to the litigation then pending between the parties being High Court Civil Case

No 589 of 1999 and in particular for the following Orders:

“1. This Honourable Court do order that the firm of Oraro & Company, Advocates and George Oraro Esquire, advocate do not continue to appear for the first and second defendants in this suit; and or:

2. This Honourable Court do order that the first and second defendants not be permitted to continue being represented in this suit by the firm of Oraro & Company, Advocates and George Oraro Esquire, advocate; and

or:

3. This Honourable Court do stay the representation by the firm of Oraro & Company, Advocates and George Oraro Esquire, advocate as advocate for the first and second defendants in this suit; and or:

4. The firm of Oraro & Company, Advocates and George Oraro Esquire, advocate be restrained by an injunction whether by themselves, their partners, servants or agents from representing the Central Bank of Kenya in HCCC No 589 of 1999 in the High Court of Kenya or any proceedings therefrom, therein or in the Court of Appeal.

5. Such further order or consequential orders as this Honourable Court deem fit.

6. The costs of this application be provided for.”

After hearing the application for five days in June, 2001 and reserving his ruling for a period of about one month the learned judge delivered his ruling on 12 July, 2001 when he found against the plaintiffs and by the order under appeal dismissed their application with costs. The plaintiffs appeal against that order and submit that the application by way of the notice of motion should have been allowed with costs.

The plaintiffs in their case rely briefly on the following facts. Between August, 1993 and December, 1993 George Oraro Esquire, advocate, (the counsel) while practising in the firm of Oraro & Rachier, now Oraro and Company, Advocates, acted for the 1st defendant, the Central Bank of Kenya (CBK) and for the 1st and 2nd plaintiffs herein (Uhdh and Pattni).

As a consequence of the intimidation, threats and undue influence exerted upon the 2nd plaintiff during occasions in which the said counsel played an active part the 1st plaintiff was forced to give a purported charge of its property known as LR No 209/9514 registered in the Land Titles Registry as IR 36755/17 to the 1st defendant. Counsel for and on behalf of the firm, the then Oraro & Rachier Advocates acting as an advocate for the 1st defendant and for the 1st and 2nd plaintiffs prepared the said charge.

It is common ground that the circumstances under which the said charge was executed by the 1st plaintiff as well as the validity of the said charge are in dispute in the suit in which the counsel and Oraro & Company formerly Oraro & Rachier Advocates are now acting as advocates for the 1st and 2nd defendants.

It is on the above grounds and facts that the prayers in the application were sought. The plaintiffs' contentions were two-fold: first, that the counsel acted for both parties in the preparation of the charge and that he may not act for one against the other as this was in breach of the counsel's duty in acting for both in the same transaction and violating the decision of this Court in *King Woollen Ltd v Kaplan & Stratton* Civil Appeal No 55 of 1999, (unreported). Secondly, that the charge is a major issue in the proceedings between the parties and rule 9 of the Advocates (Practice) Rules prohibits the counsel from appearing.

Before we deal with the counsel's opposition, we observe regrettably an unhappy feature of this application that the evidence sworn in support of the application was not in any way denied by sworn evidence on the part of the counsel and as to the risk inherent in allowing the matter to continue notwithstanding the provision of order L rule 17 allowing an affidavit in reply or opposition to be filed with the result that there was considerable risk of equating the counsel's submissions as if they were facts sworn to on oath. It therefore is important, we think, to see carefully what is the position on the facts of this case.

The counsel's response to the application was delivered by himself in his submission to the Court. First, it was submitted that the plaintiffs were not his clients with the result that he could not be in breach of a duty as by a solicitor to his client. Nor could he violate the rule in *King Woollen's* case as stated aforesaid. Secondly, he argued that in charging the plaintiffs his fees for preparation of the charge, he was not doing so because they were his clients but by way of enforcement of a provision made in the charge which entitled him to do so where, as in the case, there had been a failure to pay them. Thirdly, he contended that he expected the plaintiffs' advocate to lay out the evidence expected of him for the Court's examination before he decided whether to disqualify himself from acting or not. Fourthly, he complained that no *prima facie* case for duress was made out. Fifthly and finally, there was no disclosure of a confidential nature imparted to the counsel which might be used to the advantage of the 1st defendant or to the prejudice of the plaintiffs.

We now turn to deal with each of these defences *seriatim*. Before doing so, however, we remind ourselves that there is no cross-appeal by the counsel with the result that once rules were breached disqualification of the counsel must follow as of right.

