IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJA)

CIVIL APPEAL NO. 289 OF 2017

BETWEEN

IRENE WANGUI GITONGA.....APPELLANT

VERSUS

SAMUEL NDUNGU GITAU.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Commercial & Admiralty Division) (Lady Justice Farah S.M. Amin) Dated 15th September, 2016 in H.C. Civil Suit No. 615 of 2014)

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JUDGMENT OF THE COURT

This is an appeal arising from the Ruling erroneously headed "Judgment") of the High Court, (**Farah S.M. Amin, J.)** dated the 15th day of September, 2016.

The genesis of the appeal is that, **Irene Wangui Gitonga** (the appellant), sued **Samuel Ndungu Gitau** (the respondent), on the 22nd day of December, 2014, seeking the recovery of Kshs.14, 972,400/= together with interest at 15% p.a, costs and any other relief that the Court may deem fit to grant.

Service of the summons to enter appearance was effected upon the respondent by substituted service through advertisement in the daily newspaper of 22nd October, 2015, pursuant to leave granted to the appellant vide an *exparte* chamber summons application dated the 23rd day of June, 2015. The respondent entered appearance on the 27th October, 2015 through the firm of **Kamotho Jomo & Co. Advocates,** but failed to file a defence within the stipulated time, prompting

the appellant to file the Notice of Motion dated the 30th day of October, 2015, premised on Order **36** Rule **1(a)**, Order **51** rule 4 of the Civil Procedure Rules, and Section **3A** of the Civil Procedure Act, substantively seeking summary judgment as prayed for in the plaint.

In summary, the appellant's contention was that the respondent had no just or good defence against her claim; that he executed the agreement dated the 26th day of November, 2013, acknowledging his indebtedness to her in the sum of Kenya shillings fifteen million (Kshs. 15,000,000) in respect of which he gave 16 post-dated-cheques of Kenya shillings nine hundred and fifty thousand (Kshs. 950,000) each, issued by **Inverness Commodities**, a company associated with the respondent with specific timelines within which the postdated cheques were to mature for banking; that he successfully requested for a variation of the terms of the original agreement to which request, the appellant acceded resulting in a deed of variation agreement dated the 21st day of October, 2014. Pursuant to the agreement the respondent paid only one installment of Kenya shillings one million (Kshs. 1, 000,000) and then defaulted. It was also contended that interest prayed for was payable as it was provided for both in the original and the deed of variation agreements.

The application was resisted by the respondent who contended that prior to 2013, the two conceived a business idea to jointly supply election materials across the country; that they subsequently executed an agreement for contribution of the share capital and sharing of profits and losses equally; and that they conducted the business under the business name of "**Inverness Commodities.**" That is why the postdated cheques were issued in the names of the business name and not in the individual names of the respondent.

The respondent contended further that, following the execution of the agreement, they transacted business on credit to the tune of Kenya shillings twenty million (Kshs. 20,000,000/=) but unfortunately, their clients defaulted on payment for the material supplied resulting in the partnership losing not only the share capital, but also the intended profits. Though he admitted executing. As for execution of the original

partnership agreement dated the 26th day of November, 2013, which he conceded, he explained that the arrangement was for the sole purpose of cushioning the appellant against her creditors. He also attributed it to friendship and long business partnership. He denied executing the deed of variation agreement altering the terms of the original agreement. He also added that his defence raised triable-issues which should be allowed to go to trial.

The application was canvased by way of written submissions filed by learned counsel for the respective parties.

After assessing and analysing the rival submissions before her, the learned Judge, with respect failed to appreciate the prerequisites stipulated in Order **21** rule **4** of the Civil Procedure Rules on the mode of drafting Judgments in defended suits. It is our view that, although the above provision refers only to the mode of drafting of Judgments in defended suits, we have no doubt it also applies *mutatis mutandis* to the drafting of rulings in defended application as well. In line with the above prerequisite, the Judge was expected to give a concise summary of the pleadings and submissions of the respective parties, formulate the issues for determination, decide on those issues; and give reasons for the conclusions reached. Instead, the learned Judge simply set out a brief summary of the appellant's claim; made observations on the memorandum of appearance on record filed on behalf of the respondent, gave a summary of application, the provisions under which the application had been premised, the reliefs sought, a brief highlight of the applicable law and then proceeded to make findings thereon.

