IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 62 OF 2007

DENIS COSTELLO DOYLE.....1ST APPELLANT

PHOENIX OF EA ASSURANCE CO LTD.....2ND APPELLANT

VERSUS

DIAMOND TRUST BANK (K) LTD..... 1ST RESPONDENT

PETER MAILANYI..... 2nd RESPONDENT

***(Appeal from the ruling and order of the High Court of Kenya (Emukule, J.) dated 16th January 2006* in HCCC No. 177 of 2002)**

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JUDGMENT OF THE COURT

This appeal has had a fairly chequered history. It has spawned three substantive suits in the High Court and two appeals in this Court.

It originates from an accident that took place on 26th October 1994 along the ***Meru-Nanyuki road***, involving a motor lorry registration No. ***KAD 775L*** and a Mercedes Benz saloon car registration No. ***KPA 800***. The lorry was owned by the ***1st appellant, Denis Costello Doyle (Doyle)*** and at the material time was being driven by his driver ***Mohammed Hassan Musa*** whilst the 2nd respondent, ***Peter M. Mailanyi (Mailanyi)***, an advocate of the High Court, was the owner and driver of the saloon car.

The ***1st respondent, Diamond Trust Bank (K) Ltd (the Bank),*** was the ***appellant, Phoenix of East Africa Assurance***

financier of the 1st appellant in the purchase of the lorry, and was registered as a co-owner for purposes of securing its interest as a financier. ***The 2nd Company Ltd (Phoenix)*** was the insurer of the lorry at the material time.

In the accident, Mailanyi sustained personal injuries and he subsequently filed in the High Court at Embu ***Civil Suit No 32 of 1997*** against Doyle, his driver and the Bank, seeking general and special damages, and costs. After hearing the suit in which Mailanyi was the only witness in support of his claim, the High Court, by a judgment dated 30th June 1998, awarded him ***Kshs. 3,266,674.00*** as damages. On 6th August

1998, in execution of the decree, he proceeded to attach the Bank's property, compelling it to pay a total of ***Kshs 4,083,052***, which included interest and auctioneer's charges, to avoid sale of its property.

In the meantime Doyle and his driver were aggrieved by the judgment and decree of the High Court and lodged in this Court ***Civil Appeal No. 243 of 1998***. By a judgment dated 30th June 2000 the Court allowed the appeal and set aside the decree and judgment of the High Court after finding that Mailanyi had proved neither his injuries to entitle him to the award of the general damages nor his losses to justify the special damages. In its judgment the Court made the following observation regarding the execution against the Bank:

> **"There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached. The manner of execution of the decree and the crude tactics employed by the plaintiff in this respect together with the speedy release of the decretal sum raises many issues about the credibility of the plaintiff's evidence as regards the accident and the gravity of his injuries. Is this not ambulance chasing in reverse."**

On 10th February 2002, the Bank filed against Mailanyi, Doyle and Phoenix Nairobi ***High Court Civil Suit No 177 of 2002***, seeking to recover the Kshs 4,083,052 it had paid in satisfaction of the decree, which was ultimately set aside, interest at 36% per annum, and costs.

By a defence dated 9th April 2002 Mailanyi pleaded that he was entitled to compensation by Phoenix as the insurer of Doyle because the insured risk had occurred and therefore it was upon Phoenix and Doyle, rather than himself, to repay the Bank.

On their part, Doyle and Phoenix filed their defence on 15th March 2002 in which they averred that the Bank had no cause of action against them; that they were not responsible for the auctioneer's decision to execute against the Bank; that they had not entered into any agreement with the Bank for it to pay the decretal amount to Mailanyi; that the Bank paid the decretal amount without notice to them or consent from them; that in any event the Bank was properly obliged to pay the decretal amount because judgment had been entered jointly against it; and lastly that the Bank was guilty of inordinate and inexcusable delay in bringing the claim. On 18th May 2005, Doyle and Phoenix filed and served upon Mailanyi a notice of claim against co-defendant evincing their intention to seek indemnity from him in the event they were found liable to the Bank because he was the beneficiary of the payment by the Bank.

The next development was that by two separate applications dated 3rd May 2005, the Bank applied against Doyle and Phoenix for judgment on admission or in the alternative striking out of their defences. As against Mailanyi, it applied for judgment on admission or, in the alternative, summary judgment. It contended that Doyle and Phoenix, respectively as owner and insurer of the motor lorry bore the primary liability to settle Mailanyi's decree and that they had refused to repay the bank for the money it had paid to him. It further contended the three had admitted in their defences that it was the Bank, which paid the decree, and in the alternative that the defences did not raise any triable issues and should be struck out and judgment entered in its favour.

On their part, Doyle and Phoenix opposed the applications vide grounds of objection dated 18th May 2005 and a replying affidavit sworn on the same day by ***Paul Gathecha***, Phoenix's legal officer. The substance of the response was that they had not admitted the Bank's claim and that the applications were frivolous and misconceived because of the matters raised in the defence regarding their liability. From the record it appears that Mailanyi did not oppose the applications.

By a ruling dated 16th January 2006, the subject of this appeal, ***Emukule, J.*** held that Mailanyi had admitted receipt of money from the Bank and that subsequently the decree on the basis of which payment

had been made to him was set aside. He found his defence to be a bare denial, which did not raise any triable issues. As regards Doyle and Phoenix, the learned judge held that under section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, they were ultimately liable to Mailanyi and that the Bank, having settled Mailanyi's decree, which should have been paid by them, was entitled to a refund of that money.

Accordingly he found merit in the applications, struck out the defences and entered judgment for the Bank as prayed.

That is what spurred this appeal, founded on two broad limbs, challenging, first, the entry of judgment in favour of the Bank, and secondly the award to the Bank of interest at 36% per annum from 6th August 1998 (date of payment of the money by the Bank) until the date of filing of the suit, and 30% per annum from the date of filing the suit until 16th January 2006 (date of judgment).

In support of the first limb of the appeal, the appellants submitted that the learned judge erred in striking out their defence whilst it raised triable issues and by entering summary judgment against them, which the Bank had not prayed for. Among the triable issues, it was contended, were that the Bank had not obtained any stay of execution before execution; it did not inform the appellants that it had satisfied the decree; the entire judgment was set aside by this Court and therefore the appellants were not liable to make any payment in the absence of a judgment against them; and that in any event the Bank had other remedies available to it.

Relying on section 91(2) of the Civil Procedure Act, the appellants submitted that the Bank was precluded by that provision from filing a suit for restitution. The appellants faulted the learned judge for holding that they had admitted the Bank's claim whilst in law there was no admission.

Next they submitted that they were not liable to pay Mailanyi under section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act as held by the learned judge because there was no judgment against Doyle as the party insured by Phoenix. It was also the appellant's view that they were not liable to reimburse the Bank because they never requested it to pay Mailanyi on their behalf.

Lastly the appellants submitted that there was inordinate delay on the part of the Bank in making the application for judgment, which was not explained. They contended that whereas the suit was filed in February 2002, the application was not made until three years later in May 2005. We were urged to find that in the circumstances the learned judge erred in the exercise of his discretion to strike out the appellant's defences.

Turning to the issue of interest, the appellants submitted that whereas under section 26 of the Civil Procedure Act the learned judge had discretion to award interest, he had failed to exercise that discretion judiciously because the Bank did not pray for the interest awarded by the court; the court did not have before it any evidence to support the rate of interest it awarded; and the learned judge failed to take into account the Bank's delay in making the application for judgment.

The Bank opposed the appeal and supported the decision of the High Court. It submitted that contrary to the appellants' submission, the learned judge did not enter summary judgment against them, but only against Mailanyi and that the entry of judgment on admission against the appellants and the striking out of their defences was proper and merited. In support of the ruling of the High Court, the Bank contended that the appellants had admitted expressly or by implication the accident between the lorry and saloon car; that Doyle was the owner of the lorry and Phoenix its insurer at the material time; that Mailanyi had filed suits against them; that judgment had been entered in his favour; and that it was the Bank that paid the decree. In the circumstances and on the authority of ***Choitram v. Nazari [1984] KLR 327,*** it was urged that the entry of judgment on admission was proper and merited, in exercise of discretion under Order 12 rule 6, and that this Court therefore had no basis for interfering with the exercise of discretion by the High Court.

It was the Bank's further submission that under section 10(1) of the Insurance (Motor Vehicle Third Party

Risks) Act and the policy in force between the appellants, Phoenix was obliged to indemnify Doyle against third party claims in the event of an accident arising from the use of the lorry and that by the judgment of the High Court, Doyle was liable to settle the decree obtained by Mailanyi. Although the High Court judgment was entered against both Doyle and the Bank, it was submitted that the latter was a mere financier under a Hire Purchase Agreement who was not in possession or control of the lorry and that as of the date of the execution against the Bank, it was the Phoenix which was liable to settle the decree.

The Bank further contended that having paid the decree by compulsion of the law, it was entitled to restitution by the appellants who were primarily liable to pay the decree at the time it was executed. It relied on ***Moule v. Garette [1872] LR 104*** in support of that proposition and urged us to find that it mattered not that the judgment was subsequently set aside; it was enough that the appellants were primarily liable when the decree was executed.

On whether it was required to obtain the consent of the appellants before paying the decree, the Bank submitted that so long as the payment was under compulsion rather than voluntary, no consent was required before payment. As regards section 91 of the Civil Procedure Act, the Bank submitted that the issue was neither raised before nor addressed by the High Court and therefore could not be raised before us.

The Bank also denied that the application for judgment was made after inordinate delay and submitted that there was no set time limit for making the application. In any event, it was submitted, the appellants did not demonstrate the prejudice that they suffered.

Lastly on the question of interest, the Bank submitted that the learned judge had discretion under section 26 of the Civil Procedure Act to award interest for any period prior to the filing of the suit, from the date of filing of the suit to the date of judgment, and from the date of judgment until payment in full. It urged that it had prayed in the plaint for interest at 36% per annum and further interest on the aggregated sum at court rates, which the learned judge granted in exercise of his discretion.

We have carefully considered the record of appeal, the impugned ruling, the grounds of appeal, the submissions by the parties and the authorities they cited. Although duly served, Mailanyi did not attend the hearing of the appeal, just like he did not oppose or attend the hearing of the applications that gave rise to this appeal.

We agree with the Bank that as against the appellants, it had applied for judgment on admission or in the alternative striking out of their defence on the grounds that it may prejudice, embarrass or delay the fair trial of the action or that it was otherwise an abuse of the process of the court. As already adverted, the learned judge held that the appellants had no reasonable defence to the Bank's claim; that they were primarily liable to Mailanyi under section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act and that the Bank having paid Mailanyi on their behalf, they were liable to reimburse it.

The crux of this appeal is whether in the circumstances the learned judge erred by holding that Doyle and Phoenix had admitted the Bank's claim and by striking out their defence as he did. The circumstances under which the court will enter judgment on admission are well established. The admission in question must be plain and clear.

Madan, JA (as he then was) expressed himself as follows in this famous passage in ***Choitram v. Nazari (supra):***

> **"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt…"**

The admission that the learned judge relied upon in this appeal to enter judgment was the admission by

the appellants that it was the Bank that paid Mailanyi's decree. The real question is whether admission by the appellants that the Bank paid the decree was an unequivocal admission of the Bank's claim. While the Bank contends it was, the appellants are of a different view. In their defence and replying affidavit, the appellants, for example, averred that the judgment that was executed against the Bank was entered jointly and severally against them and the Bank; that the decision to execute against the Bank was the auctioneer's; that there was no agreement between them and the Bank for it to pay the decree; and that the plaint did not disclose any cause of action against them.

As regards the striking out of the appellants' defence, the court found that the defence prejudiced, embarrassed or delayed the fair trial of the action or that it was otherwise an abuse of the process of the court. The law on summary procedure in this jurisdiction is equally well settled in this jurisdiction. For example in ***Dhanjal Investments Ltd v. Shabaha Investments Ltd, CA. No. 232 of 1997,*** this Court expressed itself thus:

> **"The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant v. Devshi & Company [1952] EACA 77 and followed by the Court of**
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> **Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd v. Mooring Hotel Ltd [1959]**
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> **EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to def*end without conditions…" (Emphasis added).***

A defence that raises a triable issue is merely one that raises a *bona fide* issue that deserves to go for trial. It does not mean a defence, which must succeed on trial (See ***Kenya Trade Combine Ltd v Shah, CA. No. 193 of 1999).*** The *bona fide* triable issue may be raised by defence, affidavit, oral evidence, or otherwise. Once a *bona fide* triable issue is raised, the court has no discretion to exercise in regard to the defendant's right to defend the suit; the defendant is entitled to unconditional leave to defend. (See ***Momanyi v. Hatimy & Another [2003] 2 EA 600***).

Looking at the totality of the appellants' averments in the defence, the replying affidavit and their submissions, we do not see how the learned judge could have concluded that the admission by the appellants that the Bank paid Mailanyi's decree was an unequivocal admission by them of the Bank's claim, or that the appellants' defence did not raise even one *bona fide* triable issue.

If we understood the appellants' contention and submissions correctly, it is that contrary to the finding of the High Court, by the time the Bank filed its suit on 14th February 2002, the judgment whose decree had been executed against the Bank by Mailanyi had been set aside by this Court on 30th June 2000. In terms of section 10(1) of the Insurance (Motor Vehicle Third party Risks) Act, which provides for the duty of an insurer to satisfy judgments against the insured, there was no judgment entered against Doyle that Phoenix could have been obliged to satisfy. In our understanding, under section 10(1) of the Act, which the learned judge invoked, a judgment (a decree) against the insured is a condition precedent before the insurer can be called upon to pay the decree. This Court having set aside the judgment and decree in favour of Mailanyi, we cannot see how the learned judge could invoke section 10(1) to compel Phoenix to pay to the Bank money, which the latter had paid to Mailanyi.

We have no doubt that the decree having been set aside, the person who was obliged to pay the Bank, and the one who had in any event wrongfully set in motion the attachment of the Bank's property, was

Mailanyi himself. In our view this is a strong *bona fide* issue that undermines the contention that the appellants had unequivocally admitted the Bank's claim and an issue, which the learned judge was obliged to allow to proceed to trial.

The Bank submits that it is the appellants who are obliged to refund the money it paid to Mailanyi because as of the date of the wrongful execution, it was Phoenix who bore the primary responsibility to

settle the decree under section 10(1). To us that is a novel and untenable proposition because as of the date of the ruling by the High Court, the subject of this appeal, Mailanyi's judgment had long been set aside. The court could not shut its eyes to the fact that the judgment pursuant to which there was a wrongful attachment against the Bank had been set aside; was no longer in existence; and above all, the condition precedent under section 10(1) could not be satisfied.

We therefore think that the appellants' appeal has considerable merit and hereby allow the same. The ruling dated 16th January 2006 is hereby set aside as far as it relates to the appellants. Mailanyi did not appeal against that ruling. In fact he did not oppose the application against him for judgment on admission and summary judgment. As we have noted, he is the one who set in motion the wrongful execution of the Bank's property and was the beneficiary of the payment by the Bank under a judgment which was subsequently set aside. He is the one who is responsible for repaying the money that was paid to him by the Bank because there is no judgment that Phoenix can be called upon to satisfy under section 10(1).

Having come to this conclusion, we are satisfied that it is enough to dispose of this appeal and we do not deem it necessary to delve into the other issues that were raised in this appeal by the parties. In view of the peculiar history of this dispute, we direct the appellants and the Bank to bear their own costs. It is so ordered.

Dated and delivered at Nairobi this16th day of February, 2018

P. O. KIAGE

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JUDGE OF APPEAL

S GATEMBU KAIRU, FCIArb

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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