IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 16 OF 2016

BETWEEN

TWIGA CHEMICAL INDUSTRIES LIMITED.....APPELLANT

AND

ROTAM AGROCHEMICAL CO. LTD .....RESPONDENT

(*An appeal from the Ruling and Order of the High Court of Kenya*

at Nairobi (Mabeya, J) dated 25th March, 2013

in

H. C. C. C. No. 553 of 2011)

****

JUDGMENT OF THE COURT

On 25th March, 2016, the High Court **(Mabeya, J.)** struck out the defence filed by Twiga Chemicals Industries Ltd (hereinafter, **the appellant**) in **HCCC No. 553 of 2013** and allowed only one issue to go for trial. Partial execution of the ensuing decree was also allowed. The appellant now seeks to have those orders set aside and substituted with an order that the whole suit shall go for trial or arbitration on merits. The only issue is therefore whether Mabeya, J. exercised his discretionary power in a judicious manner.

Pending the hearing and determination of this appeal, the High Court **(Gikonyo, J.)** made an order that the entire decretal sum be deposited in an interest earning account in the joint names of the advocates on record and the Deputy Registrar of the court. The order has since been complied with.

A short background to the appeal is necessary:

> Rotam Agrochemical Company Ltd, (hereinafter '**the respondent**') is a multinational company based in Hong Kong and is in the business of manufacture and sale of agrochemical products. For some 14 years since 1997, the respondent used the appellant for distribution of the products in East and Central Africa. It operated its business in Kenya through its locally associated company, Rotam East Africa Ltd which has its offices in Nairobi. The distributorship was governed by an agreement between the parties which would *'remain in force for a period of one (1) year, and shall be automatically renewed and continued year to year unless either party gives to the other notice of non-renewal at least three (3) months before the end of the term then in effect..'* It also contained an arbitration clause in the event of a dispute arising during the pendency of the agreement, among other clauses.

On 7th January, 2011, the respondent invoked the 'non renewal' clause and served a notice of three months on the appellant. It was to expire on 10th April, 2011, and thus terminate any further distributorship of the respondent's products by the appellant. Two days before the expiry of the notice, 8th April, 2011, the appellant filed **HCCC No. 135 of 2011** against the local associate of the respondent, challenging the notice of 'non-renewal' of the agreement, and seeking the following orders:

> ***"a) A permanent injunction restraining the defendants from arbitrarily terminating the contract pending arbitration of this matter.***

b) Special damages of Kshs 39,922,151.

c) General damages for loss of business and future expected earnings and indemnity for clientele.

d) Exemplary punitive and Aggravated Damages.

e) Cost and interest at court rates".

The appellant also filed an interlocutory motion seeking the following orders:

"2. a temporary injunction restraining the Defendant from terminating the Distribution Agreement dated 10th April, 1997 pending hearing of this application.

3. an injunction restraining the Defendant from appointing another distributor and/or agent of its products solely distributed by the Plaintiff in Kenya, Tanzania, Zambia, Malawi and Uganda, pending the hearing and determination of this application.

4. reference to arbitration in accordance with Clause 13 of the Distribution Agreement dated 10th April, 1997.

5. Prayers 2 and 3 above be granted pending the intended arbitral proceedings and its final award.

6. the Defendant to deposit into Court security for costs of the intended arbitration.

7. Costs of this application be borne by the Defendant".

That motion was not determined until 20th December, 2011 when **Njagi, J.** delivered his Ruling rejecting the prayer for injunction on the grounds that the appellants had not established a *prima facie* case with a probability of success as the notice of 'non renewal' was issued in accordance with the agreement; that even if there was a *prima facie* case, damages were a sufficient remedy and were in fact pleaded and prayed for in the suit; and that the balance of convenience tilted in favour of the respondent who had already appointed other distributors upon expiry of the 'non renewal notice'. The prayer for security for costs was also rejected. However, Njagi, J. granted the prayer for reference of the suit to arbitration under the arbitration clause in the agreement.

None of the parties appear to have challenged those findings and ruling on appeal.

As the parties awaited determination of the motion before Njagi, J., the respondent filed **HCCC No. 553 of 2011** on 8th December, 2011 (plaint dated 23rd November, 2011) claiming a liquidated sum of USD 597,996.44 (in excess of Ksh.59 million) together with interest thereon at the rate of 18% p.a until payment in full. The claim was in respect of goods sold and delivered to the appellant for distribution between the years 2008 and 2011, particulars whereof were given.

The appellant filed a defence denying the debt and asserting that even if it existed, payment thereof was dependent upon resale of the goods. It also denied that any interest was payable at 18% p.a or at all. Finally, it raised a jurisdictional objection on the ground that there was a pending suit between the parties, HCCC No. 135 of 2011, on the same agreement, in which suit the appellant was claiming damages for unlawful termination of the agreement. The jurisdictional issue was put to the test immediately as the appellant filed a motion, simultaneously with the appearance and defence, on 19th January, 2012, seeking to have the suit struck out or alternatively stayed under ***section 6*** of the **Civil Procedure Act** (CPA) on account of the pendency of the earlier suit.

Upon considering the application, **Mabeya, J.** in a ruling dated 13th March, 2012, declined to strike out the suit as there was no basis laid for it. He also declined to stay the suit after making the finding that ***section 6*** was inapplicable. The learned Judge reasoned as follows:

"Whilst the issue in this case is recovery of a debt for goods sold and delivered, in HCCC No. 135 of 2011 the issue is non-renewal of an agreement dated 10th April, 1997. Therefore, my view is that the issues are different and Section 6 may not be breached or infringed. There is no likelihood of embarrassment of arriving at two different conclusions by the two different courts and/or forums of litigation or dispute resolution. Accordingly, I think the dicta in the case of Kobo Safaris Ltd vs Peter Gichuki Ltd HCCC 797 of 1997(UR) is applicable that for section 6 of the Civil Procedure Act to apply, the issues in the two suits must be similar. In the circumstances of this case therefore, I think section 6 of the Civil Procedure Act is not applicable."

Finally, the learned Judge, though inclined to stay the proceedings on account of the arbitration clause, nevertheless declined to do so on the basis that the appellant had taken a step in the proceedings, thereby invoking the jurisdiction of the court, by entering appearance and filing a defence, contrary to the provisions of ***section 6 (1)*** of the **Arbitration Act, 1995.**

Once again, none of the parties challenged those findings and the ruling. Emboldened by the ruling and considering that the only issue remaining was whether the debt was due and whether the defence was *bona fide*, the respondent filed the motion dated 7th May, 2012 seeking to have the defence struck out under ***Order 2 rule 15 (1) (b), (c)*** and ***(d)*** of the CPA or alternatively summary judgment be entered under ***Order 36 rule (1) (1) (a).*** Mabeya, J. considered the pleadings, the affidavits on record and the submissions of counsel and came to the conclusion that the prayer for summary judgment was untenable since there was a defence on record. However, he found that the defence on the debt of USD 597,996.44 was untenable and struck it out for being frivolous, vexatious and an abuse of court process. In his ruling delivered on 25th March, 2013, the learned Judge stated thus:

> ***"9. On the issue of whether US$597,600.41 is due, the response of the Defendant both in the Defence and Replying Affidavit of Hezekiah M. Macharia is clear. In paragraph 8 of that Affidavit, it is deponed thus:-***
>
> ***"8. I aver that the Defendant does not owe the Plaintiff US$597,600.41 as claimed by the Plaintiff in view of the Defendant's claim of Kshs.43.87 million in the above civil case NO.135 of 2011. This matter is now set to go for arbitration and we will honour the Plaintiff's claim less what is payable to us"***
>
> ***10. It is clear that the claim is not denied. It is only pegged on the claim of Kshs.43.87million raised by the Defendant in HCCC No. 135 of 2011 which is under arbitration. My view is, that claim is in a different suit. It has not been counterclaimed in this suit since the Defendant seems to indicate that what it would be seeking is to set off its claim of Kshs.43.87million in the said HCCC No. 135 of 2011 against the Plaintiff's present claim of US$597,600.41. In my view, that is no defence at all to the Plaintiff's present claim. That claim had neither been counterclaimed herein nor pleaded to be set off. To my mind that is a frivolous defence. It is frivolous because it has no substance, it is trifling and a waste of the court's time. The claim of Kshs.43.87million is an issue to be decided upon in those arbitral proceedings and not in this case".***

Judgment was accordingly entered for that sum with interest at court rates from the date of filing suit until payment, with leave to execute for the preliminary decree. The denial of interest at 18% p.a from 150 days of delivery of the goods until payment, was maintained as a valid defence and an order was made for full trial on it. It is those orders that gave rise to the appeal before us which is premised on seven grounds as follows:

> ***"a) That the Learned judge erred in failing to appreciate that the pleadings, affidavits and submissions made disclosed several triable issues which could only be effectively and properly determined at the full trial of the suit.***
>
> ***b) That the Learned judge erred in law in finding that the appellant had no defence to the plaintiff's claim and that the statement of defence did not raise any reasonable or plausible triable issues.***
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> ***c) That the Learned judge misdirected himself in finding on the basis of the documents before him that the defence filed by the appellant was a sham and did not merit being ventilated at full trial.***
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> ***d) That the Learned judge erred in improperly exercising his discretion thereby prejudiced the rights of the Appellant.***
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> ***e) That the Learned judge erred in failing to take into account the fact that the amount involved was colossal and that was in the interest of justice that the matter go to full trial.***
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> ***f) That the Learned Judge erred in fact and in law by entering judgment against the Appellant for sums of money owed for products sold to other companies separate and distinct from the appellant. These monies were in excess of US Dollars 100,000 and were owed by Twiga Chemical Industries Tanzania and Twiga Chemical Industries Uganda which are companies that are completely independent of the appellant company.***
>
> ***g) That the Learned judge erred in law and in fact in putting more weight on the Respondent's submissions than the Appellants".***

In both written submissions and oral highlights, those grounds were not specifically urged *seriatim*. They were rather urged globally under two broad issues; firstly, whether the suit should have been referred to arbitration; and secondly, whether there was any basis for striking out the suit.

In addressing the first issue, learned counsel for the appellant **Mr. Fred Ngatia,** instructed by M/s Ngatia & Associates, submitted that both **HCCC No. 135 of 2011** and **HCCC No. 553 of 2011** were between the same parties and the subject matter was the same. Both suits were based on the same agreement which contained an arbitration clause and therefore the clause should have been honoured in compliance and not in breach. Arbitration was the appropriate forum, he emphasized. He observed that the first suit was referred to arbitration while the second was not, thus causing an undesirable anomaly since the second suit by the respondent was merely a counterclaim or set off against the appellant's claims, and was only filed to cause mischief. In counsel's view, ***Article 159 (2) (c)*** of the Constitution which commands courts to be guided by the principle of promoting alternative forms of dispute resolution, such as arbitration, should have been applied. He also invoked ***section 59 C*** of the **CPA** which gives the discretion to the courts to refer suits to any method of dispute resolution; and to ***section 10*** of the **Arbitration Act** which restricts court interference in matters referred to arbitration under the Act. To drive home the primacy of the arbitral process over court intervention, counsel cited several cases, including: ***Kangethe & Co. Advocates vs Kenya Pipeline Company Ltd [2011] eKLR;***

> ***Mall Developers Limited vs Postal Corporation of Kenya [2014] eKLR; Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & 3 Others [2013] eKLR; Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR;*** and ***Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another [2015] eKLR.***

On the second issue, Mr. Ngatia submitted that the legal threshold for striking out a defence had not been met and therefore the trial court fell in error. He referred to ***Order 2 rule 15 (1) (b) (c)*** and ***(d)*** upon which the application was premised and submitted that the appellant's defence was far from being *'frivolous, vexatious* and an *abuse of court process'* as found by the learned Judge. The defence and affidavit evidence, in his view, raised pertinent issues of the existence of an arbitration clause in the agreement between the parties; the existence of another case between the parties over the same subject matter; a previous court decision referring the matter to arbitration; and the appellant's claim of breach of contract and damages for expenses incurred. He emphasized, in particular, the finding by the court that the set-off put forward by the appellant in affidavit evidence was not a defence, submitting that it was erroneous in law. The crucial question was who owes who in this matter. Counsel submitted that a single triable issue was sufficient to sustain the defence.

To underscore those submissions, he cited the cases of ***Mpaka Road Development Limited vs Kana (2004) 1 E. A. 124; Kenindia Assurance Company Limited vs Commercial Bank of Africa Limited & 2 Others [2006] eKLR; Ramji Megji Gudka Limited vs Alfred Morfat Omundi Michira & 2 Others [2014] eKLR; Five Forty Aviation Limited vs Tradewinds Aviation Services Limited [2015] eKLR;*** and ***Kisii Farmers Co-operative Union Limited vs Sanjay Natwarlal Chaunhan t/a Oriental Motors [2006] eKLR,*** among others.

Counsel further castigated the learned trial Judge for failing to do justice to the parties by applying the broad principles enunciated in **Article 159** of the Constitution, and the overriding objective under ***sections 1A*** and ***1B*** of the CPA, to cure any defect found in the defence and grant leave for amendment. As a result of the court's failure to properly exercise its discretion, he moaned, the parties have lost significant time litigating a technical issue rather than going before the adjudicative forum of their choice for resolution of all issues raised on both sides. Unnecessary hardship and delay were caused. The cases of ***Abdirahman Abdi vs Safi Petroleum Products Ltd*** & ***6 Others [2011] eKLR; Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another [2015] eKLR;*** and ***Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*** were cited in aid.

In response, learned counsel for the respondent, **Mr. John Wananda,** instructed by M/s Shapley Barret & Company Advocates, also filed written submissions which were orally highlighted. He firstly decried the raising of the issue of arbitration in this appeal, observing that the appellant had placed the same issue before Mabeya, J. in the earlier application and a decision was made declining the prayer. The Judge, he noted, found that the two suits were separate and raised different issues, and further that a defence had been filed and, therefore, there was no issue of arbitration. As the appellant accepted that ruling, in his view, it cannot be raised again.

As for the order striking out the defence, counsel submitted that the trial Judge appreciated that the jurisdiction conferred on him under the rules was exercisable with caution and proceeded to carefully examine the defence of the appellant. In counsel's view, the only issues raised in the defence were two; that the payment for the goods was dependent upon resale, and that there was another suit pending between the parties. The learned Judge rejected both as there was no support for them. The Judge further found that the affidavit evidence of the appellant amounted to an admission of the debt, and that the purported set-off was in a different suit. Those findings, in counsel's view, were unassailable and the court was faced with a clear case where the defence did not raise any triable issue and was plainly frivolous, vexatious and an abuse of court process. It was designed to delay the suit and withhold the just dues of the respondent. Counsel cited the case of ***Delphis Bank Limited vs Caneland Limited [2014] eKLR*** where this Court upheld the decision of the trial court, stating:

> ***"Where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial that would inflate costs to the disadvantage of the debtor and delay delivery of justice to the prejudice of the claimant. This was the position obtaining in this case. Needless to emphasize, in the instant case, there was no legitimate defence to the claim by either the appellant or its co-defendant as the respondent was entitled to the payment of the money..... The trial judge went a tad too far into the issues of merit but this, though undesirable, did not cause any prejudice to the appellant. In the end, the Judge found that the defences were not only scandalous and frivolous but also an abuse of the process of the court after making a finding that the defences were "*** **clearly untenable and bogus.....solely intended to delay the recovery of the money.*** **"**

We have considered the matter fully.

As stated in the opening paragraph of this judgment, the main issue to determine is whether the trial court exercised its discretion in a judicious manner. In considering the application for striking out a pleading under ***Order 2 rule 15 (1) (b) (c) and (d),*** the court was exercising discretionary power and an appellate Court will not interfere with the exercise of that power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong. The Supreme Court recently (18th January, 2019) expressed as follows on interference with the discretion of the Court of Appeal:

> "***We would only interfere with the appellate court's discretion if we reach the conclusion that in exercise of the discretion, the court acted arbitrarily or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion from the Court of Appeal is not a reason to interfere with the exercise of discretion."***

See ***Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & Two Others SC Petition No. 13 of 2018, (UR).***

The same could be said about interference by this Court with the discretion of the trial court.

We may quickly dispose of the first issue raised by the appellant as we think it is built on quick sand. Firstly, the issue, though urged in written and oral submissions, was not expressly set out in the grounds of appeal reproduced above. The gist of those grounds revolves around the basis for striking out the defence, which was urged globally as the second issue. The urging of a ground of appeal that is not specified in the memorandum of appeal runs afoul of ***Rule 104 (a)*** of the Court's rules. Secondly, it is clear to us, as urged by learned counsel for the respondent, that the issue of referring the suit to arbitration was dealt with in the ruling of Mabeya, J. dated 13th March, 2012, which ruling was never challenged by any of the parties. With respect, it is mischievous, to say the least, to raise the issue again before us. Whether it be *res judicata* or *estoppel*, it is not open for the appellant to re-agitate the issue and ask us to reverse the trial court on the earlier ruling.

Fourty years ago in the case of ***Mburu Kinyua vs Gachini Tuti (1978) KLR 69***,

Law, JA had this to say:

> ***"To sum up my view of this aspect of the case, an applicant whose application to set aside an exparte judgement which has been rejected has a right of appeal ... Alternatively, he may apply for a review of the decision, under Section 80 of the Civil Procedure***

Act. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened hereof. The position otherwise would be intolerable. A decree holder could be deprived of the benefit of his judgment by a succession of applications to set aside the judgment and the judges would in effect be asked to sit on appeal over judges."

See also ***Uhuru Highway Development Limited vs Central Bank of Kenya & 2***

Others [1996] eKLR which asked the following questions and answered the first in the negative and the second in the affirmative:

"..can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?

We reject the first broad ground of appeal.

On the 2nd broad ground, we think the appellant is on firmer ground.

This Court, in the case of ***Kivanga Estates Limited vs National Bank of Kenya Limited [2017] eKLR***, admirably summarised the jurisdiction of courts on the issue of *'striking out of pleadings'*, and we subscribe to that exposition of the law. It expressed itself as follows:

"***It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations. Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, Order 2 rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;***

"15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that -

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court ....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be." (Our emphasis). The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may".

In this case, there was no assertion that the defence of the appellant was not reasonable. If it had been, the respondent would surely have invoked ***rule 15 (1) (a)*** without more**.** But it invoked sub-rules ***(b)***, ***(c)*** and ***(d),*** the application of which has been examined by courts before as follows:

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?" See Trust Bank Limited vs Amin Company Ltd & Another (2000) KLR 164 and ***DT Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1.*** Ringera, J. (as he then was) also weighed in, in the case of ***Mpaka Road Development Limited vs Kana (2004) 1 E. A. 124,*** thus:-

"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."

To make a determination on whether an applicant has demonstrated that any of the three sub-rules apply, the court must examine and evaluate such affidavit evidence as the parties may place before it. In this matter, there was certainly considerable evidential material laid out by the parties and we have examined it under ***rule 29 (1)***

(a) of the Court's rules in order to arrive at our own conclusions. We have done this without going into the merits of the respective cases of the parties as that is the province of the trial court.

In the end, we agree with the finding by the trial court that the appellant was in effect pleading a set-off. However, with respect, we do not accept the conclusion reached, as a matter of law, that the set-off could not amount to a defence, and was hence frivolous and a waste of the court's time. We find no support for such principle. In the case of ***Kenya Oil Company Ltd vs Kenya Ports Authority [2009] eKLR***, Kimaru,

J. stated as follows, and we agree:

> ***"It cannot be said that where the plaintiff has established its claim by providing documentary evidence, then the counterclaim and set off by the defendant should be tried separately and judgment be entered for the plaintiff as against the defendant. I think it would be a travesty of justice if the court were to discount a set off raised by the defendant in its defence on the sole ground that the transaction that resulted in the defendant's claim in the set off is a separate cause of action from the set of facts that prompted the plaintiff to file suit against the defendant. The authors of Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition volume I, 1978 Issue, aptly set out the import of a set off in a defence:***
>
> *"59. Set-off. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim (h). A set-off is in its nature a defence rather than a cross-claim (j). A right of set-off normally arises where the plaintiff's claim is a debt or liquidated demand and the defendant has cross-claim for a debt or liquidated demand which, if established, will extinguish or reduce the plaintiff's money claim (k), and should be pleaded as such."*

It is apparent in this matter that the set-off or counterclaim was not elegantly pleaded in the statement of defence itself. But it has always been held that a court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. See ***Yaya Towers Limited vs Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000.*** A party may always apply for amendment of pleadings and it is for the trial court to consider such application.

It is also our view that the set-off or counterclaim raised a triable issue. In the case of ***Souza Figuerido & Co. Ltd vs Mooring Hotel Limited (1952) EA 425*** the predecessor of this Court stated that '*if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...',* while in ***Provincial Insurance Company of East Africa Limited, now known as UAP Provincial Insurance Limited vs Lenny M. Kivuli Civil Appeal No. 216 of 1996) (unreported)***, this Court stated that '*in an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend'***.** Lastly in ***Kenya Trade Combine Ltd vs M. Shah (Civil Appeal No. 193 of 1999) (unreported***), this Court emphasized:

> ***'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.'***

We have said enough to satisfy ourselves that there is sufficient reason to interfere with the discretion of the trial court in this matter. We now do so by allowing this appeal with the result that the ruling of the High Court (Mabeya, J.) made on 25th March, 2013 is hereby set aside. We substitute therefor an order dismissing the notice of motion dated 7th May, 2012. The respondent shall bear the costs of the dismissed motion but shall bear half the costs of the appeal which did not succeed wholly on the issues raised by the appellant.

We so order.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR