IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 209 OF 2004

BETWEEN

HARJINDER KAUR SEHMI .....APPELLANT

AND

STANDARD CHARTERED BANK LTD.

WESTLAND BRANCH.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi, Milimani Commercial Court (Kasango, J.) dated 15th July, 2004

in

H.C.C.C. NO. 1126 OF 2000)

****

JUDGMENT OF THE COURT

Introduction

1. This judgment was due for delivery on 25th July, 2014 but for several reasons, it was not possible to do so. First, there was the pressure and priority given to Election Petition judgments which had Constitutional deadlines. The attention of the parties was drawn to this possibility for delay. Second, in the month of November, 2014, the presiding Judge, with the authority of the Hon. The Chief Justice proceeded on annual leave and engaged in official duties as President of the Residual Special Court for Sierra Leone, which took him outside the country throughout the month. Barely two days after his return to Kenya on 30th November, 2014, his father who had been hospitalized for cancer treatment passed on and he was allowed to concentrate on funeral arrangements until the end of term. The Judgment was prepared during the Christmas vacation and is delivered at the first opportunity in the new year.

2. The appeal before us turns on two issues: the application of ***Order 4 Rule 3(4)*** of the **Civil Procedure Rules** (currently ***Order 5 Rule 1(4)*** of the **Civil Procedure Rules 2010**), and the construction of a Group Personal Accident Insurance Policy (Policy) taken out by **M/s Standard Chartered Bank Kenya Ltd** (the Bank) for its customers. We shall revert to those issues later in

this judgment.

3. The parties are ***Mrs. Harjinder Kaur Sehmi*** (Sehmi) the original plaintiff who is the appellant before us represented by learned counsel Ms. Kethi Kilonzo, instructed by M/s. Kilonzo & Company Advocates and the respondent Bank represented by learned counsel Mr. Awele, instructed by M/s. Oraro & Company Advocates. Counsel on both sides made oral submissions before us

The pleadings and Evidence.

4. Sehmi filed suit before the High Court on 23rd June, 2000 asserting that the Bank had, in the year 1994 organized for an insurance policy to cover all its account holders in the event that any of them suffered permanent disability or complete and irrecoverable loss of use of specified members of the body. In such event the customer would be paid compensation in the manner specified in the policy.

5. Sehmi was a customer of the bank holding a Savings Account Number 01201-47045007 which had a credit balance of Ksh.3,358,900.87 as at 25th June, 1994. On that day, Sehmi was lawfully travelling in a car with her family along Muthangari Road in Nairobi when the car was involved in a serious accident resulting in her hospitalization in M.P. Shah Hospital for ten days. She particularized her injuries as follows:-

> "a) *Multiple facial cuts.*
> *b) Eyelid injury.*
> *c)Left eye had a big tissue gap.*
> *d) Right eye perforated cornea scaral injury, with dislocated lens and iris prolapse. VA, reference CF at 1 metre 6/60 with correction."*

6. The most serious injury was to the right eye which was confirmed in several medical reports as 85% lost. This was construed by the eye doctors as complete and irrecoverable loss of the eye. In that case, Sehmi pleaded, the policy provided that she would be entitled to a benefit at 50% of the amount outstanding in her savings account, that is to say, Kshs.1,679,450.43. She reported the matter to the bank in accordance with the requirements of the policy, but the bank rejected the claim on the ground that she had not suffered complete and irrecoverable loss of the eye. The bank made this conclusion without even physically examining her, hence the suit, in which she sought the following orders:-

> *"a) Kshs.1,679,450.43*
> *b) Damages.*
> *c) Pain and loss.*
> *d) Cost and interest.*
> *e) Special damages."*

7. In its statement of defence, the bank admitted that Sehmi was its Savings account customer and held the account number and bank balance stated by her. It also admitted that Sehmi was involved in a motor accident, but denied the particulars of the injuries suffered as well as the extent of the injuries and put her to strict proof. With regard to the policy, the bank pleaded as follows:-

> "4. *In response to paragraph 5 of the plaint it is the defendant's case that it provided insurance covers to current account holders aged between 18 and 65 years and savings account holders aged between 15 and 65 years.*
>
> *5. Amongst the terms and conditions of the said insurance policy were:*
>
> > *5.1 Compensation was limited to a maximum of Kshs.500,000/= for savings account holders and Kshs.100,000/= for current account holders.*

5.2 Compensation was only payable when there was a 100% loss of the subject organ or limb."

On the basis of that pleading, the bank contended that Sehmi did not qualify for compensation and her demands were rightfully declined by the bank. It sought dismissal of the suit.

8. The suit was partly heard before Mbaluto, J. and was concluded by Kasango, J. between 1st April, 2003 and 15th June, 2004. Sehmi called ***Dr. Mukesh Joshi*** (PW1), a consultant Ophthalmologist who had attended to and treated her since the accident in 1994 upto 2002. He produced the treatment records and stated as follows with regard to the eye injury:-

> *"She had multiple face and eyelid injuries with a perforating eye injury on the right eye. The perforating eye injury was repaired at the hospital and I found that there was a big corneal sclera injury – The lens inside the eye was dislocated and the brown part of the eye which is called iris was collapsed. The jelly of the eye which is known as Vitreous was collapsed. I repaired the injury. As the iris was collapsed completely we had to cut it as it could not be repaired. Following injury repaired (sic) there was no recovery of vision. Therefore it was decided to carry out another operation to put a lens in the eye in 1999. As a result of the injury the retina was extensively damaged and the center part of the retina which is known as Macula is showing pickery which means following (sic). The consequences as total loss of eye sight. In my opinion she has suffered irreplaceable loss of sight in the eye."*

He added that Sehmi was legally blind by World Health Organization (WHO) standards when she first went to hospital but the first operation improved to 85% loss of sight before it ended up as a total irreplaceable loss which no amount surgery could repair.

9. Sehmi also testified and confirmed she was 35 years old at the time of the accident and was therefore within the bracket covered by the policy. She confirmed that despite operations to correct the right eye injury, she had lost sight of the eye. She produced documents in support of the accident, medical reports in support of the injuries, bank records in support of the account, and correspondence between her and the bank in pursuit of compensation culminating in the refusal by the bank to honour the claim, on 17th April,1996. Among the documents produced by Sehmi was one page of a document sent to her by the bank showing the "SCALE OF BENEFITS" under the policy. As far as is relevant it provided as follows:

> *" SCALE OF BENEFITS*
>
> *In the event of ACCIDENTAL DEATH OR DISABLEMENT occurring within 18 months from the date on which injury is sustained:*
>
> *A DEATH 100% of the sum standing to the credit of the insured Person in his/her Savings Bank Account in the books of the Bank at the opening of business on the date of the accident.*
>
> *B FULL PERMANENT (for Description of Permanent DISABLEMENT Disablement and percentage of maximum DISABLEMENT benefit payable see below).*
>
> *Description of Permanent Percentage of Disablement Maximum Benefit Payable Loss of both hands 100) Loss of both feet 100) Complete and irrecoverable loss) Of sight in both eyes. 100) Loss of one hand and one foot 100) Loss of one hand or one foot) of the sum standing to Together with complete and) the credit of the Insured Irrecoverable loss of sight in) Person in a Savings Bank One eye 100) Account in the books of) the Bank at the opening Complete and incurable insanity) of business on the date of Complete and incurable paralysis 100) the accident. Loss of arm or hand 50) Loss of one leg or one foot 50) Complete and irrecoverable loss) of sight in one eye. 50) Complete and irrecoverable loss) Of hearing in both ears.*

PROVISOS

(i) the complete and irrecoverable loss of any member or members specified above shall be deemed to be loss of such member or members." (Emphasis added)

10. According to her, she had never seen the policy document whose Number was given to her advocates as GPA 371000209. She had this to say in cross examination:

"The bank did not give me policy document. I did not ask for the policy by writing.

I had an advocate writing on behalf. I asked for policy document in writing. There was no letter that I wrote to ask for policy. Yes I had a copy of the policy. I am looking defendant exhibits page 3 onwards. I have never seen this document.

The scale of benefit produced by me is at page 3 of the defendant documents. I asked for the other pages of the policy documents but I got only page 3. I only got page 3.

I did not ask for other page. Paragraph 5 of the plaint states defendant gave policy documents. I have never seen that policy."

She clarified that when she asked the Bank for the formalities of making her claim after the accident, the Bank sent various documents including the SCALE OF BENEFITS which she produced as evidence.

11. The bank testified through its business Finance Manager, ***Bernard Kipkorir Bii*** (DW1), as the only witness. He had this to say about the policy:-

"In 1995 there was promotion as incentive to customers. The major(sic) of that promotion as regard to personal accident so if you had an account with savings and current you automatically qualify for free accident insurance. If you comply with terms and conditions of the promotion. The promotion is still on. It is part of what I deal with. Customers are aware from pamphlets and brochures which are available in all branches.

I am looking page 1 and 2 these are documents. I refer to the content has remained the same since inception.

12. He clarified that although the policy was issued by an insurance company (**AFRICA INTERNATIONAL INSURANCES (A.I.I) LTD**) which would settle the claims, it is the bank which negotiated the insurance for the benefit of its customers and paid all premiums. It was also the bank which communicated with its customers and not the Insurer. He referred to various clauses of the policy relating to qualifications of customers and the compensation a qualified customer was entitled to. One of the **"Special Conditions** "endorsed on the policy was as follows:-

"The Maximum Benefit payable in respect of any single saving account (irrespective of the number of names) is Kshs. 500,000/=. Insured Persons with balances in excess of this figure will, for the purpose of this policy, be regarded as having balance of Kshs.500,000/= only. The Maximum Benefit payable by the Company arising out of any one accident involving more than one Insured Person is Kshs.4,000,000/="

So that, if Sehmi had qualified, she would receive 50% of Kshs.500,000, despite having more than that amount in her savings account. However, he testified, Sehmi did not qualify because her eye loss was not 100% but 85%.

13. Cross examined on that evidence, Mr. Bii confirmed that there was nothing in the policy that states that compensation was subject to *"100% loss of organ"* but rather *"complete loss of eye"* or

"complete and irrecoverable loss of sight" without percentages. He also confirmed that the bank only forwarded the page on "SCALE OF BENEFITS" to Sehmi and not the entire policy when she sought advice on her claim. Nevertheless, he stated, all the bank's customers knew, from the promotion brochures circulated by the bank that the policy was in the custody of the bank and was open for perusal by the customers.

Findings of the trial court.

14. In the course of final submissions before the trial court, learned counsel for the bank raised three legal issues which the trial court latched on to decide the suit in a summary manner. He argued, firstly, that the summons to enter appearance that was issued by the court was fatally defective and of no effect and therefore the suit was a nonstarter. That is because the summons required the defendant to enter appearance within 10 days of service contrary to ***Order 4 Rule 3(4)*** of the **Civil Procedure Rules (CPR)** which provides, thus:-

> **"The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than 10 days."**

15. In support of that submission, counsel cited the decision of this Court in **Ceneast Airlines Ltd vs. Kenya Shell Ltd [2000] 2 EA. 362** where the Court declared a summons issued in contravention of that provision as "invalid and of no effect". Counsel further cited the case of **Udaykumar Chandulal Rajani & 3 Others vs Charles Thaithi [1991] eKLR** relating to validity of summons issued under ***Order 5 rule 1*** of the **CPR**, where the court held that a fresh summons to enter appearance could not be re-issued after expiry of its 24-month validity period.

16. Responding to that submission, learned counsel for Sehmi submitted that the issue raised in the **Ceneast case** was not argued before the Court of Appeal and was of little assistance in this case. He added that suits are commenced by plaint which forms part of the pleadings and not the summons to enter appearance and, therefore, a suit cannot be rendered invalid by a defective summons. He also distinguished the ***Rajani case*** on the ground that it involved the validity of summons and had no relevance to this case where summons was issued within the prescribed period.

17. The trial court considered those submissions and was persuaded by the dicta in the ***Ceneast case***. It concluded thus:

> **"I am of the view that the summons hereof are invalid by virtue of Order 4 rule 3 (4) and the fact that the defendant filed an appearance and defence and participated in the hearing hereof does not validate the summons.**
>
> **Having found that the summons are invalid I am of the view that the plaint and the whole suit is invalid."**

18. Despite that finding, the suit was not dismissed, the court chose to consider the second legal issue raised by counsel for the bank, which was that, Sehmi did not show that it was the bank which issued her with an insurance policy and did not produce any in evidence. ***Section108*** of the **Evidence Act** was relied on which states: **"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."** The court found that Sehmi had failed to comply with that Section.
19. Thirdly, the court found, as submitted on behalf of the bank, that the liability to compensate Sehmi, if it arose, was not by the bank but the Insurers, Africa International Insurance (A.I.I) Ltd.
20. With those findings, the trial court found it unnecessary to consider the case on its merits or the issue of quantum payable to Sehmi. It framed two issues upon which it based its decision, thus:

> *"(i) Did the defendant issue the plaintiff with an insurance policy for compensation for*

personal injury?

(ii) Is the defendant liable to compensate the plaintiff for personal injury?"

The answer to both was in the negative, and the suit was dismissed

The Appeal and submissions of counsel.

21. Although the appellant listed 22 grounds of appeal for our consideration, learned counsel Ms. Kilonzo argued them as four issues as follows:

i. *Whether a policy of insurance existed.*

ii. *If so, who was liable to compensate the beneficiary?*

iii. *What was the level of compensation under the policy?*

iv. *Whether the suit was a nullity by virtue of Order 4 rule 3(4) of CPR.*

22. On the first issue, Ms. Kilonzo referred to the plaint and the pleadings which confirm admissions in the defence filed, that there was indeed a group insurance policy issued at the behest of the bank for the benefit of its customers including Sehmi who qualified for it. She also referred to the numerous letters exchanged between the parties and the oral evidence of the bank's witness admitting that there was an automatic free insurance for account holders. If Sehmi had never seen the whole policy as she testified, it was the duty of the bank to produce it under ***Section 112*** of the **Evidence Act**. In her view, there was no dispute about the existence of the policy and the only reason given by the bank for declining settlement was because the loss was not 100%. The trial court was therefore wrong in fact and in law in finding that there was no insurance policy.

23.23. In response, learned counsel, Mr, Awele submitted that there was no dispute that the bank was not an insurance company and only offered a policy cover for account holders subject to conditions. The bank produced the policy it set up, but Sehmi challenged it and produced a single paper which she relied on to prove her case denying the document produced by the bank. It was on that basis that the trial court found that the case was not proved by production of the policy pleaded in the plaint. ***Section 108*** of the **Evidence Act** was thus properly applied.

24. On the second issue, Ms. Kilonzo wondered how the court could hold that the bank was not liable to settle the claim after finding that there was no policy of insurance. On the evidence, however, the Insured under the Group insurance policy was the bank and the beneficiary in this case was Sehmi. In that case, she submitted, even though there was no privity of contract, Sehmi could recover from the person who took out the insurance because it was a liability, as distinguished from personal, insurance. In support of that submission she cited **Halsbury's Laws of England, 3rd Edition Vol. 22** on "conduct of proceedings" in liability insurance claims, stating thus: **"If an action by a third party is proceeding against the assured, the insurers are not entitled to make any application in the action in their own name, unless they have been made parties to the action"** Mr. Awele conceded this submission and we think he was right to do so.

25.25. On the third issue, whether the level of disability qualified for compensation and if so what compensation, Ms. Kilonzo referred to the medical evidence on record which at first assessed the level of eye injury at 85% and submitted that this was complete and irrecoverable loss of sight in accordance with WHO standards. In her view, the terms "Complete and irrecoverable" were medical terms of art and it was not necessary to prove the level of injuries to some mathematical standard or beyond reasonable doubt.

A balance of probability was sufficient. As there was no other report produced by the bank to contradict that assessment, there was no basis for rejection of the claim. Sehmi met all the

conditions under the insurance policy to recover 50% of the balance outstanding in her savings account when she suffered the injury.

26. For his part, Mr, Awele submitted that compensation was only payable if the customer suffered complete and irrecoverable loss, but Sehmi suffered only 85% according to the evidence of her Doctor who examined her soon after the accident in 1994. It was only in the year 2002 when the doctor testified that he found the eye was completely blind. This finding, in his view, was outside the limitation period for the claim. As for the level of the claim, Mr. Awele submitted that the policy was clear in its special endorsement, which was part of the policy, that the maximum compensation was 50% of Kshs.500,000 for savings account holders. As the first requirement was not met by Sehmi, the bank was right to decline payment.

27. In her final submission on the procedural issue, Ms Kilonzo submitted that the suit could not have been declared a nullity since the bank had entered unconditional appearance and filed defence upon being served with the summons to enter appearance. If there was any irregularity in procedure therefore, it was waived. In support of that submission she cited the cases of **Boyes v. Gathure (1969) EA 380**, **Nanjibhai Prabhudas & Company Ltd vs. Standard Bank Ltd [1968]EA 670** and **Equitorial Commercial Bank Ltd vs. Mohansons (K) Ltd [2012] eKLR.** The first two cases which came before the **Ceneast case** (supra), underscored the thinking that the wrong procedure should not invalidate proceedings unless it went to jurisdiction or was prejudicial to one party. The **Equitorial Commercial Bank case** discussed the **Ceneast case** and we shall revert to it shortly.

28. In response, Mr. Awele submitted that the law was correct when the **Ceneast case** was decided and it cannot be changed by decisions which came 12 years later. **Analysis and determination.**

29. We have considered the pleadings, the submissions of counsel and the authorities cited before us. As this is a first appeal, it is also our duty to analyse and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] EA 123,** thus:

> "**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).**

This Court further stated in **Jabane -v- Olenja [1986] KLR 664**, thus:

> "**More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."**

30. We must start with the observation that the suit before the trial court was not dismissed or struck out on account of the procedural irregularity raised during final submissions. We have seen that the court instead proceeded to consider two other issues on the basis of which the suit was dismissed. Strictly therefore, the procedural issue is not germane for discussion in this appeal but we shall discuss it for the benefit of the lower courts which have laboured in a state of confusion

since the decision of this court in the **Ceneast case**.

31. The **Ceneast case** was decided by this Court (Omolo, Akiwumi & Owuor, JJ.A) in May, 2000. It was an appeal against refusal by the High Court to set aside an *ex parte* judgment for a hefty sum of Kshs.21 million obtained on the basis that the defendant had failed to enter appearance despite service of summons to enter appearance. The High Court had found that the summons had been served on a director of the defendant company, and the court of appeal accepted that the service was proper. But the court proceeded to set aside the judgment on the ground that the defendant had a defence on the merits and ought to be allowed to defend. On that basis, the *ex parte* judgment was set aside and leave was granted for entering appearance and filing defence.
32. More significantly, the issue of the validity of the summons to enter appearance was not raised or argued by counsel for the parties. It is the court itself in *obiter dicta* ,after deciding the appeal and giving the reason for setting aside the *ex parte* judgment, which made the profound statement, thus:-

> ***"This mandatory provision means that the time for entering appearance cannot be less than 10 days or within 10 days of the service of the summons. It must at least, be on the 10th day of service or any day thereafter, as may be specified in the summons. The summons which was served on the Appellant in its pertinent part is as follows:-***
>
> > ***"YOU ARE REQUIRED within 10 days from the date of service hereof to enter appearance in the said suit. Should you fail to enter an appearance within the time mentioned about, the Plaintiff may proceed with the suit and judgment may be given in your absence.".***
> >
> > ***This is a clear breach of O4 r. 3(4) and makes the summons invalid and of no effect."***

33. As stated earlier that obiter statement of the law has thrown the lower courts into a state of confusion and many are the cases where some courts followed it, others distinguished it, while others thought it only applied where *ex parte* judgments were obtained and not where the defendant had entered appearance, filed defence and participated in the trial. Some few examples will illustrate this confusion:- Githinji J. (as he then was) departed from the decision in the case of **Sebastian Mputhia Mwuarania v James Githuku Gatune [2002] eKLR,** stating::-

> *"… the Court of Appeal was not dealing with the construction of the words:-*
>
> > *"provided the time for appearance shall not be less than 10 days".*
> >
> > *The definition of the word "within" as it relates to time in The Concise Oxford Dictionary of Current English 7th Edition is "No longer than before expiry or since beginning of"*
> >
> > *By section 57(a) of the interpretation and General provisions Act (Cap 2) the day of service is excluded from the computation of time. In my view, the words "within 10 days from date of service hereof" do not connote "less than 10 days" (from date of service.)".*

34. Ransley, J. was equally defiant in **Kenya Commercial Bank Ltd v Agro Complex (K) Ltd & 2 others [2001] eKLR** where he stated:

> *"Although the learned Judges of the Appeal held that the service in this Caneast case was of no effect it is my view that if no prejudice has been occasioned to the Defendant the summons although expressed in the terms used this case must be allowed to stand.*
>
> *The summon is not per se invalid it is only that the time stated is expressed with an ambiguity namely are the words "within 10 days" limited or does this give the Defendant 10 days within which to enter an appearance. In practice the Defendant has 10 days from*

the date of service to enter an appearance. "

35. So was Sergon J. in **Hussein Mohamed Awadh v. First American Bank of Kenya Ltd [2006] eKLR**, where he stated:

> *"…. this court must look at the purpose of fixing time to enter appearance in the summons. This is to enable the defendant sufficient time to enter appearance. If the time specified in the summons is below that specified in the rules, lapses and an interlocutory judgment is entered in default of appearance, the court is bound to set aside such summons and the resultant exparte judgment. But where the defendant enters appearance within or outside the period specified in the summons before judgment, then it makes no sense to set aside the summons and then direct for re-issue and service. I am of the view that where the defendant has not suffered any prejudice the summons should not be set aside. The defect in such a case should be excused and treated as a mere irregularity which irregularity is waived a defendant enters unconditional appearance."*

Followed by Kasango, J. (surprisingly!) in **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu [2014] eKLR,** where she held:

> *"…the Summons to Enter Appearance issued for the 2nd Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2nd Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2nd Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice."*

36. The judges who followed the decision were typically represented by Maraga, J. (as he then was) in **Jimmy M. Mutua v Wilfred Gitonga [2006] eKLR** where he stated**:**

> *"Though obiter, that authority, coming from the Court of Appeal, is very persuasive. I am sure if the issue of the summons to enter appearance was alive one the Court of Appeal could have been even more emphatic in its decision. I followed it in Lualenyi Ranching Company Limited vs. William Mlenga Wasike Mombasa HCCC No. 188 of 2003 and so did Mwera J in Equitorial Commercial Bank vs . Mahansons (K) Ltd, Mombasa HCCC No. 524 of 1998 and Ringera J (as he then was) in Abraham Kiptanui vs. The Delphis Ban Limited & Another, Nairobi Milimani Commercial Courts HCCC No. 1864 of 1999. The summon to enter appearance in this matter is therefore a nullity and so are all the proceedings, decree and or orders based on it."*

37. Among those cases, the case of **Equitorial Commercial Bank vs. Mahansons (K) Ltd HCCC No. 524/1998**, where the proceedings had gone up to execution stage, went on appeal and this Court's decision thereon is now relied on in the matter before us. The bench that decided it (Omolo, Nyamu & Rawal, JJA) included one of the judges who decided the **Ceneast case** and it is obvious that the thinking of the Court on the construction and application of the procedural provision had changed. The wording of ***Order 4 rule 3(4)*** *(*CPR) and the **Ceneast** decision were directly in issue in the appeal. After a thorough and long analysis, the Court stated:

> **"Considering the facts and circumstances before us can summons be treated as void though because it has not complied strictly with the statutory provisions? Can a litigant after having fully participated in the legal process on service of such summons, resile on all the actions taken by him openly and voluntarily? We may add that there is no allegation that such actions have caused any prejudice to the respondent either in law or in equity. We shall emphatically decline to find so. We shall find that the respondent, having openly and unconditionally followed the process in the manner in which it did, specially prompting the appellant to believe in the actions taken by both parties."**

And in the end, it held as follows:-

> **"We find therefore, that the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter. The following passages from the Halsbury's Laws of England, Vol. 16(2) at Paragraph 907 on page 390 stipulate the meaning of 'waiver' and we reproduce it:-**
>
> *"The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct."*
>
> *"A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or <u>of a statutory provision</u>, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist."(***emphasis given) Lastly we find that the defect in the summons was an irregularity and that the same was waived by the respondent"**.

38. The proceedings in the ***Equitorial Commercial bank case*** had gone up to execution stage before the issue of validity of the summons to enter appearance was raised. In our case, the hearing of the case had been finalized before the bank raised the issue. Learned counsel, Mr. Awele appreciated the departure by this court from the **Ceneast** decision but submitted that **Ceneast** was applicable at the time. With respect, there were earlier decisions of the court which were not brought to the attention of the Court of Appeal in **Ceneas**t as they were in ***Equitorial Commercial case*** in which the court had full benefit of arguments from counsel. The notable one was **<u>Nanjibhai Prabhudas & Co. Ltd Vs.</u> <u>Standard Bank Ltd</u>.[*1968] E.A.(K) 670*** where it was held***:-*** **"(i) Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity. (ii) Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing" Sir Charles Newbold** at page 681 and 683of **Nanjibhai's case** (supra) observed as under:- **"The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant."**…**"The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, <u>with the consequence that everything founded thereon</u> <u>is itself a nullity, unless an incorrect act is of a most fundamental</u> nature. Matters of procedure are not normally of a fundamental <u>nature</u>."**
39. It is our view, in all the circumstances, that the *obiter dicta* in the **Cenaest case** was made *per incuriam* and the decision of this court in the case of **Equitorial Commercial Bank case** governs the correct construction and application of the provisions of **Order 4 rule 3(4) of the CPR** which is currently **Order 5 rule 1(4)** in identical terms.
40. We may now deal with the substantive issues raised in the appeal in relation to the Group Insurance Policy. Firstly, whether the policy existed and secondly, if it did, the level of compensation.The straight answer to the first issue is that the policy existed. There are enough admissions in the pleadings and evidence to lead to no other conclusion. The argument is rather that Sehmi is not the one who produced the policy since she only had one page of the one she discussed in her evidence, which was different from the policy relied on by the bank. With respect, the argument is vacuous. The page produced in evidence by Sehmi was supplied by the bank to assist her in making her claim. It is identical to page 3 of the policy produced and relied on by the bank. At all events, the policy was procedurally produced in evidence under ***Order 10 rule 11*** of the **Civil Procedure Rules**. It became valid evidence for both sides in the case. Sehmi, of course, denied that she had ever seen the policy, but she confirmed having seen brochures issued by the bank in promotion of the insurance policy. The brochures invited all customers who wished, to inspect a copy of the policy which was held in all branches of the bank, and find out the "*full details of the insurance cover and all terms and conditions which apply thereto*". The bank cannot be blamed for the omission by Sehmi to familiarize herself with the terms of the policy.

41. If Sehmi had inspected the policy, she would have found the endorsements made on page 5 of the policy relating to "SPECIAL CONDITIONS", especially the clause limiting the benefit payable to a maximum of 50% of Ksh. 500,000 in savings account balances. She would then have made a conscious decision on what levels she would maintain her savings account. But she did not bother, even after she was involved in the accident. All she received from the bank was page three of a document and did not ask for the rest. Perhaps the bank should have been more open and accommodating to her. But its conduct is not in issue. There is no suggestion or evidence that the special condition was not part of the policy when the accident occurred. In all the circumstances therefore, we find and hold that the policy of insurance produced in evidence by the bank contained the terms and conditions upon which the claim was made. We further find and hold that the bank was only liable to pay a maximum of 50% of Kshs.500,000 if the injury suffered by Sehmi fell within the policy. Did it?

42. Our answer to that issue is in the positive. We take it from the elaborate medical records produced by Sehmi and the erudite evidence of her eye doctor. All that evidence was unchallenged by other evidence from the bank despite Sehmi's readiness to submit herself to any doctor of the bank's choice to examine her. The trial court made no attempt to evaluate that evidence and in our own assessment the injury suffered by Sehmi was complete and irrecoverable in terms of the policy. The policy did not require anywhere that the blindness be proved 100%. Even at 85%, the evidence was that Sehmi could not be medically assisted further and it was wrong therefore for the bank to resile from the obligation to compensate her in terms of the policy.

43. The upshot is that this appeal partly succeeds. We allow it to the extent of setting aside the judgment and orders of the High Court and substituting therefor judgment in favour of the plaintiff for the sum of Kshs. 250,000, together with interest thereon at court rates from the time of filing suit. The appellant shall have half the costs of this appeal but shall have the full costs of the suit before the High Court. Orders accordingly.

Dated and delivered at Nairobi this 6th day of February, 2015.

P.N. WAKI

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR