IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 78 OF 2016

BETWEEN

DYER AND BLAIR INVESTMENT BANK LIMITED.....APPELLANT

AND

JOHN KUNGU KIARIE.....1ST RESPONDENT

CFC STANBIC BANK LIMITED.....2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 62 OF 2016

BETWEEN

CFC STANBIC BANK LIMITED.....APPELLANT

AND

JOHN KUNGU KIARIE.....1ST RESPONDENT

DYER AND BLAIR INVESTMENT BANK LIMITED.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ogola, J.) dated 10th March, 2016

in

H.C.C.C No. 47 of 2008)

****

JUDGMENT OF THE COURT

1. This judgment relates to Civil Appeals No.78 of 2016 and 62 of 2016 as consolidated by an order of this Court made on 16th May, 2017. Both appeals emanate from a judgment of the High Court

dated 10th March, 2016. For purposes of this judgment we shall refer to ***Dyer and Blair Investment Bank Limited*** as the 1st appellant and ***CFC Stanbic Bank Limited*** as the 2nd appellant. ***John Kungu Kiarie*** shall be referred to as the respondent.

2. The 1st appellant had a long standing relationship with the respondent as its client. It acted as an investment adviser and stockbroker to the respondent from time to time. Of significance to this appeal is an agreement dated 28th March, 2003 wherein the respondent agreed to avail a sum of Kshs. 100,000,000/= to the 1st appellant who in turn agreed to invest the same on his behalf. It was agreed that the investment would be done in the name of a nominee, *to wit*, Nomura Nominee Ltd. Pursuant to the agreement, the 1st appellant bid for a treasury bond worth Kshs. 99,000,000/= but was awarded a bond worth only Kshs. 88,000,000/=. It purchased the same and invested the balance of Kshs. 12,000,000/= in the secondary market at the Nairobi Stock Exchange. The investment in respect of Kshs. 12,000,000 is not in issue.

3. Less than a month later the 1st appellant convinced the respondent to sell the treasury bond in order to re-invest the proceeds in a new treasury bond that was being floated by the Central Bank. The sale of the bond realized an amount of Kshs. 91,630,807/= and after deduction of the 1st appellant's commission and other outgoings, a sum of Kshs. 91,500,000/= was to be re-invested in the new treasury bond. However, before such investment could be made, the 2nd appellant who is the 1st appellant's banker, received warrants issued by the Chief Magistrate's Court at Nairobi on 20th April, 2003. The warrants permitted the Central Bank's Anti- Banking Fraud Unit to investigate a Nomura Nominee Ltd. account number 0009917 -1027 held by the 1st appellant. Apparently, the account in question is where the respondent's funds were being held pending the intended investment.

4. The 1st appellant responded to the Anti- Banking Fraud Unit by a letter dated 21st May, 2003 signifying its willingness to cooperate with the investigations. The investigations culminated with the respondent being charged in Criminal Case No. 1218 of 2003(herein referred to as the criminal case) with several counts of obtaining by false pretence a sum totaling Kshs. 91,500,000/= contrary to ***Section 313*** of the ***Penal Code***. It seems the respondent's funds under the nominee account were frozen. The basis under which and at what point in time the funds were frozen is an issue in contention between the parties. Be that as it may, during the pendency of the criminal case the respondent through his counsel applied for an amount of Kshs. 24,000,000/= which was no longer subject of the proceedings to be released to him which order was granted. Eventually, on 30th May, 2005 the criminal trial court acquitted the respondent of all charges for lack of evidence. The state preferred an appeal against the decision being H.C.CR.A No. 519 of 2005 (herein after referred to as the criminal appeal) but later withdrew the same. Once again the respondent through his counsel obtained an order in the criminal appeal dated 19th September, 2007 lifting the order freezing the balance of Kshs. 67,500,000/= and the interest accrued thereon held in the Nomura Nominee Ltd account number 000991/1027.

5. Upon serving the said order on the 2nd appellant, the respondent was informed that the 1st appellant held no such account with 2nd appellant. The 2nd appellant clarified that the correct account was 0140021533301 and the respondent obtained an amended order dated 21st September, 2007 reflecting the correct account. It is at this point that the respondent drew the assumption that the appellants had misled him into believing that the account in question had been frozen.

6. Later on, the 1st appellant released the principal amount of Kshs. 67,500,000/= and interest of Kshs. 2,296,559.75/= to the respondent. The respondent was at a loss as to how such a colossal amount which had been held by the 1st appellant for a period of over 4 years could earn such low interest. He asked the 1st appellant to furnish him with proper accounts which it did but the same was not to his satisfaction. The respondent then engaged the services of Mr. Patrick Mbiyu, a certified accountant and a holder of an MBA in investments and portfolio management to assess the returns his funds would have fetched if they had been properly invested. Vide Mr. Mbiyu's report the returns would have been Kshs. 465,500,000/=.

7. It is on that basis that the respondent demanded payment of the assessed returns from the 1st appellant. The 1st appellant denied that the respondent was entitled to such payment. Consequently, the respondent filed suit against the appellants seeking *inter alia*, what he perceived as loss of income of Kshs. 465,500,000/= and interest on the same at the rate of 16% per annum to be calculated on a daily basis until payment in full.

8. In its defence, the 1st appellant maintained that it had settled its accounts with the respondent and that there was no outstanding payment. The contract between the parties had been frustrated due to the orders freezing the respondent's funds. The consequence of which was that the 1st appellant could not invest the same. As a result, the funds were transferred into a call account earning an interest of 0.5% per annum.

9. The 2nd appellant was submitted that no cause of action had been disclosed against it. This is because there was no privity of contract between itself and the respondent. It had no obligation to account to the respondent.

10. Upon weighing the evidence before him the learned Judge (Ogola, J.) in the impugned judgment found that the appellants had colluded to wrongfully and maliciously freeze the respondent's funds. Hence, he held them to be severally and jointly liable for the loss occasioned to the respondent. Towards that end judgment was entered in the following terms: -

- ***Kshs. 310,333,333.30/=.***
- ***Interest on the above at 16% per annum from 21st October, 2007 to the date the entire sum is paid.***
- ***Costs of the suit.***

11. It is that decision that provoked the appeals filed by the appellants. It is worth noting that ***Rule 86(1)*** of the ***Court of Appeal Rules*** requires that grounds ofappeal should be concise, without repetition, argument or narrative. This Court has expressed time and again that unduly wordy and expansive grounds of appeal serve no purpose other than to obfuscate the issues. Turning back to the appeals, the 1st appellant's appeal is predicated on 15 grounds which can be aptly summarized as follows: -

The learned Judge erred in law and fact by-

- ***Misapprehending the case before him thus arriving at an erroneous and unlawful decision.***
- ***Finding that the freezing of the respondent's account was initiated and unilaterally made by the 1st appellant contrary to the clear evidence in the criminal case.***
- ***Relying on the evidence of Mohammed Hassan who was the 1st appellant's General Manager as recorded in the criminal case yet he had not been called as witness in the matter before him.***
- ***Making findings on issues which were not pleaded.***
- ***Finding that the 1st appellant had breached its duty to invest the respondent's funds.***
- ***Assessing damages contrary to established legal principles and the terms of the contract.***
- ***Demonstrating apparent bias against the appellants.***

The 2nd appellant raised 11 grounds complaining in a nutshell that the learned Judge erred in law and fact by-

- ***Failing to give weight to the fact that there was no privity of contract between the 2nd appellant and the respondent.***
- ***Finding that the 2nd appellant had a duty to account to the respondent the interest earned in an account held by the 1st appellant.***

- ***Holding that there was conspiracy between the appellants to defraud the respondent yet***

fraud and the particulars thereunder had not been pleaded by the respondent.

- ***Finding that an action of freezing the account which was undertaken by the 1st appellant was actionable against the 2nd appellant.***
- ***Failing to consider the evidence given by the appellants' witnesses.***

12. The appeal was disposed of by written submissions as well as oral highlights. Mr. Ogunde led by learned senior counsel, Mr. Oraro appeared for the 1st appellant while learned counsel, Mr. Gitonga also led by senior counsel, Mr. Oraro appeared for the 2nd appellant. The respondent was represented by learned counsel, Mr. Kibahati and Ms. Omollo.

13. Mr. Oraro, senior counsel submitted that the respondent's claim was for loss of investment opportunity and as such the learned Judge erred in delving into whether a freezing order had been issued in the criminal case. In doing so, he misdirected himself by relying on the testimony of the 1st appellant's General Manager which was recorded in the said proceedings yet he was never called as a witness in the matter before him. According to him, the purport of ***Section 34*** of the ***Evidence Act*** is that the said evidence was not admissible in this case.

14. In any event it was clear from the criminal case that the respondent through his advocate had applied to the court to lift the freezing order in respect of other accounts held by the respondent save for the nominee account which was subject of the criminal proceedings. In acceding to the application, the court in its own words issued the following order on 28th July, 2003;

> ***"But account no 0009917/1027 held by Numura (sic) Nominee and Dyer and Blair at Stanbic Bank shall remain frozen until further order of the court."***

Similarly, the respondent's counsel applied for the lifting of the freezing order over the nominee account in the criminal appeal. As far as the appellants were concerned the issue of the existence of the freezing order had been conclusively determined in the aforementioned proceedings. Therefore, the learned Judge was estopped by record from making contrary conclusions. In support of that argument, the case of ***Zurich Insurance Company PLC vs. Collin Richard Hayward [2011] EWCA CIV 641*** was cited wherein the Court of Appeal held:

> ***"Estoppel by res judicata or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing stable basis for future conduct. The latin word 'res judicata' means simply 'a thing judicially determined.' They may apply to the claim as a whole (usually referred to as 'cause of action estoppel', or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on a matter before it (what is generally referred to as issue estoppel… the fact than an order is made by consent does not in my view prevent it from giving rise to estoppel by record provided the nature of the order is such that it would otherwise have that effect."***

15. The learned Judge was faulted for finding that the appellants had colluded to trade with the respondent's funds without accounting for the interest earned. In the senior counsel's view, the issue of collusion or fraud was never pleaded or raised by any of the parties. Reliance was placed on this Court's decision in ***Thomas De La Rue (K) Limited vs. David Opondo Omutelema [2013] eKLR***.

16. Mr. Oraro argued that the contract between the 1st appellant and respondent had been frustrated. This is because the 1st appellant was incapable of investing the funds which had been frozen. In that regard, the Court was referred to its decision in ***Chris Mwirigi Marirti vs. Thagana Tea Growers Sacco Limited & Another [2014] eKLR***.

17. Attacking the award of damages, it was postulated by counsel for appellants that the learned Judge

erred in relying on the report prepared by Mr. Mbiyu who the appellants considered was not an expert. Equally, the learned Judge failed to appreciate that the 1st appellant had never guaranteed a positive return to the investments made on the respondent's behalf. In light of the prevailing circumstances, the 1st appellant had exercised reasonable care and skill in executing its duty as a fund manager. Buttressing that line of argument, the Court was referred ***to Bullen & Leake & Jacobs on Precedents of Pleadings 17th Edition Vol. 1*** wherein the authors at paragraph 17-05 stated,

> ***"At common law the primary obligation of a broker is to use reasonable care and skill in executing the client's orders; he does not contract absolutely that he will do so."***

18. Mr. Oraro added that even if the respondent was entitled to damages, the same ought to have been assessed in accordance with the terms of the contract. The investment contract was for a period of one year. Placing reliance on ***V.R Chande & Others vs. East African Airways Corporation [1964] EA 78,*** he submitted that the respondent was only entitled to interest that would have been earned for a period of one year less the liabilities due to the 1st appellant. There was no justification for the interest awarded by the learned Judge.

19. Elaborating on the issue of privity of contract, counsel for the appellants stated that liability could not attach to the 2nd appellant who was not privy to the investment contract. The 2nd appellant's instruction could only emanate from the 1st appellant who was its customer. Furthermore, the reasons advanced by the learned Judge as giving rise to the 2nd appellant's liability did not fall within the exceptions of privity of contract outlined in the case of ***Aineah Liluyani Njirah vs. Agha Khan Health Services [2013] eKLR***. In as much as the respondent claimed that his cause of action against the 2nd appellant was founded on tort his pleadings did not demonstrate as much. There was no basis whatsoever for the claim and/or judgment entered against the 2nd appellant. Counsel urged the Court to allow the appeals.

20. Supporting the learned Judge's decision, Mr. Kabahati urged that the issue of the existence of the freezing order was raised in the respondent's pleadings. Besides, the 1st appellant's defence was based on the alleged freezing order. Consequently, it was an issue which rightly fell for consideration by the trial court. He went on to add that the issue of collusion and fraud on the part of the appellants was also raised in the respondent's pleadings.

21. The respondent argued that the appellants could not approbate or reprobate on the admissibility of the criminal proceedings. Expounding further, Mr. Kabahati claimed that at one point the appellants relied on the criminal case proceedings to argue that the freezing order was issued. However, since the recorded evidence of the 1st appellant's then General Manager was not favourable to their case, the appellants turned around to say that the same proceedings were inadmissible. The respondent's position was that the proceedings in the criminal case crystalized into a judicial record which was produced before the trial court. It was settled law that evidence given in previous proceedings is admissible in subsequent proceeds such as in this case. Towards that end the respondent cited ***Halsbury's laws of England, 4th Edition Vol. 17 page 15.***

22. Mr. Kabahati submitted that the appellants failed to prove that the alleged freezing order was indeed issued in the criminal case. Their evidence in that respect was contradictory. In one breath the 1st appellant's evidence was that Anti-Banking Fraud Unit had instructed the appellants to freeze the respondent's funds. In another breath, the said appellant's evidence was that the court issued the freezing order on 24th July, 2003 pursuant to an affidavit sworn by Geoffrey G. Kahiro, an inspector with the Anti-Banking Fraud Unit. Asserting that such an affidavit could not be the basis of a freezing order, the respondent relied on the persuasive decision of the High Court in ***Sanjay Shah Arunjain vs. R [2002] eKLR***.

23. In opposing the defence of frustration, it was emphasized that the same did not arise since the 1st appellant had initiated and unilaterally frozen the respondent's funds. The 1st appellant's conduct went against the very essence of the doctrine of frustration that a party wishing to rely on the same ought not to

have caused the frustration. The same is articulated in ***Ocean Tramp Tankers Corporation vs. V/O Sofracht [1964] 2 QB 226***.

24. The respondent contended that the evidence tendered by Mr. Mbiyu on assessment of the expected returns could not be challenged from the bar but only through evidence of an expert. Moreover, the 1st appellant did not exercise due diligence in investing on behalf of the respondent. Accordingly, the appellant was liable to the respondent in damages. In the circumstances there was no reason for this Court to interfere with the assessment of damages.

25. Last but not least, the respondent maintained that the claim against the 2nd appellant was not contractual but was anchored on tortious liability. For the simple reason that the 2nd appellant colluded with the 1st appellant to hold the respondent's funds for ulterior motives. The Court was urged to dismiss the appeal.

26. We have considered the record, submissions by learned counsel and the law. This being a first appeal, our primary role as a first appellate court is to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. We are also cautious of the fact that we never saw nor heard the witnesses like the trial court. See the case of ***Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212***.

27. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. This position was restated by this Court in***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR***. Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of ***Odd Jobs vs. Mubia [1970] EA 476***. Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say:-

> ***"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision..."***

28. From the record, it is clear to us that issues regarding the freezing order and the conduct of the appellants though not pleaded were issues raised for determination in the course of the trial. In addition they were central in of determining whether the respondent's claim had merit. To that extent the trial court rightly framed the following issues for determination:-

> ***a) Whether there was a contract between the plaintiff (respondent herein) and the 1st defendant (1st appellant herein) dated 28th April, 2003, or at all.***
>
> ***b) Whether there was a freezing order.***
>
> ***c) Whether the 1st defendant discharged its duty to invest the plaintiff's funds in a professional, prudent, competent and skillful manner to ensure best returns.***
>
> ***d) Whether the 1st defendant has fully paid and fully accounted for the interest and returns on investment.***
>
> ***e) Whether the 2nd defendant (2nd appellant herein) is jointly and severally liable with the 1st defendant on this claim***.

29. On our part, we find that the pertinent determinations with regard to the freezing order was: firstly, whether it was issued; secondly, the basis on which it was issued; and thirdly, at what point in time was it

issued. Contrary to the appellants' contention the foregoing were issues which neither fell for consideration in the criminal proceedings nor determined in the said proceedings. The gravamen of the criminal proceedings was whether the respondent had obtained the sum of Kshs.91.5M by false pretence. Consequently, *issue estoppel* was inapplicable in the circumstances of this case. In ***Halsbury's Laws of England, 4th Edition Vol.***

16 at paragraph 1503 estoppel of record was discussed in the following manner:

> ***"Estoppel of record or quasi of record, also known as estoppel per rem judicatam, arises (1) where an issue of fact has been judicially determined in a final manner between parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever".***

Lawson, J in ***Regina vs. Hogan, [1974] 1Q.B 398 at 401*** in his own words articulated that-

> ***"Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in a later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between the same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties"***.

30. It is not in dispute that the 1st appellant's defence was anchored on the ground that the freezing order over the respondent's funds frustrated the investment contract. In reinforcing its position, the 1st appellant's argument on the existence of the freezing order was threefold. First, it argued that the order was issued at the instance of the Anti-Banking Fraud unit through the order dated 20th April, 2003. The order in question was a warrant allowing an inspector attached to the Anti-Banking Fraud Unit to investigate the account described therein. The warrant did not freeze the respondent's funds. This much was admitted by the 1st appellant's witness. It follows therefore that the argument falls flat on its face.

31. Second, that the order was issued on 24th July, 2003 pursuant to an affidavit sworn by one Geoffrey G. Kahiro, an inspector also attached to the Anti-Banking Fraud Unit. Looking at the affidavit, it is not clear whether the same was filed in court or whether the order alluded to by the 1st appellant was actually issued. In our opinion the same did not amount to an order of the court within the meaning of ***Section 2*** of the ***Civil Procedure Act***. The Act defines an order as the formal expression of any decision of a court which is not a decree. Without setting out the entire affidavit we set out the pertinent extracts of the same herein under:-

> ***AFFIDAVIT***
>
> ***I Geoffrey G. Kahiro of Box 60000, Nairobi within the***
>
> ***Republic of Kenya hereby take oath and state as follows:***
>
> ***That I am an inspector of police currently attached to the Banking Fraud Investigations department.***
>
> **…….**

That the alleged stolen money was fraudulently deposited with Dyer and Blair Ltd Nomura Nominees account No. 1027 at Stanbic Bank (K) Ltd.

That I have received information that the said John Kungu Kiarie or his agent intends to withdraw or transfer the said money from the said account before the determination of the case pending before the court.

……..

I therefore pray this honourable court to make an order restricting the said bank from allowing any transactions, in respect to the said account, until further orders from this court.

……

Dated 24th July, 2003

Signed ……

(Police officer)

Sworn before me this 24th day of July, 2003

Signed …….

(Magistrate)

ORDER

Order to issue as prayed.

Signed …….

(Magistrate)

Dated this 24th day of July, 2003.

32. Third that the respondent through his counsel applied both in the criminal case and the criminal appeal for the lifting of the freezing order signifying the existence of such an order. In our view, there is nothing in those proceedings that indicate the source or origin of the order being lifted. Without more we, like the trial court, find that the same could not be the basis of finding that a court order freezing the respondent's funds had been issued on 20th April, 2003.

33. Our point of departure with the trial Judge is with respect to the admissibility of the evidence of the 1st appellant's General Manager which was recorded in the criminal case. We capture the sentiments of the learned Judge on the said evidence as hereunder-

"The 1st defendant's General Manager, Mohamed Hassan, categorically stated in court under oath that there existed no order to freeze the account but to investigate. As evidence has shown, he was the person who negotiated, drew and signed the agreement dated 28th April, 2003 and basically dealt with and invested the plaintiff funds. The purported freezing took place during his tenure; he signed the letter dated 30th July, 2003. Now if he said there was no order on 28th August, 2003, anyone purporting there was such an order before that date is engaged in conjectures, fabrications and imaginations."

34. ***Section 34*** of the ***Evidence Act*** sets out the criteria for admitting evidence given by a witness in

subsequent proceedings. The provision stipulates:-

> ***"34.***
>
> ***1. Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—***
>
> > ***a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—***
> >
> > ***b) the proceeding is between the same parties or their representatives in interest; and***
> >
> > ***c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and***
> >
> > ***d) the questions in issue were substantially the same in the first as in the second proceeding.***
>
> ***2. For the purposes of this section—***
>
> > ***a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and***
> >
> > ***b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused."***

The 1st appellant never participated in the criminal case and thus, did not have an opportunity to cross examine its then General Manger on his evidence. For that reason his evidence as recorded in the criminal case ought not to have been admitted by the trial Judge.

35. Even in discounting the evidence of the said General manager, we are at the very least satisfied, like the trial Judge, that there were no orders freezing the respondent's account at the time the 1st appellant informed the public vide a letter dated 30th July, 2003 that the respondent's funds had been frozen. More so, taking into account the evidence of the 2nd appellant's witness, Mr. Kelvin Kilach to the effect that there were no orders freezing the respondent's funds which were being held by the 1st appellant. As a matter of fact it is the 1st appellant who, without any prompting, volunteered to freeze the funds in a letter dated 21st May, 2003 to the Anti-Banking Fraud Unit. The relevant extract of the letter is set out herein below: -

> ***"A/C 0009917-NOMURA NOMINEES LIMITED A/C 1027***
>
> ***Further to your inquiry, we enclose herewith the statement of the above account showing the transactions that have been processed through the account.***
>
> ***We confirm that the same is a true reflection of the transactions of the account.***
>
> ***We will also freeze the account until further instructions from yourselves." Emphasis added.***

Having expressed ourselves as herein above, we concur with the trial Judge that the defence of frustration was not available to the 1st appellant.

36. At all material times the 1st appellant as a stockbroker acted as the respondent's agent. One of its obligation entailed exercising care and skill in discharging its duties. See ***Chitty on Contracts 31st Edition paragraph 31-115***. No absolute standard can be laid down as to what constitutes proper care, skill or diligence, and each particular case must be judged by its own circumstances. It's therefore a question of fact. See ***Halsbury's Laws of England Vol. 1 (2008) paragraph78***.Such an agent must show at least such diligence in conducting his principal's business as the principal would reasonably have been able to display if the principal had undertaken the business himself. See ***B Davis Ltd vs. Tooth & Co Ltd [1937] 4 All ER 118, PC.***

37. As Sumption J.A while discussing the degree of care and skill required of a stock broker in ***Voisin (trustees of the Mrs W M I Prior Settlement) v Matheson Securities (CI) Ltd (2000) 2 ITELR 907*** aptly put it:

> ***"A Stockbroker professes expertise in buying and selling stock, managing investment portfolios and giving investment advice to clients, but the extent to which he undertakes to use this expertise is a matter of agreement. At one extreme, he may transact business for a client on an execution only basis, in which case his duties are limited to effecting transactions and require very little in the way of skill. At the other, he may act as a discretionary portfolio manager, with the whole conduct of his client's investment business in his hands within broad limits fixed according to criteria which are generally agreed with the client at the outset.***
>
> **……..**
>
> ***The first obligation of any stockbroker dealing on other than an execution only basis is to know his client and to ascertain what service he wants and what service he needs (so far as it is different)."***

38. Did the 1st appellant discharge this obligation as against the respondent? As per the terms of the agreement, the 1st appellant was required to invest on behalf of the respondent by purchasing treasury bonds. It failed to do so as evidenced in the preceding paragraphs of this judgment hence, it breached the terms of the said contract. It is settled that every agent is responsible to his principal for any loss occasioned by his want of proper care, skill or diligence, in the carrying out of his undertaking. See ***Chaudhry vs. Prabhakar [1988] 3 All ER 718.***

39. Upon an agent's breach of duty the principal's remedy is, as a rule, to claim damages for breach of contract. See ***Mahesan vs. Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405***. The trial Judge appreciated as much in this case. However, he erred in the assessment of the damages. In our opinion the damages awarded ought to have been within the terms of the investment contract. See ***Halsbury's Laws of England Vol. 1 (2008) paragraph 86 and McGregor on Damages 18th Edition Paragraph 30-06***.

40. Clause 6 of the contract provided;

"That John Kiarie shall be entitled to all interest received by Nomura Nominees Limited on behalf of A/C 1027…."

Clause 7 provided;

> ***"That the agreement will run for a period of one year from the commencement date."***

As a result, we find that the learned Judge erred in assessing damages for a period of 4 years while the contract is clear on its duration. It wasn't within the learned Judge's mandate to imply that the contract to invest had been renewed for the duration of four years. There ought to have been evidence of such extension as envisaged under clause 8 of the agreement dated 23th April 2003. The absence of such extension entitled the respondent to damages for the period of one year.

41. As regards the 2nd appellant's liability, we agree with senior counsel that there was no privity of contract between the respondent and the said appellant hence the 2nd appellant's liability could not be anchored on the investment contract. Likewise from the evidence on record we were unable to find that the 2nd appellant owed a duty of care to the respondent in as far as his investment was concerned. In as much as the interest applied on the respondent's funds and the basis of freezing the funds were questionable the same could only be raised as against the 1st appellant.

42. In the end, the 1st appellant's appeal succeeds in part to the extent that we hereby set aside the assessment of damages and the interest applied thereon. We substitute the same with an award of damages equivalent to the returns the respondent would have earned from the investment in treasury bonds for a period of one year less the 1st appellant's commission and annual custody fees as set out under Clause 4 of the agreement. For avoidance of doubt, it is clear from the evidence on record that the applicable rate of interest on treasury bonds in the year 2003 was 10% hence, the returns shall be computed at the rate of 10% of the principal amount of Kshs. 91.5 million. The respondent shall also be entitled to interest at court rates on that amount from the date of judgment of the High Court until payment in full.

43. The 2nd appellant's appeal succeeds in its entirety. We set aside the liability entered against the 2nd appellant and substitute the same with an order dismissing the suit as against it with costs. The 2nd appellant shall also have the costs of this appeal. On the other hand, the 1st appellant and the respondent shall bear their own costs.

Dated and delivered at Nairobi this 28th day of July, 2017.

ALNASHIR VISRAM

…….....

JUDGE OF APPEAL

W. KARANJA

…….……..

JUDGE OF APPEAL

M. K. KOOME

……...

JUDGE OF APPEAL

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

DEPUTY REGISTRAR