



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & O'KUBASU, J.J.A.

CIVIL APPLICATION NO. NAI. 226 OF 2002

1. NURU CHEMISTS LIMITED)

2. JAMES ISABOKE)APPLICANTS

AND

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

**(An application for stay of execution pending an
intended appeal from a ruling and order the High
Court of Kenya at Nairobi (Mr. Justice Mbaluto)**

dated 24th May, 2002

in

H.C.C.C. NO. 1343 OF 2002)

RULING OF THE COURT

The applicants in this motion are Nuru Chemists Ltd and James Isaboke . They seek an order under **rule 5 (2) (b)** of the Court of Appeal Rules that the execution of the ruling and order of Mbaluto J given on 24th May, 2002 be stayed pending the determination of an intended appeal.

National Bank of Kenya Ltd, the respondent, (hereinafter called "National Bank") sued the applicants to recover Shs 5,937,231.70 which National Bank alleged Nuru Chemists Ltd borrowed from Standard Chartered Bank Kenya Ltd, Kisii Branch (hereinafter called "Standard Chartered") , in 1993. James Isaboke gave a guarantee limited to Shs 3,500,000/- for the loan.

The applicants filed a defence and denied liability. They said they never borrowed any money from National Bank. National Bank's Advocates applied for summary judgment under **Order XXXV rule 1** of the Civil Procedure Rules claiming that the applicants had no defence to National Bank's claim. The application was supported by an affidavit sworn by Samwel Odiyo, the Kisii Branch Manager. He annexed copies of two letters written to National Bank by the applicants in an attempt to show that they had admitted the debt. He also attached copies of the relevant Bank statements. Mbaluto J granted the

application and gave judgment for National Bank for the full amount together with interest and costs. It is the execution of that decree that the applicants want stayed pendiTnhge rteh e idse tearnm inaavteiomne notf tihne irt hien tepnldaaidn ta pptehaalt. the money National Bank is claiming from the applicants was lent to Nuru Chemists Ltd by Standard Chartered in 1993. There is however no averment in the plaint to explain how a debt owed to Standard Chartered ended up being a debt owed to National Bank. Only in the affidavit in support of the application for summary judgment is any attempt made by Samwel Odiyo to explain the genesis of the liability. In paragraph 6 of the affidavit dated 10th December, 2001 he deponed:-

"(6) Sometimes in 1996 the plaintiff Bank took over all debts, liabilities, obligations and duties of Standard Chartered Bank Kenya Ltd, Kisii Branch."

No documentary evidence was placed before the learned Judge to back up this assertion. If the applicants borrowed money from

Standard Chartered they are perfectly entitled to object to any attempt by National Bank to collect the debt without any proof that it had been lawfully assigned or transferred to National Bank by Standard Chartered. National Bank did not bother to tender in evidence copies of the instruments of assignment or transfer and chose to rely on a bare assertion in support of its claim. If it was National Bank's case, and it had to be, that the debt had been transferred to it by Standard Chartered it had to produce evidence in support of that claim. The applicants have a valid point which appears to have eluded the attention of the learned Judge. We can understand why this happened because the way the case was presented made it appear as if judgment was sought on the basisW eo f aarne asdamtiissffioend. that the applicants have an arguable appeal. Although the respondent is a financial institution and in normal circumstances would have no difficulty in refunding the decretal amount if the appeal succeeds, we do not think that this is the sort of case in which we should allow National Bank to take immediate benefit of the decree. Consequently, we allow the application and grant the stay sought pending the determination of the intended appeal. Costs of the application to be in the appeal.

Dated and delivered at Nairobi this 16th day of August, 2002.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

O'KUBASU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR