IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Madan, Potter JJA & Simpson Ag JA)

CIVIL APPEAL NO. 11 OF 1980

BETWEEN

OSODO...APPELLANT

AND

BARCLAYS BANK INTERNATIONAL LTD...................................RESPONDENT

JUDGMENT

MADAN JA The respondent Bank filed a suit in the High Court against the appellant and a second defendant as partners in a firm called Alfa Agencies for the recovery of Kshs 55,959.75 in respect of overdraft facilities and other banking accommodation provided to the two defendants as partners by the respondent. In a joint defence the appellant pleaded that he joined the partnership after the overdraft facilities had been cancelled by the respondent.

The respondent then applied under Order XXXV of the Civil Procedure Rules for summary judgment to be entered jointly and severally against the two defendants for Kshs 55,959.75. The appellant filed an affidavit in reply in which he deponed that he joined the partnership firm on October 30, 1971 long after the overdraft facilities were granted to the partnership; he did not want to take over the liabilities of the former partnership, and he opened another account, titled a/c No 2, with the respondent. The appellant also deponed that the debt claimed by the respondent was a debt of the former partnership of which he was not a partner.

Todd J held that no triable issue was raised and he entered judgment as prayed against the appellant and his co-defendant together with costs of the application for summary judgment notwithstanding that in his ruling he said it was not disputed that the appellant was admitted as a partner with effect from October 30, 1971. He also said that it must have been in anticipation of that fact that the respondent wrote its letter dated October 28, 1971 advising the partners of Alfa Agencies that an overdraft facility of Kshs 50,000 had been worked in their favour to expire on June 30, 1972 although the appellant was not a partner in the firm at that time the learned judge also said in his ruling that he could find nothing in the suggestion that appellant did not want to take over the liabilities of the partnership firm. The appellant has appealed. His co-defendant has not appealed. We consider that the learned judge erred in refusing the appellant leave to defend. Section 11 of the Partnership Act provides inter alia that a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the partnership firm for anything done before he became a partner.

We also consider that the learned judge erred when he said that the overdraft facilities were granted to the partnership of the appellant and his co-defendant trading as Alfa Agencies and not to any former partnership. The overdraft facilities were granted to the partnership firm as it existed on October 28, 1971 when the appellant was not a partner in the firm.

Learned counsel for the respondent argued that the appellant as partner continued to use the overdraft facilities after he became a partner. There is no evidence to indicate to this effect. On the contrary the respondent's account filed in court and beginning Kshs 55,959.75 on January 19, 1976 does not include the name of the appellant as a partner, the partners shown being the appellant's co-defendant in the suit and two other different persons.

When a new partner is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorized what may have been done prior to his admission. This is wholly consistent with the fact that after the admission of a new member, a new partnership is constituted, and thus special circumstances are required to be shown before the debts and liabilities of the old partnership are treated as having been undertaken by the new partnership, Lindley on Partnership, 14th Ed p 333. No such special circumstances were shown in this case.

Learned counsel for the respondent further argued that the learned judge exercised his discretion in entering judgment for the respondent and we ought not to disturb it. If upon an application for summary judgment a defendant is able to raise a prima facie triable issue as the appellant did in this case, there is no room for discretion. There is only one course for the court to follow, ie to grant unconditional leave to defend.

We allow the appeal with costs and set aside the order made by the learned judge and substitute therefore an order giving the appellant leave to defend unconditionally. The costs of the application for summary judgment in the High Court will be in the cause.

As **Potter JJA** and **Simpson Ag JA** agree, it is so ordered.

Dated and Delivered at Nairobi this 28th day of November 1980.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

A.H.SIMPSON

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AG.JUDGE OF APPEAL

I certify that this is a true copy of

the original.

<u>DEPUTY REGISTRAR</u>

MADAN, POTTER JJA & SIMPSON AG JA