IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 62 OF 2011

SAMUEL KAMAU MACHARIA.....1ST APPELLANT

PURITY GATHONI GITHAE.....2ND APPELLANT

AND

OCEANFREIGHT TRANSPORT COMPANY LIMITED.....RESPONDENT

(Being an appealfrom the Judgment and Order of the High Court of Kenya at Nairobi (*Koome, J.*) dated 28th day of January, 2011

in

Bankruptcy Cause No. 25 of 2009)

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JUDGMENT OF THE COURT

On 23rd October 2001, a summary judgment was entered by the High Court (**Rawal, J.** as she then was) against **Samuel Kamau Macharia** "*the 1st appellant*" and **Purity Gathoni Githae** "*the 2nd appellant*" in **HCCC No. 3958 of 1991** (Nairobi). The judgment was in favour of **Oceanfreight Transport Company Ltd** ("*the respondent*") for Kshs. 500,000/- with interest thereon at 19% per annum compounded monthly from 6th December 1986 until payment in full. Upon failure by the appellants to satisfy the decree, the respondent on 10th July, 2008 issued and served on the appellants' bankruptcy notices numbers 3 and 4 of 2008, respectively on 4th August 2008. However, the appellants failed to comply with the notices and instead sought to have them reviewed and set aside. The High Court (**Kimaru, J**.) declined the invitation and dismissed the application on 27thMay 2008. Instead, the judge granted the respondent leave to commence bankruptcy proceedings against the appellants

The appellants were aggrieved by that decision and desiring to appeal, lodged notices of appeal. Subsequently the appellants filed an application to stay further proceedings pending the hearing and determination of the intended appeal but the same was also dismissed by **Kimaru**, **J** on 2nd July 2009. Efforts by the appellants in this court to stay further proceedings with respect to the same bankruptcy notices pending intended appeal were turned down on 16th October 2009. Undeterred the appellants once more filed a similar application before the High Court but the same was dismissed by **Koome, J** (as she then was) on 5th February 2010 on the ground that it was an abuse of the court process.

All along, the appellants denied that they owed the respondent Kshs. 34, 854, 510/- as at 31st May 2009 or that they had committed an act of bankruptcy. They also maintained that they were capable of settling the debt. They also stated that they had filed **a** counterclaim, set off or cross demand which exceeded the judgment debt and further contended that the summary judgement was not final since they were keen to lodge an appeal against the same. After hearing the petitions which had been consolidated the High Court (**Koome, J** found that the appellants had not lodged an appeal against the summary judgment entered against them in **HCCC No. 3958 of 1991,** and that the judgment remained unsatisfied as efforts by the respondent to execute it against the appellants had been futile. The Judge then issued a receiving order against the appellants and directed that their estates be placed under receivership. In essence, the Judge in the exercising her discretion acknowledged that the summary judgment delivered in **HCCC. No. 3958 of 1991** still stood, having never been appealed, otherwise set aside or vacated.

This appeal seeks to impugn those findings. It is instructive to note that on 29th October 2001, the appellants filed a notice of appeal expressing their desire to appeal the summary judgment entered against them as aforesaid. The appellants however did not serve upon the respondent the memorandum of appeal and the record of appeal until 13th June 2011, some nine years later. Upon being served with the

record of appeal, the respondent successfully applied to have it struck out on 29th September 2017 on the grounds that the appellants had filed it after an inordinate and inexplicable delay of more than nine years with no reasonable excuse.

The instant appeal is based on the memorandum of appeal dated 29th March 2011 raising 22 grounds of appeal. As rightly submitted by the respondent through **Mr. Riunga Raiji**, teaming up with **Mr. Maina Murage**, learned counsel, most of the grounds are a repetition of each other or are too vague and generalized to stand alone as substantive grounds of appeal. They instead collapsed them into four broad grounds. **Mr. Gibson Kamau Kuria, SC** appearing for the appellants similarly merged and urged the grounds into four broad clusters. These were; the jurisdiction of a bankruptcy court; the phenomenon of the bankruptcy court to examine a previous judgement of court; the burden of proof applicable in a bankruptcy cause; and the evidence before the bankruptcy court. It is apparent however that the appellants' main contention is that the receiving order was pronounced on a fraudulent judgment, an illegal decree and therefore the debt founding the receiving order was unjustified.

Urging the first issue, counsel contended that the Judge failed to apply the law on bankruptcy since in the appellants' view, the court did not establish a debt or an act of bankruptcy. The contention was based on section **7** of the repealed **Bankruptcy Act**, which provided the basis upon which a receiving order may be pronounced or made by court against a debtor. Counsel cited the English case of **Re: Fraser (1892) QB 633**, where it was held that if the court is not satisfied with the proof of the petitioning creditor's debt, or the act of bankruptcy, or the service of the petition, or is satisfied by the debtor that he is able to pay his debts or that for such other sufficient cause, no order ought to be made, the court may dismiss the petition. Though the said provision was based on the interpretation of section 7 of the English Act, counsel asserted that the Act was word-for-word as our own Bankruptcy Act since repealed.

The appellants further argued that in this case, the High Court did not consider whether or not they had ability to pay, despite expressing in their amended notices their ability to pay. The appellants' main thrust was however, that the summary judgment was founded on fraud and that the court ignored the basis of the debt which they alleged had not been established. Since the judge hinged her findings on the summary judgment, counsel submitted that the court in opting to follow that route failed to first satisfy itself of the elements of bankruptcy provided in section 7 of the Act. Specifically, that it did not satisfy itself as to the existence of a debt or an act of bankruptcy. To buttress that point, the Australian case of **Wren v Mahony (1972) HCA 5; 126 CLR 212**, was cited. In that case, the High Court considered the duty of a bankruptcy court where the debtor challenges the judgment upon which a bankruptcy notice is based and came to the conclusion that the court must be satisfied that the petitioning creditor's debt is due. Counsel further cited the recent Australian case of **Ramsay Health Care Australia Pty Ltd v Compton (2017) HCA 28,** where the issue before the bankruptcy court was whether the court ought to accept judgment as satisfactory proof of the petitioning creditors debt or whether the court had the discretion '*of going behind*' the judgment where substantial reasons are given for questioning whether by that judgment there was in truth and reality a debt due to the petitioner. The court held, that the discretion to accept a judgment as satisfactory proof of a debt "*is not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner*". In essence, the court expressed the view that it had discretion to go behind a creditor's judgment and interrogate it where sufficient basis has been laid or exists.

In a bid to establish fraud or fault by the bankruptcy court for relying on the summary judgment, Counsel submitted that the respondent had in the High Court claimed that the 2nd appellant had sold him a non-existent piece of land. That however, during the hearing of the petition, the appellant and the registrar confirmed that the appellants were selling a piece of land in the Industrial area in Nairobi and the respondent's managing director obtained or manufactured his own land reference number. According to counsel, the agreement between the parties was that the respondent would obtain title documents directly from the lands office and that the availability of the land was not in issue. The appellants further urged that the respondent failed to appreciate and discharge its burden of proof regarding the debt. In their view, the law relating to bankruptcy required the act of bankruptcy be proved again at the hearing of the petition by fresh evidence. They argued that the respondent had during the hearing failed to prove the circumstances under which the summary judgment was given in its favour. They accused the respondent of simply reproducing documents it had relied on in previous proceedings which included the decree now impugned and the certificate of costs taxed at Kshs. 108,000/- and failing to adduce evidence rebutting the testimony of the appellants. Thus, the respondent did not meet the threshold as was held in **Wren v Mahony (1972) HCA 5**; **Re: Blythe (1881) 17**; **Corney v Brien (1950-1951) CLR 343** and **Re: Hawkins (1895) 1 QB 494** where courts did not treat judgments of the civil courts as conclusive.

