**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 556 OF 2010**

**KIOKO MANG'ELI……...……..1ST APPELLANT**

**KIMANI CHEGE……2ND APPELLANT**

**VERSUS**

**MURAGE& MWANGI ADVOCATES……RESPONDENT**

**JUDGMENT OF THE COURT**

*(Being an appeal from Ruling and Orders of Hon. S.A.Okato, Principal Magistrate dated 25th November, 2010 in Milimani Chief Magistrate's Court Nairobi Civil suit No. 4766 of 2009)*

This appeal arises from the ruling and orders of honorable S.A Okatoat the Milimani Chief Magistrates Court Nairobi in CMCC No. 4766 of 2009made on 25th November 2010.The respondent, Murage & Mwangi Advocates (a firm) by a plaint dated 24th July, 2009 and filed in court on 27thJuly, 2009 sought from the defendants jointly and severally an order for Shs. 1,000,000 being the amount due and owing to the respondent by the appellants as balance of the agreed legal fees for professional services rendered to the defendants at their own request and instances.

The defendants entered a joint appearance and filed their joint defence dated 15th September, 2009 denying the respondent's claim and averring that they never instructed the respondents to render any professional services as alleged, and putting the respondents to strict proofthereof. The appellants also averred that the plaintiff/respondent had no capacity to sue or bring the suit and prayed that it should be struck out, among other contentions.

By a notice of motion dated 14th September, 2009 and filed in court on 15th September, 2009 the respondents herein moved to court seeking for summary judgment against the defendant/appellant in a claim of Kshs 1,000,000 being the balance of the legal fees. The application was based on the ground that the appellants were indebted and there was absolutely no credible defence to the claim by the appellants. Further, that the defence filed was intended to delay the fair and expeditious disposal of the suit. The said application was supported by an affidavit sworn by Paul Mwangi advocate, partner in the law firm of Murage&Mwangi Advocates.

Mr. Mwangi deposed that his firm was retained by the appellants herein in HCCC No 2071 of 2000 between M-Link Communications Limited and Telecom (K) Ltd and Communications Commission of Kenya.

Further, that the clients advocate relationship extinguished on 14th January, 2006 in consideration of the appellants paying Kshs. 5 million to the respondents out of which the appellants paid only shs4,000,000 by installments leaving a balance of Kshs. 1million which, despite demand and notices, the appellants did not respond except that they dared the advocates to go to court with an endorsement on the demand letter dated 7th October, 2008. He annexed a copy of addendum and the said letter.

In his replying affidavit sworn on 29th October, 2009, the 1st appellant deposed that the defence raised legalissues and could not be struck out as he never retained the plaintiff/respondent to act for him in the mentioned suit since he was not a party to the said suit. Further, that the respondent had not explained how the debt arose and that even if the appellants had an interest in the company the decision to retain the respondents could only have been made by a company resolution of directors of the companies involved in the dispute, which resolution was not available and that if the retention was made in 2000 then the suit was statute barred. He also deposed that the addendum is inadmissible, that there was no proof of HCC 2071 of 2000 and neither had stamp duty been paid as required by law. That the addendum did not show the party the respondent was representing and that it showed the respondent was a beneficiary of proceeds of proceedings which makes the same illegal. That the suit was brought to avoid real issues.

On 28th September, 2009 the appellants filed a notice of preliminary objection seeking to have the suit struck out for being bad in law, incompetent and that the respondent had no locus standi to file the suit.

By a notice to cross examine Mr. Kioko Mangeli on his replying affidavit sworn on 29th October, 2009, the respondents did on 22nd January, 2010 file the said notice on account that the replying affidavit was evasive, a submission and that he had committed perjury. They also sought the striking out of the said affidavit. The trial magistrate did on 23rd March, 2010 allow the oral application to cross examine the deponent under Order 8 rule 2(1) of the Civil Procedure Rules.

However, the 1st appellant was not cross examined fully owing to many objections and counter objections which eventually led to the application proceeding without him being cross examined. The court then set a date for ruling on the application for summary judgment and directed parties to file written submissions to dispose of that application.

The court then found that the defence filed by the appellants was a mere denial and allowed the application and summary judgment entered according to the plaint in favour of the plaintiff/respondent herein. The magistrate also struck out the appellant's replying affidavit on account that it was not sworn on the deponent's own behalf or with written authority of the 2nd appellant.

The appellants being aggrieved by the said decisionlodged this appeal videa memorandum of appeal dated 1st December 2010, as amended on 17th April, 2012 setting out 10 grounds of appeal namely:

**1. The learned honorable magistrate erred and misdirected himself in law and fact when he held that the defendant's defence did not disclose reasonable defence.**

**2. The learned honorable magistrate erred when he found the defence did not raise triable issues.**

**3. The learned honorable magistrate erred and when he failed to appreciate that the plaintiffs' plaint contradicted material facts contained in his application dated 14th September 2009 and proceeded to allow the same.**

**4. The learned honorable magistrate erred in law and facts when he allowed interest to run from 15/5/when there was no jurisdiction for the same.**

**5. The learned honorable magistrate erred and misdirected himself when he failed to appreciate that the annexure in support of the application were highly contentious and**

**needed clarification by cross examination of the plaintiff during full hearing.**

**6. The learned honorable magistrate erred in law when he failed to appreciate that the state of the plaintiff which had been denied in the defence was a triable issue.**

**7. The learned honorable magistrate erred when he proceeded to enter judgment against the appellant when the subject matter involved a limited liability company which is separate entity from the defendants.**

**8. The learned honorable magistrate erred when he allowed the respondent application in its entirety.**

**9. The learned honorable magistrate erred and misdirected himself in law when he held the appellant's replying affidavit sworn on 29th October 2010 was fatally defective and proceeded to strike it out.**

**10. The learned honorable magistrate erred and misdirected himself in law when he held that the respondent's application dated 14th September 2010 was unopposed when there were various papers in record in opposition to the said application including appellants' submissions.**

The appeal was admitted to hearing on 12th may, 2014 and directions given on 26th November, 2014. The hearing of the appeal by way of oral submissions was on 2nd December 2014. Mr. Musyoki counsel for the appellant told the court that the magistrate struck out the replying affidavit and proceeded to allow the application for summary judgment against the appellant for reasons that the affidavit did not state that he was swearing it on his own behalf. He submitted that there was no law that mandates a deponent must state he/she swears an affidavit on his behalf. Mr.Musyoki further claimed that the affidavit was sworn in the first person by the respondent in opposition to the application for summary judgment. He further submitted that the affidavit concerned issues that were within the personal knowledge of the deponent. Mr. Musyoki argued that A**rticle 159 of the Constitution**should have been applied by the court to consider the application as opposed. He further argued that even if there was no authority from the 2nd defendant it should have been held that it was only the second appellant/defendant who was not opposed to the application.

Counsel also submitted that it was erroneous to hold that the application was not opposed when the record was clear that the appellants had jointly filed a Notice of preliminary objection to the suit. Further, that even where no objection is raised the court is bound to look at the pleadings. He argued that an application for summary judgment will only be considered before a defence has been filed. Counsel stated that they had filed a defence which raised triable issues and the ruling did not indicate if the trial magistrate ever examined that defence. Mr. Musyoki stated that if the court had considered the defence then it would have found 3 triable issues.1) status of the plaintiff not being juristic person,(2) they did not file a reply to the defence and 3) the defendant had not instructed the plaintiffs to carry out professional services. Mr.Musyoki further submitted that paragraph 3 and 7 of the plaint was deniedby paragraph 4 of the defence and that there was also denial of the signing of the addendum by 1stdefendant. Counsel claimed that the signature was not his compared to the signature in the replying affidavit. He submitted that where the defence raises even a single triable issue, the defendants were entitled to be heard. He stated that the summary judgment was erroneous and urged the court to allow the appeal with costs.

Mr. Thuita, counsel for the respondent opposed the appeal and urged the court to uphold the lower court's decision since the defence was a mere denial. He argued that the status of the respondent is not a triable issue under Order 30 rule 1. That the respondent was and is a firm which can be sued in its own name since it is a partnership. Counsel further submitted that there was a clear addendum between the appellant and the firm, and that the defendants/appellants paid 4 million and the balance was 1 million, he argued that thefirm's contention was not controverted by the defendants/appellants.Mr. Thuita also submitted that the issue of the signature was never raised in the replying affidavit or before the trial court, it was

being raised in the appeal.Counsel also told the court that the appellant's submissions in the lower court raised latches under order 2 rule 4(1). The appellant had to plead statute of limitation which they never pleaded in their defence and sought to introduce it in an application for summary judgment, which could not be considered by this court.

Concerning the authority to swear an affidavit on behalf the 2nd defendant, counsel for the respondent submitted that the court evaluated the evidence before it and came to the conclusion that the defence and the replying affidavit had no substance. He further stated that the issue of preliminary objection was never raised in the trial court.

