IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, OUKO & GATEMBU, JJ.A.

CIVIL APPEAL NO. 328 OF 2012

BETWEEN

CENTRAL BANK OF KENYA ……..……..……... APPELLANT

AND

KENYA AKIBA MICROFINANCE LTD & 14 OTHERS …… RESPONDENTS

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mabeya, J) dated the 4th May, 2012

in

HCCS NO. 644 OF 2005)

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JUDGMENT OF THE COURT

1. This is an interlocutory appeal. It arises from a decision of the High Court(Mabeya, J) made on 4th May, 2012, in which the learned Judge allowed an application for striking out the defence of the ***CENTRAL BANK OF KENYA*** (CBK) on liability and set down the main suit for assessment of damages. CBK is the appellant before us and is represented, as it was in the High Court, by Mr. Oraro assisted by Mr. Amoko from M/s Oraro & Company Advocates. The 1st Respondent, ***KENYA AKIBA MICROFINACE LTD (AKIBA),*** is a Kenyan Company holding a Hire Purchase Licence and according to it, carried on the business of *"money lending and business financing"* or in short *"Micro-finance"*. It is represented before us by Mr. Njengo assisted by Mr. Miriti from the firms of J.M. Njengo & co and Gikunda Miriti & Company Advocates. The 2nd and 3rd Respondents were employees of CBK while the 4th to 14th Respondents were police officers working in the **BANKING FRAUD INVESTIGATION UNIT (BFIU)** of the Criminal Investigation Department of the Kenya Police Service, and they were all represented before us by Mr Mwangi Njoroge, instructed by the Attorney General (AG), the 15th Respondent. Fifteen other individuals, who expressed various interests in Akiba, applied before the High court to be joined in the suit and were joined accordingly, but they are not named as respondents in this appeal.

Background

2. On the 2nd November, 2005, eleven (11) police officers in the presence of two employees of CBK

descended upon three different offices of Akiba at Lonrho House in Nairobi, Kitengela and Ongata Rongai, both in Kajiado and seized and carted away various documents, files, tools of trade, electronic and other equipment, before locking down the premises. They further froze the Bank Accounts of Akiba, arrested four of its Directors/Shareholders and promptly charged them, through KICC Police Station, on five counts of carrying out banking business and using the word *"Finance"* without the approval of the Minister of Finance contrary to various sections of the ***Banking Act, Cap.488, Laws of Kenya***. That was Criminal Case No. 2474/2005 in the Nairobi Chief Magistrate's Court, where the four accused persons took their pleas on 7th November, 2005, denying the offences and were released on bond.

3. Other criminal cases were also instituted against the Directors but they went before the High court and sought to stop them through Judicial Review applications and a Constitutional Petition, that is to say: Misc. Civil App. Nos. 1594/2005, 446/2006 and Constitutional Petition No. 513/2006. After hearing the matters, the High Court refused to stop the criminal process, reasoning that the directors were at liberty to use the contentions made in the applications towards their defences in the criminal cases.

4. The Directors also instructed their advocates who went before the High Court on 10th November, 2005, and filed suit on behalf of Akiba against CBK and the AG representing the Commissioner of Police and BFIU. They asserted that Akiba was carrying out the lawful business for which it was licenced but police officers, on the instructions of the Commissioner of Police and the Governor of CBK had wrongfully, callously and blatantly in breach of the law invaded their offices, closed down their business premises and frozen their Bank accounts, thus forcing a complete closure and ruin of the company. It claimed a liquidated loss in the sum of KShs.995 million, general and exemplary damages, a permanent injunction to stop any further interference with the operations of Akiba and an order to reopen the premises. Contemporaneously with the suit, Akiba took out a chamber summons seeking a mandatory injunction to compel the reopening of their premises and return of the seized property.

5. CBK filed a defence on 6th January, 2006, denying any wrong doing and asserting that it was the lawful authority regulating the banking industry and had received credible information that Akiba was carrying on banking business contrary to the law. It put Akiba to strict proof of the assertion that it was only carrying out Hire Purchase business for which it was licenced. It further asserted that the police, through the BFIU of CID and the Commissioner, had carried out investigations on the strength of which they proceeded to prefer criminal charges against the Directors of Akiba and, therefore, CBK was wrongly sued as it had no powers over the Police nor did it direct them on how to perform their duties. CBK also opposed the application for mandatory injunction.

6. Before the AG could file defence on behalf of the Police and BFIU, Akiba sought to amend its plaint, not only to enjoin the 11 police officers who participated in the operation of the 2nd November, 2005, but also to substantially alter the cause of action and reduce their monetary claim. Despite opposition from CBK that Akiba was seeking to file a new suit under the guise of amending the plaint, the application was granted and the amended plaint was filed on 7th April, 2006. It sought the following orders:

a. *A declaration that having complied with all and singular the requirements of the Companies Act the plaintiff had the inalienable and indefeasible right to trade and operate under the name Kenya Akiba Mico-Finance Limited.*
b. *A declaration that the business operations of the plaintiff never infringed upon any of the provisions of the Banking Act.*
c. *A declaration that the acts perpetrated by the defendants on the 2nd November 2005 were selective, illegal, unjustified and amounted to trespass and infringed the plaintiff's rights to use its name and to induct its business under that name.*
d. *An order for delivery of the plaintiffs particlarised files, computers and computer accessories as in paragraph 19 of the plaint and for payments of any consequential damages.*
e. *A mandatory injunction compelling the 1st, 2nd and 14th defendants to return and restitute to the plaintiff the items seized and removed from its offices on the 2nd November, 2005.*
f. *A mandatory injunction compelling the 14th defendant to remove the freeze/embargo placed upon*

its bank accounts namely.[sic]

g. *Without prejudice to prayer [d] a declaration that the seizure by the 3rd to the 13th defendants of the items pleaded to in paragraph 13 of the plaint was illegal and unjustified and a breach of the rights of the plaintiff.*
h. *Without prejudice to prayer [e] a declaration that the freeze/embargo placed by the Banking Fraud Investigations Unit upon the bank accounts held by the plaintiff is illegal unjustified and breach of the rights of the plaintiff.*
i. *Judgment in the sum of KShs.930,000,000/=.*
j. *Costs of the suit.*

7. The AG responded to the amended plaint asserting that the BFIU was part of the Police force and not a department of CBK; that upon investigations it had been established that Akiba was operating its business in contravention of the banking law; that the police proceeded with investigations on the strength of numerous complaints from unsuspecting customers; and that consequently, the actions of the police were lawful and led to the prosecution of the Directors of Akiba.

8. Akiba then seems to have abandoned the original Chamber summons filed on 15th November, 2005, seeking injunctory relief, in favour of one filed on 9th April, 2010 seeking release of all the seized property, an order that CBK and the AG undertake to release the properties in default of which they would pay KShs.2 billion in damages, and an order that all the defendants deposit security in court pending hearing of the suit. CBK filed lengthy affidavits in reply to equally lengthy affidavits in support of the application, and serious issues of fact and law were raised on both sides. The application, however, was not prosecuted until 27th July, 2011, when written submissions were filed on both sides and it was partly heard orally. Subsequently, Akiba abandoned it in favour of another application it had filed on 28th October, 2011.

9. The application filed on 28th October, 2011, came hot on the heels of the acquittal of the Directors of Akiba in Criminal Case No. 2474/2005 by the Principal Magistrate in Nairobi, on 3rd September, 2011. The main prayer in the application was that the defences of CBK and the AG be struck out totally or alternatively various specified paragraphs of the defences relating to liability be struck out and the suit be set down for assessment of damages. That was the application heard and determined by Mabeya J. on 4th May, 2012 and the subject matter of this appeal.

The Notice of Motion to strike out

10. The motion was predicated on several provisions of the Civil Procedure Act and Rules and sought several prayers, but for purposes of this appeal, the relevant provision is ***Order 2 Rule 15 (b), (c),*** and ***(d)*** which relate to striking out. That was the former ***Order 6 Rule 13 CPR***. As stated earlier, Akiba was emboldened by the acquittal of its Directors to make the application. Indeed, the main grounds stated in support of the motion relied heavily on the Principal Magistrate's decision. We may reproduce them:

> *"2. That all the issues of liability raised in the instant suit have been fully tried and determined in the Nairobi Chief Magistrates Criminal Case No. 2474 of 2005 [Republic v Gideon Mwiti Irea & 3 Others] vide a judgment delivered by the court on 3rd September, 2011.*
>
> *3. That in light of the outcome of the aforesaid Nairobi Chief Magistrates Criminal Case No. 2474 of 2005, the defences filed by the defendants are:*

a. *Sham*
b. *Do not raise any or any bona fide triable issues to warrant a trial on liability.*
c. *Spurious, frivolous and vexatious.*
d. *Scandalous in as much as they purport to shift blame between the co-defendants.*
e. *An abuse of the court process.*

4. That in its judgment in Nairobi Chief Magistrates Criminal Case No. 2474 of 2005 [Republic v Gideon Mwiti Irea & 3 Others] the honourable court found and held inter alia:

a. *The plaintiff was at all material times prior to 2nd November, 2005 a lawful going concern carrying on its business within the Republic of Kenya.*
b. *On 2nd November, 2005, the defendants jointly raided the plaintiff's offices, seized all the tools of trade, carried away customer files, securities, computers and all other assets and materials therein and closed down the plaintiff's offices.*
c. *As a result of the …….. subjected to loss and damage by way of inter alia loss of income, loss of return on investment, loss of business, exposure to suits by the affected innocent 3rd parties who held contracts with the plaintiff.*
d. *That the said act of illegal raid perpetrated by the defendant against the plaintiff were unfortunate and regrettable since the directors of the plaintiff had a great business vision which came to naught as a result of the unlawful raid carried out by the Central Bank of Kenya.*

5. The continued sustenance of the defences will prejudice, embarrass and/or delay the fair trial of this matter."

The same reliance is carried forward in the lengthy affidavit in support.

11. The AG filed Grounds of opposition asserting that the defence on record raised serious triable issues and ought not to be struck out, while CBK filed a lengthy Affidavit in reply on 27th January, 2012, dealing with all the issues of fact in the affidavit in support of the motion. The parties filed written submissions, were orally heard on further submissions, and filed several authorities for consideration before the Ruling was made on 4th May, 2012.

The Ruling

12. In allowing the application to strike out, the learned Judge stated that he was guided by the authority of ***D.T. DOBIE & COMPANY V MUCHINA, (1982) KLR 1***, which laid down the principles, which he summarized thus:

> ***"The power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised."***

13. He then identified two issues which in his view anchored the liability of the defendants in the suit, that is to say:

> *a) Whether Akiba was conducting banking business for which it was not licenced, or Hire purchase business as a microfinance institution.*
>
> *b) Whether BFIU was under the direction and command of CBK when it raided Akiba's premises.*

14. What followed was a minute dissection of ***sections 2 of the Banking Act*** (*the definition of banking business*) and ***16*** (*restrictions on deposit taking*), and examination of the respective affidavits in support and in reply to the motion, before coming to the conclusion that Akiba was truthful in stating on affidavit evidence that it did not carry out banking business as defined in those sections. In the learned Judge's view, neither CBK nor the AG had denied those assertions, either in affidavits in reply or in their defences. He was of the view that the whole case was based on documents, not oral evidence, and blamed CBK and the AG for keeping the documents of Akiba for six months and yet failing to establish that Akiba was carrying out banking business and not Hire Purchase business. Finally the learned Judge deferred to and applied the findings of the Principal Magistrate in Criminal Case No. 2474/2005 because,

in his view, that court was considering the same issues, stating:

> ***"After the trial court had considered all the relevant evidence before it, the criminal court [which is a competent court under*** *Section 3 of the Act****] made firm findings to the effect that the plaintiff was carrying hire purchase business which it was licenced to, that it was financing purchase of specific assets and was not at all carrying any banking business. … I do not think that there would be any other and further evidence that a trial in this case will elucidate as far as this issue is concerned. The parties have put their best foot forward and I have made a finding based on what they have availed to the court, to the effect that there is no evidence that the plaintiff was carrying on banking business or business of deposit taking. The tried before the criminal court and they failed."***

The first issue was, therefore, declared a non-issue.

15. As for the second issue, the learned Judge found that the argument as to who was in control of the BFIU was really between CBK and the AG. Both would be jointly and severally liable to Akiba since the issue of liability is not denied. In any event, he reasoned, there was evidence before the Criminal Court that the instructions to raid Akiba emanated from CBK's officials and that there was an organogram depicting BFIU as a Police investigation unit under the Governor of CBK. It was not, therefore, a triable issue.

16. The defences of CBK and the AG were declared not only frivolous and vexatious, but also scandalous, an abuse of court process and a waste of judicial time. They were struck out and judgment was entered, hence the appeal.

The Challenge to the Ruling

17. The Memorandum of Appeal filed by CBK has nine grounds but learned counsel for them, Mr. Oraro, argued them globally and basically raised three issues of law. He argued, firstly, that the learned Judge erred in paying lip service to the principles laid down in the ***D.T. Dobie case (supra)*** despite citing them correctly. He did so by deciding with finality a complex suit on affidavit evidence which was not tested in cross-examination. The learned Judge further stated erroneously that the assertions of Akiba on liability had not been rebutted by CBK or the AG when the defences of both parties were on record and there was an elaborate affidavit in reply from CBK. In any event, the assertions of Akiba, particularly in paragraphs 7A and 7B of the amended plaint, amounted to admissions that Akiba was taking deposits from the public and lending money contrary to the Banking Act and had outwardly used the word *"finance"* in its dealings. Mr. Oraro referred to several other paragraphs of the defences and affidavits on record to demonstrate that there were serious issues of fact and law relating to: whether or not Akiba was carrying out banking business; whether in the absence of a law governing microfinance operations, anyone could breach the Banking Act by operating an entity called *"Micro-Finance"*; and whether the activities of BFIU were attributable to CBK or the AG. He submitted that all the facts on record militated against the finding by the learned Judge that:

> ***"The Defendants did not specifically or otherwise deny that the plaintiff's business was carried out as set out in the affidavit in support of the motion."***

18. Secondly, Mr. Oraro submitted, the learned Judge was in error when he accepted as final and binding, the findings of the Principal Magistrate in the criminal case in which the directors of Akiba were acquitted. He cited various ***Sections of the Evidence Act (Cap 80)*** on the binding effect or conclusive nature of judgments: ***Sec. 45*** (*other judgments of a public nature*), ***Sec. 46*** *(inadmissible judgments*), ***Sec. 47***(*proof that judgment was incompetent or obtained by fraud or collusion*), and submitted that the criminal case judgment was irrelevant and inadmissible and only useful as proof that there was an acquittal and nothing else. It could not facilitate the discharge of the burden of proof imposed by law on

Akiba to show that it was carrying out Hire Purchase business and the evidential burden that shifts to CBK to show that the Banking Act was contravened. That is because CBK was not a party to the criminal proceedings and had no opportunity to cross-examine the witnesses in that matter. In this regard, Mr. Oraro referred to ***Section 34 of the Evidence Act*** which governs admissibility of evidence given in previous proceedings, and pointed out, as defined in the section, that a criminal trial is a proceeding between the prosecutor and the accused. He also cited this Court's decision in ***KISII FARMERS CO-OPERATIVE UNION LTD V SANJAY CHAUHAN T/A ORIENTAL MOTORS, CIVIL APPEAL NO. 32 OF 2003,*** where, as in this case, a civil case between the parties was pending in Court when criminal proceedings were commenced and finalized by acquittal of the respondent, and the respondent sought to have the civil case struck out on the strength of that acquittal. The Court stated:

> ***"There is and has always been a difference in the standard of proof required in civil cases and that required in criminal cases. That, in effect, means that the acquittal in criminal cases could only have been adduced as part of the evidence in the civil case but could not mean the civil case stood for striking out."***

19. Finally, Mr Oraro submitted that despite the extensive analysis evident in the High Court judgment, the findings of fact and law were baseless as the learned Judge did not peruse the pleadings on record and therefore arrived at the wrong conclusions. He referred to several portions of the judgment to demonstrate that the learned Judge was not only conducting a full trial on an application, but also shifted the burden of proof severally. The Judge further gave short shrift to the weighty issue as to whether BFIU was a police unit under the Commissioner of Police or was a CBK unit, which issue could only be resolved on oral and documentary evidence. He cited the decisions of ***COMMERCIAL BANK OF AFRICA LTD V COPAL LTD, (1985) KLR 1,*** and ***WENLOCK V MOLONEY & OTHERS, [1965] 2 ALL ER 871,*** to illustrate his submissions.

20. Mr Oraro's submissions found support from Mr Njoroge for the AG who submitted that there were numerous triable issues between the parties and these could only be resolved with finality in oral hearing where the evidence would be properly tested. He referred to the record to demonstrate that the AG was ready to discharge the burden of proof, on a balance of probability, that Akiba was conducting banking business contrary to the law, because the documents, even on face value do not attest to Hire Purchase business as contended by Akiba. There were "*savings Accounts"* and "*lender/borrower relationships"* whose nature should have been properly ventilated at the main trial. There was also an issue on the purported membership of Akiba stated to be over 3,000 when a private company can only have 50 members or less.

21. In opposition to the appeal, learned counsel Mr. Njengo, found no reason to interfere with the discretion of the High Court which was properly exercised on the two issues framed by it. Akiba, he submitted, was licenced to carry out Hire Purchase business. That Act permits the taking of deposits from the public but only to facilitate the acquisition of assets, not for any purpose prohibited under ***section 16 of the Banking Act***. This was established in the criminal case brought against the Directors of Akiba, and Akiba's assertions on oath were not directly controverted by CBK or the AG in the civil suit. Furthermore, all the documents of Akiba were in the custody of BFIU and CBK had access to them but did not bother to compile evidence to establish its allegations that Akiba was in breach of the law. As for reliance on the Criminal proceedings, Mr Njengo submitted that they were only considered because CBK produced them in evidence. The Judge, therefore, properly found that the questions for determination in both cases were the same and the parties' interests were represented since one of the witnesses for the prosecution was an employee of CBK. ***Section 34(b) of the Evidence Act*** thus applied. Finally, as regards BFIU, Mr Njengo submitted that there was no issue. That is because BFIU was merely used to carry out the decision and directives of the CBK Governor. At all events, there was a circular on record depicting BFIU as part of CBK.

Analysis and Disposition

22. ***Order 2 Rule 5 b, c*** and ***d***, upon which the application before the High court was made and considered, donates the power, in an appropriate case, to strike out any pleading on the grounds that it is

"scandalous, frivolous or vexatious", or *"it may prejudice, embarrass or delay the fair trial of the action'*, or *"it is otherwise an abuse of the process of the court"*. The High court, in granting the motion stated that the defences were *"frivolous and vexatious", "scandalous"* and *"an abuse of court process"*. Put differently, the court was persuaded that the defences were *"without substance and fanciful"*, *"lacking in bona fides and hopeless or offensive"* and would *"embarrass or delay a fair trial or misuse the court process"*. Was this the nature of the defences on record?

23. In the ***D.T. Dobie case (supra)***, Madan J.A *(as he then was)* eloquently expounded on the approach to be adopted in exercising the power to strike out pleadings, and we may quote him at some length:

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits [without discovery, without oral evidence tested by cross-examination in the ordinary way]. Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.***
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> ***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***
>
> ***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."***

24. The same sentiments were expressed by Danckwerts L.J when the House of Lords considered a similar Rule in ***WENLOCK V MOLONEY, [1965] 2 All E.R 871*** at page 874, as follows:

> ***"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."***

25. We have carefully considered the pleadings and all the affidavits on record. We have also considered the Ruling of the High court, the memorandum of appeal and submissions of all counsel. In the end, we are left in no doubt that the High Court, despite its awareness of the principles governing the application before it, nevertheless paid lip service to those principles, and also erred in the evaluation of the evidential material before it as well as the application of the relevant law.

26. The approach taken by the learned judge, in our view, offended the principles expounded in the ***D.T. Dobie case*** to which he made reference. The learned judge made findings of fact based on pleadings and affidavits in which allegations and counter allegations were made. Those allegations and counter allegations were never tested in cross-examination. For instance, regarding the question whether Akiba

was conducting banking business the learned judge had this to say:

> ***"… this suit is entirely premised on the circumstances surrounding the raid carried out on 2nd November, 2005 upon the plaintiff's offices and the subsequent closure of its operations. The answer given by the defendants is that the plaintiff had breached the law by conducting banking business for which it was not licensed. The plaintiff on its part contends that it was carrying out hire purchase business as a micro finance institution. Is this a triable issue that should be allowed to go to trial?"***

The learned judge answered that question based on what he referred to as a careful examination of ***"the nature of the plaintiff's business as detailed in the affidavit of Gideon Irea…".*** He then concluded as follows:

> ***"I do not find the same to amount to either banking business, financial business or business of deposit-taking in terms of Section 2 and 16(5) of the Act."***

In our view, the issue that the learned judge determined based on contested facts is one on which the parties should have had an opportunity to have resolved by the court after a hearing. It was not an issue whose answer was plain and obvious. It was, therefore, not an issue that could be determined, as the judge did, based on affidavit evidence.

27. The most glaring misdirection was the finding that CBK **"did not specifically or otherwise deny that Akiba was carrying out Hire Purchase business"** as asserted by it in its Affidavit in support of the motion. It was from that finding that the court concluded that the truthfulness of Akiba's case was established beyond challenge and it would thus be a waste of the court's time to delve into oral evidence. The court referred to four paragraphs (12 to 15) of the Affidavit in support of the motion in which one of Akiba's Directors gave details of Akiba's operations and how that, in his view, did not amount to Banking business. In paragraph 7 of the Affidavit in reply (sworn by Neala Wanjala on 27th January, 2012), CBK not only specifically referred to those paragraphs as well as others, but also adopted by reference, the contents of the defence on record as if they were set out fully in the Affidavit. It also adopted the contents of an affidavit filed earlier on record (sworn by Frederick Pere of CBK on 4th May, 2010) which dealt specifically with the assertions made by Akiba at some length. The AG also filed *"Grounds of opposition"* to the motion raising issues of law.

28. In view of the existence of those documents, there was no basis in fact or in law, to find, as the court did, that there was no denial to the assertions of Akiba, and that therefore the defences filed were frivolous, vexatious, scandalous or a waste of precious judicial time. On our own evaluation of the matter, the defences on record are not without substance or fanciful. They could only be vexatious if they were lacking in *bona fides* or were hopeless or offensive, but there is no firm basis laid for such conclusions. We also find that it would be an abuse of court process to deny a party to civil proceedings access to a fair ventilation of its case in accordance with the Rules. Indeed, there is on record, a list of twenty issues drawn up by Akiba's Advocates on 10th April, 2007, which are still awaiting determination. The pleadings were lucid enough, even for Akiba, to attract the framing of issues for determination by the court.

29. The other misdirection, in our view, was the elevation of the decision of the Principal Magistrate in the Criminal case against Directors of Akiba to the level of decisiveness of the civil case pending before the High Court between Akiba and 15 defendants who had a right to be heard on their defences on record. As correctly surmised by the court in the ***Kisii Farmers case (supra),*** the standard of proof in both cases differs and the utility of the Criminal case decision was to establish the acquittal of the accused persons in that case and not to forestall further discussions on relevant issues pending in civil proceedings. We further agree with the submissions of Mr Oraro that the learned Judge did not fully appreciate the relevant provisions of the Evidence Act on the probative value of the decision in the criminal case.

30. Finally, in our view, the defence by CBK that the BFIU was part of the Kenyan Police service is

not an idle, fanciful or offensive assertion and it ought to be given ventilation in oral evidence tested in cross examination before a final decision is made.

31. In the result, we allow this appeal with costs to be borne by the 1st Respondent. The decision of the High Court in the Ruling delivered on 4th May, 2012, is hereby set aside and the 1st Respondent's notice of motion dated 28th October, 2011, is dismissed with costs to the Appellants. The main suit shall be placed before any Judge of the High court, excluding Mabeya J., for hearing and disposal on merits.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of December, 2013.

P. N. WAKI

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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