The findings were that the appellant had failed to annex the agreement pursuant to which the arrangement had been entered into between her and the respondent. However, both agreements were annexed to the supporting affidavit, and therefore the finding was not based on the evidence on record. The Judge was also of the view that, there appeared to be inconsistency in what was claimed and the case that had been presented to the Court; that there was also doubt as to whether the respondent had been served with the plaint and the application then under review. Which in our view, was also erroneous as will be shown later in this Judgment. The Judge, further found that the quantum claimed in the plaint was neither justified nor supported by evidence on account of the appellant's failure to show how Kenya shillings eight million (Kshs. 8,000,000) less Kenya shillings two million (Kshs. 2,000,000) translated to an outstanding balance of over Kenya shillings fourteen million (Kshs. 14,000,000) or thereabouts over a period of about two years. There was therefore no way, in the Judge's view, that the appellant's claim could be sustained as laid.

The Judge also took issue with the appellant's failure to specify the election materials that were provided in 2012; and the failure to display the correspondences that had allegedly been sent to her by the respondent requesting for a variation of the terms of the original agreement. On account of the above findings, the Judge concluded that what the appellant had presented before her was not a clear cut cases capable of being disposed of by way of summary Judgment, and accordingly dismissed the application for summary judgment with costs.

The appellant was aggrieved and filed this appeal raising -nine (9) grounds, subsequently compressed into three main issues in the appellant's written submissions dated the 6th day of December, 2017, and filed on the 7th day of December, 2017. The appellant complains that the learned Judge erred when she:-

1. Held that the appellant had not complied with the law with regard to substituted service.

2. Suo motu raised and determined the issue of alleged non service by the appellant upon the respondent of both the summons to enter appearance and pleadings in her claim.

3. Failed to grant summary judgment as prayed for by the appellant.

On the date fixed for the hearing of the appeal, only learned counsel **Mr. P.N. Kerongo,** for the appellant attended Court. The Court being satisfied that the date for the hearing of the appeal had been taken by consent during the pretrial procedures before the Deputy Registrar and in the presence of an advocate recorded as having held brief for the respondent's counsel, allowed the appellant to prosecute her appeal.

The appeal was canvased by way of written submissions, orally highlighted by learned counsel, **Mr. Kerongo.**

In support of ground 1, **Mr. Kerongo,** relied on **Mavji Patel versus Tonny Keter** [**2010] eKLR**, in support of the submissions that the appellant had satisfied the prerequisites for substituted service pursuant to which the respondent filed a memorandum of appearance through the firm of Kamotho-Jomo & Co. Advocates. Counsel also relied on Form No.5 in Appendix A of the schedule to the Civil Procedure Rules in support of the submission, that the respondent as the party served with summons to enter appearance through substituted service had a duty to collect a copy of the pleadings either from the registry where the matter had been filed or the appellant's Advocates' offices. Counsel also urged that the issue of non-service or in adequacy of service of the summons to enter appearance and the pleadings on the respondent was never canvassed by the respective parties before the trial Judge. Neither did the Judge on her own motion invite parties to address her on the issue.

In support of ground 2, counsel relied on the persuasive decision in **Leaders of Company Ltd & Another versus Major General Musa Bamaiyi** [**2010] LPELR-SC 246/2004; [2010] 18NwLR(Pt.1225)3295 S.C** & the High Court decision in **Political Parties Dispute Tribunal & Another versus Musalia Mudavadi & 6 others exparte Petronila Were** [**2014] eKLR,** in support of his submission that the Judge erred when she *suo-motu* raised a non-issue and used it to determine the application before her to the detriment of the appellant who had no opportunity to comment on it.

Turning to the last main issue for the appeal, learned counsel relied on **Edward Njane Ng'ang'a & Another versus Damaris Wanjiku Kamau & Another [2015] eKLR; Sumaria & Another versus Allied Industrial Limited [2007] 2KLR,** and **Makube versus Nyamuro** [**1983] KLR 403**, all on the role of a first appellate Court. **Solomon Muvinga Kitheka versus Benard Oyugi [2015] eKLR,** and **Mrao Ltd versus First American Bank of Kenya Ltd and two others [2003] eKLR**, to support the proposition that the appellant and the respondent having mutually contracted on a friendly basis as persons of sound minds and exercising their own free will, were bound by the terms of the friendly loan agreements which included a provision for the payment of interest on the loan sum. On account of the above submissions,

counsel urged us to fault the Judge for allowing the respondent to wriggle out of his obligations under the said loan agreement by dismissing the appellant's application for summary Judgment.

Also relied upon is the case of **Delphis Bank Limited versus Caneland Limited [2014] eKLR,** for the proposition that a party who has no plausible defence has no right of defence.

This is a first appeal arising from the exercise of the trial court's discretion to disallow the appellant's application for summary Judgment. The principles that guide the exercise of our mandate have been enunciated in numerous decisions of the Court. See **Mbogo and Another versus Shah** [**1968] EA 93** for the holding *inter alia,* that,

> **"a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice".**

We have considered the record in the light of the above mandate. The issues that fall for our determination are as follows:-

> **Whether the appellant complied with the prerequisites for substituted service.**
>
> **Whether the Judge fell into error when she suo-motu raised and determined the issues of either-non-service or inadequacy of service.**
>
> **Whether the Judge exercised her discretion judiciously when she disallowed the appellant's application for summary Judgment.**

With regard to the first issue, we agree with the appellant's submissions that on the basis of the record as it was before the Judge and now before us, the appellant complied with the order of service by way of substituted service when she caused service of the summons to enter appearance upon the respondent by way of advertisement in the Daily Nation issue of 22nd October, 2015. It is also our view, as correctly contended by the appellant, that the respondent responded entered appearance on the 27th October, 2015, through the firm of Kamotho Jomo & Co. Advocates substituted service; that as at the time of the determination of the application for summary Judgment, the respondent's replying affidavit as well as his defence were already on the record and that learned counsel for the respective parties had in fact made reference to those documents in their respective written submissions. It is for those reasons that the Judge is faulted for entertaining doubt with regard to the alleged non service of both the summons, plaint and the application for summary Judgment on the respondent.

As for the 2nd issue, it is our finding that the issue of want of or inadequacy of service was never an issue in the respective parties written submissions. Neither is there any entry made on the record where the Judge on her own motion either inquired into this issue or asked the parties to address her on it. In fact, as per the entries made on the record by the same trial Judge, as at the 29th day of February, 2016, the respondent had already entered appearance on the 27th October, 2015, through the firm of Kamotho_ Jomo & Co. Advocates. This is the same counsel that the Judge granted leave on 29th day of February, 2016 either to obtain instructions to proceed in the matter, or proceed to argue his application to cease acting for the respondent, which was already on the record. It is the same firm of advocates that the Judge in the alternative gave an option to file and serve a replying affidavit to the application for summary judgment and a defence to the appellant's claim within 14 days of that date should he receive instructions to continue acting for the respondent in the matter. It is also our observation that this was the same Judge before whom the same firm of advocates applied on the 20th day of April, 2016 to withdraw the application to cease acting for the respondent in the matter in lieu of leave to file a defence, to the appellant's claim and a replying affidavit and written submissions to the appellant's application for summary Judgment, which request was granted. We therefore find merit in the appellant's complaint that the Judge erred in determining the application on grounds other than those raised before her in the written submissions filed by the respective parties, notwithstanding, that this does not appear to be one of the reasons the Judge gave for dismissing the application for summary Judgment.

Turning to the last issue, it is not disputed that what the appellant sought from the Court was an order for summary Judgment. As already observed above, the application for summary Judgment was premised on Order **36** rule **1** of the Civil Procedure Rules (CPR). It provides *inter alia* as follows:-

> **" In all suits where plaintiff seeks Judgment for-**
>
> **a. A liquidated demand with or without interest; or**
>
> **b. …….where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed or part thereof and interest……"**

The parameters for the exercise of jurisdiction under this provision have been crystalized by a long line of case law enunciated by the Court. In **ICDC versus Deber Enterprises Ltd** [**2006] IEA75**, the Court stated-*inter alia,* as follows:-

> **"The purpose of the proceedings in an application for summary Judgment is to enable the plaintiff to obtain a quick Judgment where there is plainly no defence to the claim."**

In Kenindia Assurance Co. Ltd versus Commercial Bank of Africa & 2 others Nairobi CA No. 11 of 2000 , the Court stated that the law on summary procedure is now well settled and that this is a procedure resorted to in the clearest of cases. In **Dhanjal Investments Ltd**

versus Shabaha Investments Ltd Civil Appeal No. 232 of 1997 the Court went further and stated as follows on summary Judgment;

> "**The law on summary Judgment procedures has been *settled for many years now. It was held as early as in 1952 in the case of Kandanlal Restaurant versus Devshi & Company [1952] EACA77 and followed by the Court of Appeal for Eastern Africa in the case of Sonza Figuerido & Company Ltd Vs. Mooring Hotel Ltd [1929] E.A 424, that if the defendant shows a - bona-fide-triable issue, he must be allowed to defend without conditions…..*"**

As to what constitutes a triable issue, the Court in **Kenya Trade Combine Ltd versus Shah Civil Appeal No. 193 of 1991**, had this to say:

> "**……. 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. The defendant is at liberty to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues.**

Further in **Dedan King'ang'i Thiongo versus Mbai Gatune Civil Appeal No. 292 of 2000** and **Bangue Indosuez versus DJ Lowe & Co. Ltd Civil Appeal No. 79 of 2002**, the Court was categorical that where *bona-fide*- triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. Lastly, in **D.T. Dobie & Co. Ltd versus Muchina & another [1982] KLR 1,** it was stated *inter alia*, that a pleading which does not disclose any reasonable cause of action or defence ought to be dismissed. Likewise, no suit ought to be summarily dismissed unless, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption by way of an amendment.

We have applied the principles of law distilled above to the appellant's contention that the Judge exercised her discretion unjudiciously when she disallowed her application for summary Judgment. The guiding principle is that the remedy of summary Judgment is only available in the clearest of cases and that the burden is on the defendant to show that he has a *bona-fide* defence to the claim.

The respondent relied on paragraphs 5, 6, &7 which state as follows:-

> "**5. The defendant has never requested for any variation as alleged in paragraph 6 of the plaint and the plaintiff is put to strict proof of all the allegations thereof.**
>
> **6. The contents of paragraphs 7 and 8 of the plaint are denied and more specifically that the defendant owes the plaintiff Kshs.14,972,400/=. The alleged rate of interest is also denied and the plaintiff put to strict proof thereof.**
>
> **7. The defendant denies the contents of paragraph 9 of the plaint and puts the plaintiff to strict proof thereof."**

He also relied on the replying affidavit which in paragraphs 3,4,5,6,7,8,9 &10 state:-

> **3. That prior to the 2013 General Elections, we conceived a business idea with the plaintiff herein and we agreed to jointly supply campaign materials.**
>
> **4. That as per our understanding, we would contribute to the business equally and it was agreed that profits and losses would be shared equally.**
>
> **5. That we agreed to trade under the name Inverness Commodities which would act as the supplier of the campaign materials in various parts of the country.**
>
> **6. That we did supply the campaign materials worth appropriately Kenya Shillings Twenty Million (Kshs.20, 000,000/=) and we both expected to reap handsome profits from our joint investment with the plaintiff.**
>
> **7. That we supplied the materials on credit and unfortunately, most of the politicians that we supplied with election campaign *materials did not pay up as promised. We therefore ended up losing both the capital invested and the projected profits.***
>
> **8. That the plaintiff explained to me that she had borrowed heavily from different people and she therefore needed some document to prove to her lenders that someone else owed her money.**
>
> **9. That the plaintiff, being not only a business partner but also a very good friend of mine convinced me to assist her in developing paperwork to portray that indeed someone owed her money so as to reduce the demands and the pressures that her debtors were exerting.**
>
> **10. That it was at that point that we entered into agreements for money repayment between myself and the plaintiff but it is not true I owe her the alleged Kshs.14,972,400/=."**

We have given due consideration to the above averments in the defence and the depositions in the replying affidavit. It is our considered view that in the absence of a reply to the defence and a further affidavit controverting the depositions in the replying affidavit as highlighted above, there is no way the Judge could have sustained the appellant's application for summary Judgment . In our view, these were serious assertions that went to the root of the appellant's claim for summary Judgments.

The law is that, one *bona-fide* issue is sufficient to entitle a defendant to a right of defence. There are certainly more than one triable-issue in this matter.

For the reasons given above, we find that though the Judge did not apply the requirements of **Order 21** rule **4** CPR, none-the-less, she arrived at the correct conclusion on the matter that the appellant's application had no merit. We affirm that decision.

In the result and for the reasons given above, we find no merit in the appeal.

It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 20th day of July, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.