I have carefully considered the record including the lower court pleadings affidavit evidence and the ruling on summary judgment. I have also considered the grounds of appeal and rival submissions by both parties' advocates. I note that none of the parties relied on any authority in support of their respective positions.

This being a first appeal, this court is bound by the principles espoused in section 78 of the Civil Procedure Act to: evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction. And in the determination of the appeal, this court has powers to:

> ***"S. 78 (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –***
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> ***a) to determine a case finally***
>
> ***b) to remand a case***
>
> ***c) to frame issues and refer them for trial***
>
> ***d) to take additional evidence or to require the evidence to be taken***
>
> ***e) to order a new trial***
>
> ***2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.***

Iam also guided by the decision in **SELLE –Vs- ASSOCIATED MOTOR BOAT COMP [1968] E.A. 123**, to evaluate the trial Court's evidence, analyze it and come to my own conclusion, but in so doing, I must give allowance of the fact that I neither saw nor heard the witnesses. However, this court is not bound to follow the trial court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

Iam also bound by the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the Court of Appeal set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the 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 account and consideration and in doing so arrived at a wrong conclusion."***

The appellants challenge the ruling in which the lower court allowed an application for summary judgment against them for the sum of Kshs. 1,000,000 in favour of the respondents/advocates.

In an application for summary judgment the applicable law is found Under **Order 36 rule 1 of the civil** p**rocedure Rules which** state.

> ***1. In all suits where a plaintiff seeks judgment for –***
>
> ***a. a liquidated demand with or without interest; or***
>
> ***b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits***

A plain reading of the above rule show that a plaintiff may apply for summaryjudgment where the claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence. In this case, at the time the application for summary judgment was filed on 15th September, 2009, the defendants had not filed defence. The record shows that the defence dated 15thSeptember, 2009 was filed on 18th September, 2009. In other words, the respondents' application was filed within the stipulated timeframe provided for in the law. Nonetheless, the law provides for application for summary judgment being made before defence is filed, but there is no automatic right of entitlement to such relief. A party who alleges by their application that they are entitled to summary judgment must prove their case, even if no defence was filed to deny the claim. (see sections 107,108 and 109 of the Evidence Act on burden of proof).

The Court of Appeal in **HON. DANIEL TOROITICH ARAP MOI VS MWANGI STEPHEN MURIITHI AND ANOTHER [2014] EKLR** held that:

> "***Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:" the burden of proof in a suit or proceedings lie on that person who would fail if no evidence at all were given on either side."……..it is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim must be dismissed. The standard of proof in civil cases is on a balance of probabilities does not change even in the absence of a rebuttal by the other side.***

In the instant case, the respondent in its plaint dated 24thJuly 2009 claimed for Kshs 1,000,000 together with interest from 15th May 2006 until payment in full. The amount due was alleged to be a balance of the legal fees for services rendered to the appellant. The appellant entered appearance through the firm of B.M Musyoki on 8th September 2009. The respondent filed the application for summary judgment on 15th September 2009 and served upon the appellant on 17th September 2009, after which the appellants filed their defence on 18th September, 2009. The appellants also filed a notice of preliminary objection on 28th September 2009 on the grounds that the respondents suit was bad in law,incompetent and that the respondents had no locus standi to file the suit. The appellants also filed a replying affidavit opposing the application for summary judgment on 29th October 2009. The application for summary judgment was heard on 17th February 2010 with many hurdles after the 1st appellant who was the deponent of the replying affidavit to the application for summary judgment was cross examined on his affidavit but the exercise was not completed after he allegedly left the jurisdiction of the court and was no longer available for further cross examination on his affidavit.Consequently, the trial magistrate struck out his affidavit

and proceeded to determine the application by the respondents/ plaintiffs as if it was not opposed.

**The main issue for determination** in this 10-paragraph grounds of appeal is whether or not the respondents proved on a balance of probabilities that they were entitled to a summary judgment and if not, whether the appellants should have been given an opportunity to be heard on their defence?

In the Court of Appealcase of **HARIT SHETH T/A HARIT SHETH ADVOCATES V SHAMAS CHARANIACIVIL APPEAL NO. 252 OF 2008 [2014] eKLR,** in determining an appeal from the High Court where the court entered summary judgment in favour of the respondent for KShs.32 million with interest at court rates from the date of the suit, as well as costs, the court held:

> ***"The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENTCORPORATION Vs DABER ENTERPRISES LTD, (2000) 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.(emphasis mine)(See also CONTINENTAL BUTCHERY LTD V NDHIWA, (1989) KLR 573).***

**In *DHANJAL INVESTMENTS LTD V SHABAHA INVESTMENTS LTDCIVIL APPEAL NO. 232 OF 1997,***the Court of Appeal had earlier stated as follows regarding summary judgment**:**

> ***"The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurantvs Devshi& Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs MooringHotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions…"***
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> **Regarding what constitutes triable issues, in *KENYA TRADE COMBINE LTD V SHAH, Civil Appeal No. 193 of 1999,* and this Court stated as follows:**
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> ***"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."(Emphasis mine).***
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> ***The defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues. (See DEDAN KING'ANG'I THIONGO V MBAI GATUMA, Civil Appeal No. 292 of 2000 and BANQUE INDOSUEZ V D J LOWE&CO LTD,Civil Appeal No 79 of 2002. Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. (See MOMANYI V HATIMY & ANOTHER, (2003) 2 EA 600). That is precisely the reason why the defendant is entitled to unconditional leave to defend.***

In applying the principles espoused by the Court of Appeal in the above cited decisions to this case, the claim herein arose from alleged legal services rendered to the appellants in **HCCC No. 2071 of 2000 between M-Link Communications Limited and Telkom (K) Ltd vs Communications Commission of Kenya**.

In their Joint defence at paragraph 4, the appellants denied having instructed the respondents to render any professional services to them.However, according to the respondents, that denial was intended to delay the fair trial of the suit as there was uncontroverted evidence that the money was owed as per the signed addendum.

The ancillary question for my consideration is, did the addendum clearly, plainly and or obviously prove

that the legal services were indeed rendered by the respondents in the named suit?Further, did the said addendum provide evidence of payment of the agreed sum and or the outstanding balance?

In this case, it was incumbent upon the respondents to prove in their application for summary judgment that indeed such services were retained and or rendered, and that plainly and obviously, a sum of Kshs. 5, 000,000 was agreed upon, with Kshs. 4,000,000 being settled, leaving a balance of Kshs. 1,000,000to justify an order for summary judgment.

I have carefully examined the Addendum which is alleged to have been signed by the appellants for the alleged legal servicesrendered in the named suit. There is no evidence of payment of the alleged agreed fee of Shs. 4 million leaving a balance of shs. 1 million. Therefore, in my view, the idea that shs. 1 million was outstanding does not arise in a plain, clear and obvious manner it requires probing by way of cross-examination of the claimant for the court to satisfy itself that indeed the amount was due and owing.

And what is an addendum? I ask. Black's Law Dictionary Ninth Edition defines addendum as: ***"something to be added, especially to a document; a supplement."*** And as to what a ***"supplement"*** is, the said Law Dictionary defines this term under "***supplemental agreement"*** as "a ***side agreement.""A side agreement"*** is defined at page 79 of the said Black's Law Dictionary as***" an agreement that is ancillary to another agreement."***

In other words, in this case, there must have been the primary agreement between the parties, which was supplemented by the addendum or side agreement. That primary agreement which was being supplemented by the addendum or side agreement was never annexed to the application for summary judgment, which leaves a lacuna in the evidence in support of the summary judgment. In my view, the respondents were under a duty to exhibit not only an addendum, but also the main agreement which they were relying on for the retention of the legal professional services allegedly rendered to the appellants.

Not even the details of the High Court suit were exhibited after the defendants/appellants herein filed replying affidavit denying retaining the respondents. Furthermore, from the cited case, it is clear that the suit involved incorporated companies and a state corporation Communications Commission of Kenya. In law, a company is an artificial entity yes but with the legal persona different from its owners, with the capacity to sue and be sued in its own name. It would also have the legal capacity to give instructions through its directors by a resolution. The directors would therefore only sign affidavits or documents with the authority of the company and not in their own right or behalf. There was no such evidence exhibited in this case by the respondents.

Noting that indeed there was no evidence that the appellants herein were parties to that suit wherein the respondents were allegedly retained to represent the appellants, it was encumbent upon the respondents to prove that fact that they were not only indebted in the sum as claimed but also evidence that they were retained to represent the appellants. The agreement dated 23rd January, 2002 regarding remuneration for working over HCCC NO 2071 OF 2000 was never exhibited in court. There was further no evidence that the advocates relinquished instructions on the said suit and claims from the proceeds thereof. I reiterate that in the absence of evidence that out of the **"agreed 5 million, 4 million was settled leaving balance of 1 million"** giving rise to the suit subject of this appeal, the summary judgment entered against the appellants cannot stand.

With that issue only, I find the defence as filed raised a triable issue which ought to be determined by the court.

I also find that the lower court erred in finding that the appellant was indebted without giving the appellant a fair trial. To the trial magistrate's understanding, the respondent's application was unopposed. The appellant opposed the application through the replying affidavit sworn by Kioko Mangeli on 29thOctober 2009 which was struck out on the ground that there was no written and signed authority from the 2nd defendant.The court in my view erred by striking out the affidavit. Order 18 rule 7 (now order 19 rule 6 of the Civil Procedure Rules) provides that*the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise*

*in the title or other irregularity in the form thereof.*

In the interest of justice, the court ought to have considered the affidavit since the two appellants were defending the suit jointly. Furthermore, it was erroneous on the part of the trial magistrate to hold that the affidavit was not sworn on the deponent's own behalf when the said affidavit was sworn in the first person on matters of fact that the deponent had knowledge of. Even if the deponent had no written authority from his co-defendant to swear the affidavit, the trial magistrate should, at worst, have found that the affidavit was only valid with respect to the 1st defendant/deponent. Paragraph 1 of the replying affidavit of the 1st appellant affirmed that he was swearing the affidavit with the authority of the 2nd appellant. The error pointed out by the lower court is in my view a procedural technicality which did not go to the root of the matter.

There was also a preliminary objection on record which raised serious points of law. Had the trial magistrate considered it alongside the submissions filed by the appellants' advocates, he could have assessed whether or not the defence as filed raised any triable issues.The trial magistrate did not even refer to the submissions by counsel for the appellants to decipher any points of law raised even if the appellants' affidavit had been fatally defective and or non-consequential to the application for summary judgment.

The trial court, in my view, totally failed to consider both parties'contentions before allowing the application. On this point am persuaded by the decision in **AAT HOLDINGS LIMITED VS DIAMOND SHIELDS INTERNATIONAL LTD [2014] EKLR**where Gikonyo J held:

> **[19] There are sound legal and policy considerations which are responsible for the approach taken by the law on this subject; arising from the right of access to justice by all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial. Which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether a bona fide triable issue exists; and 2) the Plaintiff equally gets a fair trial by eliminating such delay in the administration of justice which would keep him away from his just dues or enjoyment of property; this is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases. I admit, this balancing act of the rights and interests of parties is most useful in the adjudication of cases, yet quite delicate as well. But courts are experienced at carrying out the exercise by following the laid down principles of law enunciated above."**

I hold the view that the appellants should still be given an opportunity to defend the respondents claim as the defence filed **was not even struck out** and neither did the magistrate refer to it in his ruling.I hasten to add that courtsof justice should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had, despite the delay like in this case.

Summary judgment has also been termed as a draconian measure which should be given in the clearest of cases. Iam fortified by the Court of Appeal decision in **Francis Kamande – Vs – Vanguard Electrical Services Ltd 1996**, where the Court held that:

> ***"The summary procedure can only be adopted when it can be clearly seen that a claim or answer on the face of it is 'obviously unsustainable'".***

In another Court of Appeal decision of **Olympic Escort International Co. Ltd & 2 Others – Vs – Parminda Singh Sandhu & Another (2009) eKLR** the court held that,

> "***It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."***

In my view and from the exposition given, this was not one of those clearest of the cases to warrant summary judgment.

In the end I find that this appeal has merit. Accordingly, I allow the appeal, set aside the order entering summary judgment in favour of the respondents and substitute it with an order dismissing the respondents' application for summary judgment and direct that the suit be set down for hearing on merit. Costs are in the discretion of the court. I order that costs of the application for summary judgment and application for setting aside the summary judgment shall be borne by each party.Costs of this appeal shall abide by the suit in favour of the successful party.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2015**

**ROSELYNE EKIRAPA ABURILI**

**JUDGE**

**20/3/15**

Coram: Aburili J

CC: Kavata

Mr. Musyoka for appellants

Mr. Thuita for the Respondents

**Court:** Judgment read and pronounced in open court as scheduled.

**R.E. ABURILI**

**JUDGE**

**17/3/2015**

**Mr. Musyoki:** There was some money deposited in the joint interest earning account by both advocates for the parties with Co-operative Bank of Kenya.

**Mr. Thuita:** I leave it to court.

**R.E. ABURILI**

**JUDGE**

**Court:** As there is no objection to the prayer sought by Mr. Musyoki for the release of the money deposited in the joint account operated by both advocates parties, I order that the said sums of money held with Co-operative Bank, University Way Branch account no. 01100172274100 together with interest accrued should forthwith be released to the firm of B.M. Musyoki & Co Advocates for onward transmission to his clients the appellant herein.

**R.E. ABURILI**

**JUDGE**

**20/3/2015**