To Return. WAIGANJO'S 36

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, LAKHA & O'KUBASU, JJ.A.)

CIVIL APPEAL NO. 286 OF 2001

BETWEEN

UHURU HIGHWAY DEVELOPMENT)
KAMLESH MANSUKHLAL DAMJI PATTNI)
PANSAL INVESTMENTS LIMITED)
GRAND HOTELS MANAGEMENT LIMITED) .....
APPELLANT

AND

CENTRAL BANK OF KENYA)
DEPOSIT PROTECTION FUND BOARD)
JOSEPH KITTONY)
GEORGE ORARO)
RESPONDENTS

(Appeal from a Ruling of the High Court of Kenya at Nairobi (The Hon. Mr. Justice Aganyanya) dated the 12th day of July, 2001

in

H.C.C.C. NO. 589 OF 1999)

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DRAFT RULING OF THE COURT

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 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 **5 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 Fir st 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 Geo rge 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 for 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 (**UHDL** and **PATTNI**). As a consequence of the intimidation, threats and undue influence exerted upon the 2nd Plaintiff/Applicant during occasions in which the said Counsel played an active part the 1st Plaintiff/ Applicant was forced to give a purported charge

of its property known as **L.R. NO. 209/9514** registered in the Land Titles Registry as **I.R. 36755/17** to the 1st Defendant. The Counsel for an on behalf of the firm the then Oraro & Rachier Advocates acting as an advocate for the 1st Defendant and for the 1st and 2nd Plaintiff/Applicant prepared the said Charge. The circumstances under which the said purported charge was executed by the 1st Plaintiff/Applicant as well as the validity of the said purported charge are in dispute in its suit in which the counsel and Oraro & Company formerly Oraro & Rachier Advocates are now acting as advocates for the 1st and 2nd Defendant.

It is on the above grounds and facts that the prayers in the application were sought. The applicants' contentions were two-fold: first, the Counsel acted for both parties in the preparation of the charge and 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 Woollan Ltd vs. Kaplan & Stratton Civil Appeal No. 55 of 1999, (unreported)**. It is said, 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 applicant was not his client 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 Wollen's case** as stated aforesaid. Secondly, he argued that in charging the applicant his fees for preparation of the charge, he was not doing so because he was his client 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 contented that he expected the applicant's advocate to lay out the evidence expected from 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 plaintiff.

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 (a) right Whether the applicant was the Counsel's client 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 applicant. 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 of the present dispute. We question why correspondence regarding the charge was sent directly to the 2nd plaintiff rather that pass through D.V. Kapila & Co., advocates. This raises a strong presumption that it was the firm of Oraro & Rachier acting for the first 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 first plaintiff and the handwritten manuscript of the counsel.

In any event, **section 2** of the Advocates Act, Cap. 16, 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 applicant paid to the Counsel his costs. In all the above circumstances 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, Cap. 16 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 at. In paragraph 6 of the supporting affidavit the deponent gave the particulars, inter alia, of duress. In the absence of a replying affidavit this was not denied and 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 applicant, remains former client. I now 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, made three submissions; that a client may be represented by an advocate of his choice and the responsibilities and duty of a trial judge. He, however, strongly criticized the delay in raising the objection. He laid considerable importance on this: 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 applicants' part in bringing this objection before the court. Delay 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 applicants 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 privilege 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, J.A. (as he then was) expressed himself as follows in **King Williams Case, Civil Appeal No. 55 of 1993, (unreported):**

> "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 ....."

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 Wollens case**. We are satisfied that the real mischief or real prejudice were not rightly anticipated. The learned judge failed to appreciate that more confidential information was imparted to the counsel than envisaged. We have no doubt in our minds that the Counsel will consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will also 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 witness was not subjective but governed by **rule 9** of the Advocates (Practice) Rule.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 Lestamg V.P. said at page 94:-

> "I think it is well settled that this court will not interfere with the exercise of its discretion by an ..... 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 therefore an Order granting the applicants' notice of motion dated 5 June 2001 as prayed. The respondents shall pay to the applicants 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 ..... day of January, 2003.

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

E.O O'KUBASU

.....

JUDGE OF APPEAL