IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & SICHALE, JJ.A)

CIVIL APPEAL NO. 58 OF 2015

BETWEEN

HON. WANYIRI KIHORO …….....……. APPELLANT

AND

KONAHAUTHI LTD ……. RESPONDENT

(Being an Appeal from the Ruling, Orders and all consequential Orders, if any, (Waithaka, J) delivered at Nyeri Law Courts, on 7th July, 2015)

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JUDGMENT OF THE COURT

The appellant, **HON. WANYIRI KIHORO** filed an appeal against the judgment of Waithaka, J who on 7th July, 2015 found in favour of the respondents, **KONAHAUTHI LIMITED**.

A brief background to this appeal is that the respondent filed a suit against the appellant (the then defendant) vide a plaint dated 11th February, 2000. In its plaint the respondent averred, *interlia*, that ***"The defendant has not since issuance of the Notice either tendered any rent upon the plaintiff which rent now stands in arrears amounting to Kshs: 322,800.00. The lease of the Defendant has therefore been forfeited to the plaintiff in accordance with Section 113 of the Act."*** The respondent sought the following orders:

(a) Kshs. 322,800.00 being arrears of rent due upto August 31st 1999:

(b) Mesne profits at the rate of Kshs. 14,700.00 per month until possession:

(c) A Declaration that the plaintiff is entitled to vacant possession:

(d) An Order for Vacant Possession of the Premises:

(e) Costs of this suit:

(f) Interest upon (a), (b), and (e) at court rates from the date of filing to payment in full: and

(g) Any other or further relief which this Honourable Court may deem fit to grant.

The appellant filed a defence dated 2nd May, 2000 and subsequently an amended defence and counter-claim dated 30th July, 2000. In the amended defence and counterclaim the appellant averred that:

Of paragraph 3

> **"The defendant states that he is owed Kshs. 200,000/= by the plaintiff which sum plus the accrued interest has not been credited to this account to offset the rent."**

Of paragraph 5

> **"The defendant states that he is ready to pay any amount due after credit of Kshs. 200,000/= and accrued interest."**

This is the dispute that was heard by Waithaka, J who as stated above, in a judgment dated 7th July, 2015 found in favour of the respondent. The appellant was dissatisfied with the outcome of the case and filed this appeal.

On 17th May, 2016 the appellant filed his list of authorities as well as what he referred to as ***"speaking notes,"*** which we understand to mean his written submissions. The respondent too, filed its submissions on 7th November, 2016 as well as its list of authorities.

The appeal came before us for plenary hearing on 7th November, 2016. The appellant's submission was that the High Court rejected his counter-claim which was not denied by the respondent as no defence to the counter-claim was filed; that one of the Directors of the appellant had admitted that a sum of Kshs. 200,000/= was owing to the appellant and which sum he counter-claimed in his amended defence and counter-claim. He faulted the trial court for wrongly awarding the respondent interest on the rent allegedly owed by the appellant. It was his further submission that the plaint was not accompanied by a verifying affidavit and that there was no authority from the respondent company for the institution of the suit. He disputed the sums found to be due and owing by him.

In opposing the appeal, the respondent contended that the issue that the plaint did not have the requisite verifying affidavit and that the filing of the suit was not authorized by the respondent was not raised in the trial court, and hence could not be a subject of appeal; that in any event the requirement of a verifying affidavit was introduced by Legal Notice No. 36 of 2000, after the institution of the suit; that the judgment of the trial court did not include interest on the rent; and that the actions of Duncan Ndegwa, a director of the respondent was not binding upon the respondent.

This is a first appeal. The position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our conclusion whilst bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see **Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123).** In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings he did (see **Jabane vs Olenja [1986] KLR 661).**

The impugned judgment awarded the respondent a sum of Kshs. 51,000/= plus interest at court rates from the date the suit was filed until payment in full. The learned judge also awarded the respondent costs of the suit. In arriving at the judgment, the learned judge took into account the admission by the appellant that he had lived in the suit premises for 32 months (a) Kshs. 14,700/=, this is bringing the total sum owed to Kshs. 470,400/=. In a schedule of payments the respondent acknowledged receipt of Kshs. 418,800/= which sum was deducted from Kshs. 470,400/= thus leaving a balance of Kshs. 51,600/=

In his defence in the trial court, the appellant maintained that he was entitled to set off Kshs. 200,000/= which was pledged by Mr. Duncan Ndegwa, a director of the respondent company and which sum he failed to pay. It is noteworthy that in his statement of defence, the appellant did not deny owing the rent

as stated in the plaint save for the issue of a set off of Kshs. 200,000/=. In paragraph 5 of the amended defence and counterclaim dated 30th July, 2005, the appellant stated as follows: ***"The defendant states that he is ready to pay any amount due after credit of Kshs. 200,000/= and accrued interest."*** The learned judge considered the appellant's contention as regards this claim and stated:

> ***"It is noteworthy that the defendant claims that he is entitled to set off any balance found to be due from him from the Kshs. 200,000/= allegedly paid on behalf of the plaintiff and Duncan Ndegwa. With regard to that claim, I hold the view that the said Duncan Ndegwa and the plaintiff are in law, separate legal entities. Without any evidence that the plaintiff passed a resolution authorizing the said pledge, the same cannot be said to have been sanctioned by it. The defendant cannot rely on the said pledge to prove his claim against the plaintiff."***

We too are in agreement with the learned judge's findings. The respondent company was not bound by the pledges (if at all) made by Mr. Duncan Ndegwa in any harambee as the respondent and Mr. Ndegwa, albeit being a director are two separate and distinct entities. Indeed, even the appellant's assertion that there was no defence to his counter-claim of Kshs. 200,000/= does not find favour with us. In his amended defence and counter-claim dated 30th July, 2005, it is evident that there was no prayer for Kshs. 200,000/=. The appellant merely stated that he was owed Kshs. 200,000/= but he failed to include a prayer in his counter-claim. It cannot therefore be said that the learned judge erred in failing to enter judgment for the claim of Kshs. 200,000/= on the basis that there was no defence to the counter-claim.

On the issue of interest, the appellant faulted the trial judge for awarding interest from the date of filing suit till payment in full. Again we cannot fault the learned judge in making this order. Section 26 (1) of the Civil Procedure Act provides as follows:

> ***"(i) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."***

It was therefore within the judge's discretion to order for payment of interest from the date of filing suit.

Having come to the above conclusion, we do not deem it fit to consider the effects of lack of a verifying affidavit to accompany a plaint and/or the suit having been filed on behalf of a company without authority from its directors.

Suffice to state on the first issue that the lgal requirement for a verifying Affidavit was introduced after the filing of the suit and it had no retrospective effect. The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; **Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-**

> **"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."**

However, the principle enunciated in the **Bugerere cas**e has since been overruled by the Uganda Supreme court in the case of **Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000** where the Court endorsed the decision of the Court of Appeal that the decision in the ***Bugerere case*** was no longer good law as it had been overturned in the case of **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-**

> **"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."**

The decision has since been applied in Kenyan courts, for example, in **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.**

In the end, we find no merit in this appeal. It is dismissed with costs.

Dated and delivered at Nyeri this 1st day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR