



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPLICATION NO. NAI. 358 OF 1999 (149/99 UR)

BETWEEN

ORARO & RACHIER ADVOCATES.....APPLICANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

RULING OF THE COURT

There is before this Court an application brought under rules 5(2)(b) 1(2), 92(2), and 43(1) of the Rules of this Court seeking stay of order made by the superior court (Mbitio, J) whereby he entered judgment for the respondent against the applicant in the sum of Shs.8,770,320/60 plus interest thereon and costs, on an originating summons brought before the superior court under Order 52 rules 7(1)(b), (2), 10(1) and(2) and order xxxvi rule 7 of the Civil Procedure Rules. That application was for enforcement of an alleged undertaking given by the then law firm of Messrs. Oraro & Rachier, Advocates to pay the sum of Shs.8,770,320/60 to the respondent.

Order 52 rule 7(2) provides as follows:-

"(2) save for special reasons to be recorded by the Judge, the order shall in the first instance be that the advocate honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made."

Despite this clear provision, the learned Judge, not having recorded any special reasons, entered judgment in the said sum against the applicants. That is, to our mind, at least one arguable issue.

The judgment of the learned Judge was delivered by M.J. Bhatt Esquire, Principal Deputy Registrar of the superior court. Order 20 rule 2 of the Civil Procedure Rules provides as follows:

"2(1)A Judge may pronounce a judgment written and signed but not pronounced by his predecessor.

(2)A Judge of the High Court may pronounce a judgment written and signed but not pronounced by another Judge of the High Court. Order 20 rule 3(2) of the Civil Procedure Rules provides:

"(2)A judgment pronounced by a Judge other than the Judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it."

Order 48 of the Civil Procedure Rules which give special powers to Registrars of the superior court does not give the power of reading and dating a judgment of a Judge, to the Registrar.

Therefore it is at least arguable if the judgment as read and dated by the Principal Deputy Registrar is a judgment, as yet, of the superior court.

The other arguable point as we see it is: whether or not there is any binding undertaking given by the then firm of M/S Oraro & Rachier. By a letter dated 7th May, 1993 the managing director of the respondent bank informed M/S Oraro & Rachier, to use the words of the managing director, as follows:

"The Bank has an interest on the above property to the extent of K.shs.6,658,521/90 which Mr. Ohas is aware of and although we have no objection to the intended sale we are anxious that our interest do not appear to be taken into account. As lawyers we want you to take the above information into account and advise us on the best way of protecting our interest."

M/S Oraro & Rachier responded to the said letter of 7th May, 1993 as follows:

"We refer to your letter of 7th May, 1993 and confirm that we have received instructions from Mr. Ohas that at the conclusion of sale of this property of the amounts owing to your bank should be paid from the proceeds thereof. We therefore confirm that upon receipt of the purchase price we shall retain an amount sufficient to discharge the liabilities owing to the bank."

By their letter of 18th October, 1994, M/S Oraro & Rachier, responding to the letter of 14th October, 1994 addressed to them by M/S Kibuchi & Company (advocates then acting for the respondent) stated as follows:

"Our clients are in the process of selling this property and expect to be able to redeem your client's loan before the close of the year. In due course, we shall be in a position to give you a firm undertaking for redemption as soon as the agreement for sale is executed by both parties. In the circumstances, we would on behalf of our client request that you hold the matter in abeyance until you hear from us which should be early next month."

The general principles governing undertakings given by a solicitor in England are stated succinctly in *Cordery on Solicitors*, 8th Edition, at page 110 and it would be prudent to set these out:

"The court has a discretion whether to exercise its summary jurisdiction, and will do so only in clear cases. Whether an undertaking given by a solicitor to the court, his client or a third party may be enforced against him personally will depend upon the fact of each case, but the undertaking must be a personal undertaking and given by the solicitor: It must be clear in its terms: the whole of the undertaking must be before the court; and the undertaking must be one which is capable of being performed ab initio."

It would in our opinion be a matter of argument before the Court, when the appeal is heard, whether or not there is any binding professional undertaking capable of being enforced and which could be gleaned out of the correspondence. The learned Judge has stated that "it is clear that by their letter of 18th May, 1993 they agreed to retain an amount sufficient to discharge the liabilities owing to the plaintiff". Whether that letter gives a clear and unequivocal undertaking will be a matter for arguments on appeal.

Another arguable point that we see it is whether or not there was accord and satisfaction? M/S Oraro & Rachier sent the sum of Kshs.6,768,797.95/= to the managing director of the respondent bank on condition that it was to be accepted "in full and final settlement of any amount which may be due or owing in connection with our letter dated 18th May, 1993". They added a rider to the effect that if the cheque was not to be so accepted it was to be returned to them. Instead of returning the cheque to M/S Oraro & Rachier, the respondent bank accepted and banked the cheque on nmbaccount and on without prejudice basis.

We need not set out any further arguable points or matters and we must therefore consider whether or not the success in the intended appeal will be rendered nugatory if a stay is not granted. Mr. Gatonye for the respondent bank argued that if Mr. Oraro were to succeed in the appeal the respondent bank was

sound enough to be able to refund the sum in question. Ordinarily that is the principle on which this Court acts but recent rulings of this Court suggest that in dealing with this limb of the application the Court ought to weigh the claims of both sides.

This Court in the case of Clarkson Notcut (Insurance Broker) Limited vs. South Coast Fitness Center, Civil Application No. Nai. 204 of 1995 (unreported), stated that:- "The amount involved is, by any standard a huge one and we think we ought to secure the position of the applicant in this matter." In the case of Trust Bank Limited & another vs. Investech Bank Limited & Three others, Civil Application Nos. Nai.258 and 315 of 1999 (consolidated), (unreported), this Court said:- "On the second limb of the applications, namely, whether unless a stay is granted, the applicants' intended appeals will be rendered nugatory, the decree upon which a stay of execution is sought being a money decree, and since the respondent in our view, is a bank with a sound financial base, we do not think the intended appeals, if successful would be rendered nugatory unless the stay prayed for is granted."

We must weigh the claims of both sides. If M/S Oraro & Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the respondent bank is kept out of the sum of Shs.10,000,000/= it would not be affected. This is in our view, in this case, the position, when we are considering the situation. The balance of convenience overall favours the applicant. For these reasons we would allow this application, stay the execution of the decree which follows the judgment of the superior court dated 23rd day of November, 1999 by the learned Judge and delivered on 10th December, 1999 by the Principal Deputy Registrar and order that the costs of this application be in the intended appeal.

Dated and delivered at Nairobi this 7th day of April, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.