Though the appellants conceded receiving Kshs. 500, 000/-, they claimed that the respondent owed them Kshs. 1.5 million being the balance of the purchase price. They submitted that the dispute leading to the summary judgment emanated from an oral transaction between the 2nd appellant and the respondent for purchase of a plot identified as LR No. 209/9877. The parcel had been allocated to the 2nd appellant by the Commissioner of Lands as unsurveyed plot No. 28 ("*the plot*") off Enterprise Road in Nairobi on 13th September 1982 on condition that the sum of Kshs. 636, 970/- was paid as consideration. Sometimes in 1986, the respondent expressed its interest in acquiring the said plot. According to the appellants, the agreement was that the respondent's managing director, **Mr. Waithaka,** would pay the amount demanded by the commissioner of lands in the allotment letter and obtain a grant directly in his name. The purchase price, excluding the payments to be made to the commissioner of lands was Kshs. 2 million. The 2nd appellant then gave the respondent the original letter of allotment in order for him to complete the transfer and considered the sale complete upon payment of the balance of the purchase price. Since the respondent's case was that it was sold a non-existent parcel of land, the appellants refuted that allegation by the submission that the evidence of the Assistant Registrar of lands, **Mr Ngetich** showed that the land indeed existed.

Despite those assertions, the appellants conceded in their submissions that the commissioner of lands continued requesting them to pay for the plot as late as May 1992. That on 27th June 1994 the commissioner of lands surprisingly withdrew the appellants'letter of aforesaid allotment and the plot was subsequently allotted to **Mr. Malaki & Somche traders** who later sold it to **Excelo Structures Ltd**. They admitted though that Kshs. 500,000/- was paid to them by the respondent as part payment of the purchase price of Kshs. 2 million. In their submissions, the appellants also raised claim that the respondent extracted an illegal decree since the same did not accord with the summary judgment and was allegedly extracted without their input. It was further the appellants' submissions that allegations in the petition should be supported by further evidence other than the affidavit verifying the petitions. According to them, the evidence led at the hearing of the bankruptcy notices cannot be used during the bankruptcy proceedings as the latter are wholly distinct from the proceedings on a petition founded upon non-compliance with bankruptcy notice. As such, they contended that the respondent failed to offer any evidence at the bankruptcy hearing. It was their contention that in bankruptcy proceedings, the petitioner has a higher burden of proof than in ordinary civil suits as the status of a bankrupt does not only affect parties to the proceedings but the general public. The cases of **Ex parte Lennox (1885-1886) 16 QBD 315 and Re; A Debtor (1935) Chancery 353** were cited to urge that proposition.

In response, **Mr. Raiji** submitted stating that by the time the Judge issued a receiving order against the appellants on 28th January 2011, no appeal had been lodged in respect of the summary judgment. That however, and in any event, when the appeal was lodged later, the same was struck out by this Court for having been filed out of time. It was also the respondent's submission that in issuing a receiving order against the appellants the bankruptcy court was acting as an execution or enforcement court of a valid decree of the High Court which the court had an obligation towards. Counsel further submitted that the ruling of **Kimaru J.,** when he refused to set aside the bankruptcy notices, had not been appealed. Counsel refuted claims that the bankruptcy court misapprehended the law on bankruptcy as the court did conduct an inquiry as to the debt and considered the evidence adduced. According to counsel, in exceptional cases, a bankruptcy court has the power to go behind a judgment and make inquiries as to its merits. That it was not the jurisdiction of the court to retry a case heard and determined by another court. It was also counsel's submission that the appellants were duly represented by counsel during the hearing of the application for summary judgment and evidence was given on the basis of affidavits and annextures.

Replying on the allegation of fraud made against the respondent, counsel submitted that after a protracted hearing, it was established that the appellants failed to comply with the conditions of the allotment letter and therefore the allotment was subsequently cancelled and given to another party. Counsel submitted that the respondent was not a party to the issuance of the letter of allotment to the other party. Counsel reiterated that the decree was properly issued and remained valid as it had never been reviewed, set aside or been the subject of an appeal. Further that the interest granted by court had been prayed for in the plaint.

The respondent reiterated that Kshs. 500,000/- was paid to the appellants between October and December 1986 for the plot. It was pointed out that in the appellants' defence and counterclaim, they had admitted that the sum of Kshs. 500,000/-had been received as deposit for purchase of the plot but alleged that the respondent failed to pay the balance of the purchase price amounting to Kshs. 2,500,000/-. More pertinently, the respondent submitted that when a bankruptcy court goes behind to inquire into a judgment, unlike an appellate court, the bankruptcy court does not concern itself with whether the judgement was correctly or wrongly decided, or whether it should have been decided differently in the way it happens in the court of appeal on a first appeal. According to the respondent, the bankruptcy court concerns itself only with whether there is any evidence of fraud or collusion and whether there exists a real and genuine debt behind the judgment. The case of **RE: Flatau exparte Scotch Whiskey Distillers Ltd (1888) Vol 27 QBD 84** was cited for that proposition. It denied that such a scenario obtained in this matter where the judgment debtor was represented by counsel and there was no evidence that the judgment was obtained by fraud or collusion as correctly held by the Judge.

The respondent disputed and discounted all suggestions of fraud on its part and submitted that there was no connection at all between its managing director, **Mr. Waithaka** and the transfer of the plot to third parties after the allotment letter was withdrawn from the 2nd appellant. With regard to the contention that the interest granted was illegal, the respondent submitted that complaints against that judgment properly belonged to an appeal lodged against that particular judgment. The respondent pointed out that the instant appeal emanated from the judgment of **Koome, J,** and was not against the judgment of **Rawal, J** (as she then was). It contended that the appellants were attempting to use the present appeal to argue another appeal which was not before the court and which was untenable in law. In response to the allegations made that the decree obtained was illegal in the sense that the appellants never participated in its extraction, the respondent stated that a draft decree was forwarded to the appellants' advocates for their approval but they never responded to the same. The respondent as required then forwarded the decree for sealing by the court and the same was accepted as drawn and was sealed.

In our view, the issues for determination in this appeal are; whether the debt was satisfactorily proved before the bankruptcy court; whether the interest levied on the decretal amount was illegal; and whether the allegations of fraud to impeach the judgment dated 23rd October 2001 were proved.

The jurisdiction of a first appellate court pursuant to **Rule 29** of this Court's rule does not change and remains the same even in an appeal such as the instant appeal which emanates from the High Court sitting as a bankruptcy court. As such, this being a first appeal, this Court's duty is as was put in the oft cited case of **Selle v Associated Motor Boat Co. (1968) EA 123**, thus: -

> "**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally** (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A 270." Further in **Jabane v Olenja (1986) KLR 664**it was reiterated as follows;

"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870." Section 7 of the repealed Bankruptcy Act required that the bankruptcy court should, amongst other things, be satisfied by proof of the debt of the petitioning creditor and that if and when satisfied of that proof, the Court may make a receiving order in pursuance of the petition. **Rule 130** of the Bankruptcy rules underpin the requirement to prove the debt by the creditor during the hearing of the petition. This is of course due to the consequences that attach upon a debtor when a receiving order is made against him and thus to prevent the quasi–penal aspect of bankruptcy or substantial injustice to the debtor, proof of debt before such a court becomes paramount. The existence of the judgment is no doubt *prima facie* evidence of a debt but the bankruptcy court is still entitled to inquire whether there is really a debt due to the petitioning creditor. See

Fraser: Ex parte Central Bank of London.

So, did the respondent discharge that burden during the hearing of the petition? In its petitions, the respondent pleaded that the appellants were indebted to it in the sum of Kshs. 34, 746, 510/- as at 31st May 2009. It stated that the amount was the decretal amount obtained in its favour in **Nairobi HCCC 3958 of 1991** (together with interest at the rate of 19% per annum compounded monthly from 1st June 2000) and

that the appellants had failed to comply with bankruptcy notices issued and served upon them by the High Court on 4th August 2008. According to it, the decree in its favour created a debt within the meaning of section 7 of the Act which the bankruptcy court could rely on to satisfy itself as to the existence of a debt. To prove its allegations against the appellants during the hearing, the respondent called its managing director, **Mr. L. N Waithaka** to testify. He produced the decree obtained in its favour; the certificate of costs and the bankruptcy notices which the appellants had failed to comply with.

Upon the production of the decree in its favour, the same would have sufficed as proof of debt in accordance with section **7 (4)** of the Act which stipulated that when the act of bankruptcy relied on is non-compliance with a judgment debt, or sum ordered to be paid, the court may stay or dismiss the petition on the grounds that an appeal is pending from the judgment or order. It is apparent from the record that by the time Koome **J.** rendered her judgment in respect of the petitions, the substantive appeal in respect of the summary judgment had not been lodged. The appellants have in their memorandum of appeal faulted the Judge for hearing or commencing the hearing of the petitions whilst they were in the process of appealing to this Court against the summary judgment. However, in canvassing the appeal, the appellants did not address this Court on the issue and it is deemed they abandoned it. The same was also not pursued in the High Court and therefore this Court therefore lacks the benefit of the reasoning of that court on the issue. Even if it had been argued that a notice of appeal was on record and in essence therefore an appeal, nothing turns on the issue since the appeal was eventually struck out for being served out of time and without leave of court. The fact of the matter is that no record of appeal had been filed by the appellants at the time and therefore Koome, J was perfectly in order to proceed with the hearing of the bankruptcy petitions. The matter would have ended there were it not for the allegations of fraud raised by the appellants. The appellants disputed the debt underpinning the summary judgement on the grounds that the decree obtained pursuant thereto was tainted with fraud. This necessitated the court to go behind the judgment and inquire and satisfy itself as to the legality of the debt upon which the receiving order was based. The duty or mandate to go behind a judgement in such circumstances, and which the court was alive to, was aptly captured in the case of **Wren v Mahony** (supra) as below: -

> "**The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as satisfactory proof of the petitioning creditor's debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration**."

The Judge considered the allegations of fraud advanced by the appellants in their bid to impeach the summary judgment. The allegations of fraud levelled and which are reiterated in the appeal before this Court, were that the receiving order was made on a debt which was unfair and unreasonable since the respondent had acquired both the beneficial interest in the plot and a decree for the return of the monies paid in its favour. Secondly, the appellants were challenging the decree extracted by the respondent without their participation as required by order 20 rule 7 of the Civil Procedure Rules. Thirdly, they disputed the sum of Kshs. 34, 854, 510/- demanded, that included interest that was not awarded in the summary judgment.

All these allegations were considered by the learned Judge in her final determination. The facts informing the first allegation were that the 2nd appellant was allotted the plot by the Commissioner of Lands on condition that a total sum of Kshs. 636, 970/- was paid as consideration for the allotment. It is alleged that the plot was later surveyed and according to the testimony of **Mr. Ngetich** the plot was demarcated as L.R No. 209/9827 on 4th October 1984. When the respondent expressed its interest to buy the plot, an oral agreement was entered into and the respondent was to pay Kshs. 2 million as consideration. The appellants submitted that the respondent's managing director was to pay a deposit against the purchase price and the balance after obtaining registration in its favour. By a letter dated 14th October 1986 and addressed to the 2ndappellant, the respondent formally confirmed its willingness to acquire the plot LR No. 209/727 for 2 million and enclosed therein a cheque of Kshs. 250,000/-. The receipt of the amount was acknowledged by the judgment debtors' advocate who promised to forward an agreement for sale for L.R No. 209/727 for execution No agreement to that effect was ever forwarded and later on, the appellants appointed **M/s Waruhiu & Muite Advocate**s to act on their behalf in the transaction. The respondent's advocates wrote to the said advocates in 1989, two years after the verbal agreement, and requested them for copies of the title documents to enable them conduct a diligence search at the lands office and also for purposes of preparing a sale agreement. The 1st appellant wrote to his advocates and copied the letter to the respondent's advocates, **M/s Murimi & Co. Advocates,** confirming receipt of Kshs. 500,000/- in respect of LR No. 209/727 and undertook to deliver the title documents to his advocates to facilitate transfer to the respondent. When the respondent failed to get the documents as promised, it conducted a search and realized that the LR number belonged to another parcel of land situate along Biashara Street, Nairobi rather than the Industrial Area plot. Clarifications sought by the respondent's advocates as to those findings were never furnished and demands for refund of the amount paid were never honoured. Needless to say, the situation prevailed until the respondent instituted HCCC No. **3958 of 1991** (Nairobi) claiming refund of the amount paid for lack of consideration.

In their joint defence, the appellants admitted receiving Kshs. 500,000/- but claimed that the purchase price for the plot was Kshs. 3 million. According to the appellants, the Kshs. 2.5 million excluded the payments to be made to the Commissioner of Lands as consideration for the plot which the 2nd appellant had never paid and which was still due. They further sought to forfeit the deposit paid to them on account of breach of the sale agreement by the respondent. Based on the foregoing the respondent instituted an application under now order 36 of the Civil Procedure Rules for summary judgment against the appellants. After consideration, **Rawal, J** found that there was no defence to the respondent's claim and the defence filed did not disclose any triable issues that would have warranted a full trial. The Judge proceeded to order a refund of the monies paid together with interest as prayed for in the plaint. Worth mentioning is that the appellants were duly represented by able counsel in the proceedings. The allegation that the receiving order was made on a debt which was unfair and unreasonable does not, therefore, stand in light of the above.The appellants have also claimed that the respondent acquired both the beneficial interest in the plot and a decree for the return of the monies paid in its favour. The allegation was debunked during the hearing of the petitions where the 2nd appellant testified that upon her failure to comply with the terms of the allotment letter, some third parties applied for allotment of the same. The allotment to her of the plot was subsequently withdrawn and the plot was allotted to **M/s Malaki & Somche Trader**s who soon thereafter, as already stated, sold and transferred the plot to **Excelo Structures Ltd**. The allegation that the respondent fraudulently acquired the beneficial interest in the plot and later again obtained the decree in its favour is misleading and cannot stand.

The appellants have further sought to impeach the summary judgment on the basis that the respondent extracted the decree pursuant to the judgment without their participation as required by Order 21 rule 8 of the Civil Procedure Rules. In its submissions, the respondent stated that a draft decree was forwarded to the appellants' advocates for their approval but they never responded to the same. As a result, the respondent forwarded the decree for sealing by the court and the same was done on 29th November 2001. The civil procedure rules allow for such process. These submissions were not challenged by the appellants. The appellants can only blame themselves for failing to amend or contest the decree extracted and sealed. It remains a valid court decree to date.

Thirdly, the summary judgment was challenged on grounds that the sum of Kshs. 34, 854, 510/- inclusive of interest, had not been awarded. Reiteration of that allegation in this Court by the appellants is not well founded. As intimated, the dispute between the parties has had a long history, spanning a period of almost 3 decades, in the courts. During that time, there have been many applications and counter applications between the parties and some of the issues raised herein have already been conclusively determined. For instance, this Court has previously examined the allegations relating to the interest charged and stated as below in **Oceanfreight Transport Co. Ltd v Purity Gathoni Githae & Samuel Kamau Macharia (2017) eKLR,** wherein this Court,constituted differently, struck out the appeal against the summary judgment delivered on 23rd October 2001;

> **"By a notice of motion dated 28th February, 2002, filed in the High Court, the applicant sought interpretation of the judgment of the High Court dated 23rd October, 2001, in regard to the order for payment of interest. This was because the learned judge had entered judgment for the applicant "as prayed in the plaint", and the applicant wanted confirmation that it was entitled to interest at the rate of "19% per annum compounded monthly from the 6th day of December, 1986 until payment in full", as had been prayed for in the plaint. That application was opposed by the respondents who maintained that the ruling was silent on the payment of interest and this implied that the specific prayer for interest was refused and/or denied.**
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> **Our perusal of the record has not revealed the outcome of the notice of motion dated 28th February, 2002. Nonetheless, the decree dated 29th November, 2001 is certified by the Deputy Registrar of the High Court and confirms that judgment was issued together with interest at 19% per annum compounded monthly as prayed for in the plaint."**

In giving reasons for that finding, the Court explained that the appellants had the opportunity to raise the issue in the High Court since the respondent had filed a motion dated 28th February 2002 for interpretation of the judgment of the court, but also forwarded drafts of the decree to the appellants for approval which they failed to do. However, and as correctly submitted by counsel for the respondent, any challenge on the interest awarded ought to have been pursued in the appeal against that judgment. The same cannot be revisited in this appeal which emanates from the bankruptcy court proceedings. It would be tantamount to sneaking in an appeal. In other words, the appellants should not use this appeal to argue the issues and complaints which properly belong to the appeal against Rawal J's judgment, or to put it differently, they are not permitted to get in through the back door the issues they are unable to get in through the front door. This Court emphatically stated in **Barclays Bank Limited v. William Mwangi Nguruki, Nyeri Civil Appeal No. 20 of 201**4 that an appellant cannot be allowed to use an appeal before it to argue out another appeal which either has not been filed or which is not before the Court. The appellants have not demonstrated that in hinging her final determination on the summary judgment, **Koome, J** erred or exercised her discretion injudiciously so as warrant interference by this Court.

The allegations of fraud against the respondent as alluded were considered and succinctly discounted by **Koome, J**. as follows;

> "1**9. From the evidence by DW3 and the documents that were shown to court there is not an iota of evidence to show that the petitioner participated in the fraud to obtain the title in respect of LR NO. 209/9877 in favour of Excelo Structures Ltd. More importantly the debtors do not deny that they received a deposit of Ksh. 500,000/-. The interest rate was awarded by the court, which has discretion to do so. If the debtors were dissatisfied by the order of interest rate that was awarded, they should have appealed in the court of appeal. I do not see how the petitioner misled the trial court to award unconscionable interest rate, considering that the debtors kept the petitioner's deposit for the same amount of period**."

Having alleged fraud, the appellants failed to adduce evidence to prove that the judgment was tainted with fraud as rightly held by the Judge. Furthermore, allegations imputing fraud against a party have been considered to be serious allegations which when pleaded must be proved to a standard above a balance of probabilities but not beyond reasonable doubt. The issue was considered in **Wanyororo Farmers Co. Ltd v Nakuru Kiamunyeki Co. Ltd (2017) eKLR,** wherein the Court stated as follows;

> **"Whether there was fraud is, however, a matter of evidence."**

In **Vivo Energy Kenya Limited Vs. Maloba Petrol Station Limited & 3 Others [2015] eKLR** the court went on to add that**: -**

> **"Where fraud is alleged, it must be specially pleaded and particulars thereof given.**
>
> **……**
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> **Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In R.G. Patel vs. Lalji Makanji [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that: -**
>
> > **"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required:**

And in Richard **Akwesera Onditi Vs. Kenya Commercial Finance Co. Ltd, CA No. 329 of 2009** this Court expressed itself on the issue as follows: -

> **"Needless to say fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability…"**

In the above case, the Court also observed that general allegations, however strong may be the words in which they are stated, are insufficient to surmount an averment of fraud of which any court ought to take notice. It is our considered view that the appellants failed to meet that threshold to satisfy the court of the existence of fraud. In any event Mr. Ngetich wholly exonerated the respondent from the allegations. He was emphatic that the respondent had no hand in or played any role at all in the subsequent allocation by Commissioner of Lands of the plot to Malaki & Somche Traders who eventually transferred it to Excelo Structures Ltd.

The upshot is that the appeal fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of February, 2019.

W. OUKO (P)

JUDGE OF APPEAL

ASIKE MAKHANDIA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR