REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL 10 OF 1999

LAWI KIPLAGAT …….…… APPELLANT

AND

DELPHIS BANK LIMITED ……..……. RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Kuloba, J.) dated 3rd December, 1998

In

H.C.C.C. NO. 1127 OF 1995)

JUDGMENT OF THE COURT:

Arising from his refusal to set aside his judgment dated 20th May, 1998, Kuloba, J. in his ruling in an application by the respondent for review of the said refusal said in totality:

'I agree that in dealing with the application dated 25th May, 1998, I seem to have paid attention to the specific provisions of Order 9A and Order 9B and obviously did not pay attention to "all enabling provisions of law". This is an obvious error on the face of the record, as I should have considered that aspect. So the decision is reviewed by setting it aside to allow parties to be heard on "enabling provisions of law" other than Orders 9A and 9B. The parties may take dates at the registry for that purpose.'

The respondent herein had filed suit in the superior court on 12th April, 1995 against the appellant herein for the recovery of K.Shs. 1,194,330/- together with interest thereon at the rate of 43% per annum from 23rd February, 1995 until payment in full. This amount of money was on account of accrued interest at the rate of 40% per annum on the principal sum of K.Shs. 600,000/- that the appellant had borrowed from the respondent and which remained unpaid even after the appellant had paid back the principal amount referred to above. The appellant's position was that there was no agreement between him and the respondent which entitled the respondent to charge any interest on the principal sum and on account of this, the interest claimed by the respondent in respect of the aforesaid sum was improperly and unlawfully charged, eventually, the respondent's suit against the appellant was by consent of parties set down for hearing on 20th and 21 May, 1998. When the same came up for hearing on 20th May, 1998, counsel then appearing for the respondent herein in the superior court, Mr. Mutinda, is recorded to have said:

"The plaintiff and witnesses are not present. I ask for an adjournment."

Whereupon Mr. Ougo who appeared for the appellant herein in that court as he does in this Court is recorded to have said:

"I am ready to proceed. I have one witness. Hearing to go on."

The ruling of the superior court, Kuloba, J., in this regard read as follows:

"As there is no reason for the absence of the Plaintiff or its representative or witness, an adjournment cannot be granted without a good reason for it. Absence without reason is not a good reason for an adjournment. Adjournment is refused. Case to proceed. "

Mr. Mutinda is then recorded to have said:

"I have no evidence to offer. There is no witness to call.",

to which Mr. Ougo is recorded to have said:

"There is no part of the claim admitted. The claim is not admitted. It is denied."

Kuloba, J. then entered judgment in the following terms:

"The claim is for K.Shs. 1,194,330/- with interest. It is denied in its entirety. Evidence is required to prove it. No evidence is called to prove it. The claim is not proved. It is dismissed for lack of evidence. Costs for the suit to the defendant. Orders accordingly."

It was this judgment that was sought to be set aside by the superior court in a Chamber Summons taken out by the respondent herein under **Order IXA rule 10** and **Order IXB rules 4 and 8 of the Civil Procedure Rules** and all the enabling provisions of law and filed in the superior court on 29th May, 1998. Kuloba, J. refused to set aside the said judgment the result of which refusal precipitated an application made on 9th November, 1998 by the respondent herein under **Orders XLIV rules 1 and 2 and L rule 11 of the Civil Procedure Rules** for the review of the ruling refusing to set aside the aforementioned judgment. That application was the subject-matter of the ruling set out at the beginning of this judgment. One of the two grounds upon which this application was made was that there was an apparent error on the face of the record in respect of which the application to set aside the judgment of the superior court given on 20th May, 1998 was refused. In his grounds of opposition to the application for review filed in the superior court on 16th November, 1998, the appellant herein stated that there was no basis upon which an application for review could be granted and in any event the respondent herein had not extracted the order it sought to be reviewed. At the hearing of that application before Kuloba, J. on 3rd December, 1998, Mr. Rustam Hira who then appeared for the respondent herein in the superior court as he does in this Court is recorded to have said:

"Seek review of the dismissal of 26th June, 1998. It did not take into account section 3A of the CPA which was also cited in the body of the application. All the enabling provisions of the law were overlooked."

Mr. Ougo who appeared for the appellant herein in the superior court and also appears for him in this Court is recorded to have responded to the respondent's application for review by saying:

"Application must show error on the face of the record. Applicant should have appealed. No basis on which review can be done."

In his appeal to this Court against the order of the superior court arising out of its ruling set out at the commencement of this judgment, the appellant sets out three grounds of appeal, namely:

1. "**THAT**, the learned Judge erred in law in failing to appreciate sufficiently or at all that there was no basis in law upon which he could properly review the decision he made on the 26th day of June, 1998.

2. **THAT**, the learned Judge misdirected himself on the issue whether there was an error on the face of the record, as a consequence of which he arrived at a wrong decision.

3. **THAT**, the learned Judge erred in law in failing to appreciate sufficiently or at all that he could not properly review the decision he made on the 26th day of June, 1998 when the respondent had not extracted the order it sought to review."

At the hearing of this appeal on 12th October, 1999, Mr. Ougo for the appellant submitted that the review of the ruling of the superior court dated 26th June, 1998 was improper as there was no error on the face of the record particularly when the respondent should have taken the proper step of appealing against the judgment of the superior court dated 20th May, 1998. Indeed, according to him, even in the application to set aside the aforesaid judgment, the so called "all the enabling provisions of law" were neither set out in the said application nor were they otherwise brought to the attention of the superior court to adjudicate on. Hence, reliance on them was of no avail to the respondent.

Mr. Hira's response, however, was that despite the respondent having had a right to appeal against the judgment of the superior court dated 20th May, 1998 and against the refusal by that court to set it aside, the respondent was still entitled to seek a review of the ruling refusing to set aside the said judgment as it did and brought to the attention of that court its failure to take into account the provisions of **section 3A of the Civil Procedure Act.**

It is correct that in the respondent's application to set aside the judgment of the superior court dated 20th May, 1998 "all the other enabling provisions of law" were neither set out in that application nor were they submitted on. Nevertheless, in civil jurisdiction in the superior court or in the subordinate court where the ends of justice is in issue, the inherent powers of those courts to do justice as provided by **section 3A of the Civil Procedure Act** really comes to aid. Ordinarily, the provisions of **Order L rule 12 of the Civil Procedure Rules** require that every Order, rule or other statutory provision under or by virtue of which any application is made must be stated, but failure to do so does not invalidated any such application.

In his ruling dated 26th June, 1998 in which he refused to set aside his judgment dated 20th May, 1998 as is outlined in this judgment, Kuloba, J. made no reference to any of the "other enabling provisions of law" under which the application to set aside the aforesaid judgment was made. Having not done so and one of the "the enabling provisions of law" – **section 3A of the Civil Procedure Act** – having been brought to his attention in the respondent's application for review, the learned Judge was right in holding that an obvious error on the face of the record had occurred. Indeed, that was an error of law on the face of the record in the application to set aside his judgment dated 20th May, 1998. The learned Judge cannot therefore be faulted in reviewing his decision in which he had refused to set aside the aforesaid judgment.

Concerning the appellant's complaint encompassed in ground three of his grounds of appeal, it is to be noted that this complaint was one of his two grounds of opposition to the respondent's application for review in the superior court. That ground, however, was never a subject of submission whatsoever when the review application came up for hearing before that court on 3rd December, 1998. Indeed, no reference was made to it in the ruling of the superior court out of which the order appealed from arises. That complaint touches on the jurisdiction of the superior court of review its decision of 26th June, 1998. It is an issue that should have been raised **in limine** and adjudicated on forthwith. This was not done and from what has fallen from our lips and in the wider interests of justice we do not consider that it behoves us to adjudicate on this ground of appeal either way. In the result, we think that the appellant's appeal is without merit and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of October, 1999.

J.E. GICHERU

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JUDGE OF APPEAL

A.M. AKIWUMI

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COURT OF APPEAL

A.B. SHAH…….

JUDGE OF APPEAL