



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CORAM: KWACH, SHAH & O'KUBASU JJA

CIVIL APPLICATION NO. NAI. 346 OF 1999(UR.141/99)

BETWEEN

BONIFACE NJIRU T/A NJIRU BONIFACE & CO. ADVOCATES.....APPLICANT

AND

J.M. KIBUCHI T/A KIBUCHI & CO. ADVOCATES.....RESPONDENT

**(Application for stay of Execution in an intended appeal
from the judgment and decree of the High Court of
Kenya at Nairobi (Mbaluto, J) delivered on 23rd
February, 1999**

in

H.C.C.C. NO.342 OF 1993(O.S))

RULING OF THE COURT

This is an application for stay of execution of a judgment and decree of the superior court (Mbaluto,J) delivered on 23rd February, 1999 at Nairobi. The judgment in question was entered pursuant to an application for summary judgment filed by the respondent, J.M. Kibuchi Esq., Advocate, practicing as M/S Kibuchi & Company Advocates, in a suit brought by an originating summons to enforce a professional undertaking given by Boniface Njiru Esq. Advocate practicing as Njiru Boniface & Company Advocates.

The said undertaking was given by Mr. Njiru in his letter of 21st April, 1997 addressed to M/S Kibuchi & Company Advocates. The extent and purport of the undertaking eventually became a bone of contention between the two Advocates and Mr. Kibuchi brought proceedings against Mr. Njiru, under

Order 52 of the Civil Procedure Rules. Order 52 of the Civil Procedure Rules caters (inter alia) for speedy relief to enforce an advocate's undertaking and rule 10 thereof provides as follows:

"10(1) An originating summons under this Order, shall be made returnable for a fixed date before a judge in chambers and unless otherwise directed, shall be served on all parties at least seven clear days before the return date.

(2) No appearance need be entered to the summons and no affidavit in reply need be filed and all

parties may be heard without entering appearance".

Although Order 36 rule 7 of the Civil Procedure Rules provides for the format of originating summons as set out in Form No. 13, 13A and B in Appendix B to the Civil Procedure Rules, Order 52 rule 10 restricts the form of the originating summons to Form No. 13B, that is to say that an originating summons issued under order 52 must be returnable on a fixed date and all parties be heard without entering appearance.

The form of the originating summons adopted by the respondent in the superior court and filed on 10th June, 1998 called upon the applicant to enter appearance to the said summons within 10 days of service thereof on Mr. Njiru. Mr. Njiru filed a replying affidavit to counter what was stated in the affidavit in support of the originating summons. The respondent then sought leave to lodge an amended originating summons. That amended originating summons was ordered as "deemed to be filed on 22nd January, 1999". On 29th January, 1999 the respondent moved the court under Order 12 rule 6, Order 35 rules 1&5 and Order 51 of the Civil Procedure Rules (with Section 3A of the Civil Procedure Act thrown in for good measure) for entry of judgment against the applicant in the sum of Shs.1,473,323/25. Apart from relying on his affidavit of the 9th July, 1998 Mr. Njiru, filed grounds of objection to the application for summary judgment on 16th February, 1999. That application came up for hearing before the superior court on 23rd February, 1999 when Miss Makengu appeared for Mr. Kirugara to seek an adjournment of the hearing thereof. The adjournment was refused and the learned judge entered judgment as prayed in the application dated 28th January, 1999. There are at least two arguable issues that emerge. These are:-

1. Was the procedure adopted by the respondent for enforcement of the undertaking such as is allowed by the rules. If not, is it fatal?

2. Was the learned judge right in disregarding two affidavits on record in opposition to the application as well as the grounds of opposition?

The intended appeal is therefore an arguable one. As to whether the success in the intended appeal would be rendered nugatory if the stay sought is not granted is an issue we would not comment too much on. If the moneys in question are paid out to M/S Kibuchi & Company Advocates who will probably pay the same out to their client, the question of restitution in the event of appeal succeeding, may give rise to difficulties and we would therefore want to secure the position of the applicant pending the hearing and determination of the intended appeal.

The upshot of this is that this application is allowed, the execution of the decree given on 23rd February, 1999 is stayed pending the hearing and determination of the appeal. Costs of the application be in the intended appeal.

Dated and delivered at Nairobi this 11th day of February, 2000.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.