(a) Whether the plaintiffs were the counsel's clients may be discerned from a careful consideration of the correspondence on the record. A careful consideration of the same is, of course, required. We refer to the fee note and notice of taxation and conclude that the relationship emanating from these exchanges is that of an advocate and client or else the counsel should have sent these notes through D V Kapila & Company, Advocates, alleged by the counsel as acting for the plaintiffs. For the sake of clarity we reproduce herewith the fee note dated 23rd October, 1993.

"TO: Kamlesh K Pattni

"Fee Note

RE: LR NO 209/9514 – NAIROBI

To instructions to prepare the charge and guarantee in favour of Central Bank of Kenya to secure various amounts owing to it, making a search of the title, drafting and engrossing the security documents, numerous attendances where the issue was discussed, procuring discharges in respect of the encumbrances, generally advising the Central Bank of the efficacy of the security.

To our fees per scale including

attendances Kshs 12,500,000.00

Less amount paid Kshs 2,500,000.00

Kshs 10,000,000.00

VAT at 18% Kshs 1,000,000.00

Kshs 11,000,000.00

For: Oraro & Rachier Advocates”.

While the firm of D V Kapila & Company, Advocates, acted for the 1st plaintiff in respect of other matters at the time, it did not do so in relation to the charge which is the subject matter of the present dispute. We question why correspondence regarding the charge was sent directly to the 2nd plaintiff rather than pass through D V Kapila & Company Advocates.

This raises a strong presumption that it was the firm of Oraro & Rachier acting for the 1st plaintiff in the matter relating to the charge and not D V Kapila & Company, Advocates. There is also the draft made by the counsel said to give rise to the charge obtained from the 1st plaintiff and the handwritten manuscript by Mr Oraro. That he personally authored the manuscript is readily admitted by him. The purpose of the manuscript was so that the 2nd plaintiff could incorporate all that Mr Oraro and the 1st defendant exactly desired to be in the typed document. The pertinent parts of the typed manuscript read as follows:-

“I, Kamlesh M Pattni of Post Office Box Number 288442, Nairobi, in the Republic of Kenya confirm the following agreement with the Central Bank of Kenya:-

1. That I am the Executive Chairman of Exchange Bank Limited.

2. That Exchange Bank Limited is indebted to the Central Bank of Kenya for an amount of

Kshs9,931,115,400/= as at 30th June, 1993 and a further total sum of Kshs 45,320,557.30 arising out of audit and report by Price Waterhouse dated 16th July, 1993.

3. That I hereby undertake to fully repay and discharge the said amounts in the paragraph 2 above as follows:-

(a) I have surrendered to the Central Bank of Kenya Treasury Bills equivalent to Kshs 4,653,134/= the receipt of which the Central Bank of Kenya hereby acknowledge by signing the copy of this letter.

(b) I have assigned to the Central Bank of Kenya the right and the title to the debt for the sum of Kshs 1,255,904,931/= due by National Bank of Kenya Limited which had been advance by Exchange Bank Limited, and I have procured the authority of the said Exchange Bank Limited to effect the said assignment.

(c) I have assigned to the Central Bank of Kenya the right and the title to the debt in the sum of Kshs 244,556,164/= due to Exchange Bank Limited from Trans National Bank Limited and I have procured the authority of the said Exchange Bank Limited to effect the said assignment.

(d) That the said Exchange Bank Limited has assigned to the Central Bank of Kenya some Forex ‘C’ certificates equivalent to US \$120 Million now being discounted by Central Bank of Kenya at the rate of Kshs 15/= per US Dollar amounting to a total sum of Kshs 1.8 billion.

The Exchange Bank Limited shall benefit in case if any discount rate higher than the agreed rate of Kshs 15/= per US Dollar is offered to Forex 'C' bearers by Central Bank of Kenya on discount of the said certificates.

(e) I undertake to pay the balance of the debt presently amounting to Kshs 1,977,623,171/= through the sale to Central Bank of Kenya of the sum of US \$20,000,000/ = (US Dollars twenty million only) at the interbank rate prevailing at the time of sale and any balance then outstanding in the lawful currency of Kenya.

The amount referred to in paragraph (e) above shall be secured by a first charge over LR No 209/9514 otherwise known as Meridian Hotel at an interest rate of 25% per annum for the time being that the whole amount of principal and accrued interest to be paid to the Central Bank of Kenya on or before 31st December, 1993.

On settlement of all the above sums payable to Central Bank of Kenya, the Central Bank of Kenya shall release their charge on the said LR No 209/9514.

Signed

Executive Chairman

I accept the above terms and conditions and further acknowledge the receipt of the original copy of this agreement.

For the Central Bank of Kenya.

Signed: 15/8/93".

Section 2 of the Advocates Act, defines "client" to include:-

"any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs".

In the present case the 2nd plaintiff paid to the counsel his costs. In all the above circumstances, therefore, it was perhaps, with respect, a misdirection on the part of the learned judge to find:

"..... I see no possibility of being convinced that either the 1st or 2nd plaintiff became clients of Messrs Oraro & Rachier, advocates"

(b) Even if payment of fees was made pursuant to a provision in the charge, this does not exclude the person making payment being a client. This follows from the definition of "client" as provided in section 2 of the Advocates Act, as set out above.

(c) The bar to being a witness does not depend upon the nature of evidence from which a decision can be made as to its substance establishing a *prima facie* case with the probability of success but on the basis of rule

9 of The Advocates (Practice) Rules which provides as follows:-

"9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by

declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.

(d) We find no difficulty in finding that a *prima facie* case for duress was made out. In paragraph 6 of the supporting affidavit the 2nd plaintiff gave the particulars, *inter alia*, of duress. In the absence of a replying affidavit it must follow that this was not denied and indeed constituted evidence of a *prima facie* case.

(e) To refuse the injunction sought on the ground set out above as fifthly; and finally, would, with respect, be a misdirection. It would amount to a failure that the information under the retainer or employment was confidential *ab initio*, and that the counsel may have had more confidential information. The counsel being the author of the charge may know much more behind the charge than is apparent on the charge and is bound to use that knowledge against the plaintiffs, his former clients. The suspicion is well-founded.

It remains for us to deal with the submissions of Mr Ojiambo for the first respondent, the firm of Messrs Oraro & Company, Advocates. He briefly associated himself with the submissions made by the counsel. Mr Gatonye, however, for the 1st and 2nd respondents, in addition to associating himself with the counsel and Mr Ojiambo, submitted that a client may be represented by an advocate of his choice. He, however, strongly criticized the delay in raising the objection. He laid considerable importance on this and averred that this is essentially a case of the type where it would be wholly inappropriate to grant relief, having regard to the lack of urgency which has been shown on the plaintiffs' part in bringing this objection before the Court. Delay, of course, is of particular importance in any case where, as a result of the delay, the interest of the defendants has been prejudiced. The advocate for the plaintiffs submits, we think with some substance, that this is not a case of that character. Where, as here, an advocate is acting in breach of privileged protection, delay in bringing an application such as the present one does not change or defeat the duty or obligation of the common advocate of the parties: See section 134(1) Evidence Act.

Moreover, in dealing with such an objection of delay, Muli, JA (as he then was) expressed himself as follows in *King Woollen Case*:-

“Further, the mere delay in raising the point of objection to the respondents continuing acting against the appellants does not defeat or change the duty or the obligations of the common advocates imposed on him under the retainer.”

With respect, we agree. We think that the objection of delay is sufficiently disposed of.

We have said enough to reach the conclusion that the refusal to grant the injunction and the application was not in accordance with the law. The learned judge, with respect, failed to apply the principles set out in *King Woollen case*.

We are satisfied that the real mischief or real prejudice were not rightly anticipated. The learned judge failed to appreciate that possibly much more confidential information was imparted to the counsel than envisaged.

We have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by the counsel in bringing about the 1st and the 2nd plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge.

There will no doubt be prejudice. Having held that duress was properly pleaded in the supporting affidavit with full particulars, the learned judge, with respect, erred in complaining that there was no evidence. Again, the bar to the counsel appearing as a possible witness was not subjective but governed by rule 9 of the Advocates (Practice) Rules.

In reaching the conclusion we have, we are not unmindful that we are interfering with the exercise of a discretion by the Superior Court. Since the grant of the injunction is discretionary, this Court would not

normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of *Mbogo vs Shah* [1968] EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang VP said at page 94:-

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.

Applying these principles to the present case, we are satisfied that this is one of those cases where, with the greatest of respect, we have no hesitation in interfering with the exercise of the discretion of the learned judge.

Considering, we hope, all the factors which are relevant to be considered in coming to a conclusion as to the result of this appeal, we are of the clear opinion that this is a case in which the grant of reliefs sought would be appropriate.

In the result, we allow the appeal, set aside the order of the Superior

Court given on 12 July, 2001 and substitute therefor an order granting all the prayers in the plaintiffs’ notice of motion dated 5 June, 2001 as prayed.

The defendants shall pay to the plaintiffs the costs of this appeal and in the Court below. Before parting with the appeal, we ought to say how indebted we are to the advocates for the lengthy submissions which they put before us.

Dated and delivered at Nairobi this 13th day of February, 2003

P.K.TUNOI

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR