IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 58 OF 2006

BETWEEN

FLYSTAR LIMITED ....APPELLANT

AND

THE DELPHIS BANK LIMITED*(Under Statutory Management)*............... RESPONDENT

(An appeal from the ruling & decree of the High Court of Kenya at Nairobi (Azangalala, J) dated 24th October, 2005

in

HCCC NO. 447 OF 2002)

****

JUDGMENT OF THE COURT

Background

1. This is an appeal from the decision of the High Court Azangalala, J (as he then was). The appellant, ***FLYSTAR LIMITED***, (the Company) sought orders ***inter alia***, that the ***ex parte*** judgment entered against the appellant on 2nd September, 2002, be set aside; and that the appellant be granted leave to file its statement of defence.

2. Amongst its grounds supporting the application, the appellant submitted that the plaint drawn and filed by the respondent, ***DELPHIS BANK LIMITED***, (under statutory management), is incompetent, as its verifying affidavit was void having been commissioned by a person not authorised in law to do so that the

Commissioner for Oaths, one Wachira L Mwangi, did not have in force a practising

certificate as at the time of commissioning the verifying affidavit.

3. The application was supported by the affidavit of **Peterson Njuguna,**a

director of the appellant company, sworn on 9th June, 2005, on behalf of the

Board of Directors of the Company. He deponed that in the *"Daily Nation"* newspaper on 28th April, 2005, he came across an advertisement notifying the appellant of a hearing date of a Notice to Show Cause filed at the Milimani Commercial Courts at **Nairobi HCCC 447 of 2002, Delphis Bank Limited v Flystar Limited**, scheduled for 4th May, 2005. The appellant also learnt that an ***ex parte*** judgment in default of appearance had been entered against the Company on 2nd September, 2002.

4. The deponent averred that there was no attempt made by the respondent toeffect service upon them before resorting to service by registered post. The deponent further denied that the appellant had ever received summons regarding the suit by way of registered post or by any other mode of service. He further averred that the appellant had a good defence which raised triable issues and annexed a draft statement of defence to illustrate the same. He averred that the appellant stood to be prejudiced greatly if execution was allowed to proceed as it would be tantamount to being condemned unheard in clear violation of the principles of natural justice.

5. In an affidavit sworn by **Ravi Patrick**, the Managing Director of the respondent, he averred that the verifying affidavit in question was commissioned by one **„L.W Mwangi Advocate?** whereas a letter from the Law Society of Kenya stated that it was **„Mwangi L. Wachira Advocate?** who did not hold a valid practising certificate. He further deponed that there was no evidence before the High Court to suggest that **„L.W Mwangi Advocate?** and **„Mwangi L. Wachira Advocate?** are one and the same person. He prayed for the application to be dismissed as it was without merit.

6. Regarding the respondent's claim that the verifying affidavit was defective as it was commissioned by a person who did not have a practising certificate, the learned Judge found that the respondent should have attached a copy of the practising certificate to end the controversy. As none was exhibited and no explanation for the omission was given, the learned Judge found that he was satisfied that the Commissioner for Oaths who purported to attest the verifying affidavit did not have a practising certificate on the date that he purported to attest the verifying affidavit.

7. The learned Judge relied on the case of ***KENYA COMMERCIAL BANK LTD***

AND ANOTHER V KENYA HOTELS LTD, NO. NAI 40 OF 2004 (UR 24/2004),

where this Court held:

"Being a practicing advocate is a condition precedent to being appointed a Commissioner of

Oaths; the latter position attaches to the practice of law and cannot exist independently on its own if the condition precedent to its acquisition has disappeared."

The learned Judge stated:

"On this authority, having found that L.W. Mwangi did not have a practicing certificate as at the time she purported to commission the verifying affidavit, I hold that what purports to be a verifying affidavit is as their Lordships said in the Kenya Commercial Bank Ltd And Another V Kenya Hotels Ltd, *case supra*, ***"no affidavit at all. It is null and void as having been commissioned by a person not authorised by the law to do so."***

8. Consequently, the learned Judge found that the plaint dated 9th April, 2002 and filed on 12th April, 2002, did not comply with ***Order VII rule (1) (2) of the***

Civil Procedure Rules (now Order 4 rule 1 (2), with the result that judgment

could not be entered for the respondent against the appellant pursuant to an incompetent plaint.

9. Regarding the issue of summons to enter appearance, the learned Judge

found that the summons to enter appearance was not effected on the appellant as contemplated by ***Order V rule 26 (1) of the Civil Procedure Act*** as no attempt was made to serve the Secretary, Director or other principal officer of the defendant before effecting service by registered post.

10.The learned Judge found that as no proper service of the summons to enter

appearance was effected upon the appellant, the default judgment that was entered against the appellant was an irregular judgment. The learned Judge made the following orders:

1. ***"The verifying affidavit accompanying the plaint herein is struck out. Under Order VII Rule 1 (3) it does not follow automatically that the plaint should be struck out. I have discretion in the matter and decline to strike out the plaint but order that the plaintiff shall within 7 days of today file a compliant verifying affidavit.***

2. ***The default judgment entered against the defendant and all consequential orders made against the defendant are hereby set aside ex debito justiatiae.***
3. ***The defendant is granted leave to file itsdefence within 14 days of today.***

4. ***There will be no order as to costs."***

11.That decision provoked the present appeal.

12.The appellant's memorandum of appeal lists eleven [11] grounds of appeal

as follows:

i. *That the learned trial judge erred in failing to appreciate that the application that was before the Honourable court was for determination was a chamber summons application dated 9th June, 2005 to set aside the ex parte judgment entered against the defendant on 2nd September, 2002, the consequential decree dated 2nd September, 2002 and all subsequent orders;*

ii. *That the learned trial judge erred in failing to appreciate that the honourable court's jurisdiction and power to grant any orders was circumscribed by the provisions under which chamber summons application dated 9th June, 2005 was presented to the honourable court;*

iii. *That the learned trial judge erred in exceeding his jurisdiction and power under the provisions under which chamber summons application dated 9th June, 2005 was presented to the honourable court and proceeding to determine issues that were not before the honourable court;*

iv. *That the learned trial judge erred in exceeding his jurisdiction and power under the provisions under which chamber summons application dated 9th June, 2005 was presented to the honourable court and proceeding to grant orders that were not prayed for in the application that was before the honourable court;*

v. *That the learned trial judge erred in raising and proceeding to determine the issue of leave to file a complaint verifying affidavit under Order VIII of the Civil Procedure Rules without any application from the respondent to the honourable court;*

vi. *That the learned trial judge erred in raising and proceeding to determine the issue of striking out the verifying affidavit when there was no such application before the honourable court;*

vii. *That the learned trial judge erred in raising and proceeding to determine issues that were not before the honourable court by way of an application acted contrary to law and procedure;*

viii. *That the learned trial judge erred in granting leave to the respondent to file a complaint*

verifying affidavit to sustain suit that was a nullity ab initio *to the prejudice of the defendant;*

ix. *That the learned trial judge erred in having found that there was no service, erred in failing to award costs to the appellant;*

x. *That the learned trial judge erred in the exercise of discretion by failing to apply the rule that* "costs follow the event" *and in failing to give reasons for departing from the said rule.*

xi. *That the matters complained of in paragraphs 1-10 above were all prejudicial to the appellant.*

Submissions by counsel

13. When the appeal came for hearing before this Court on 10th February, 2015 both parties were represented by learned counsel. Mr James Ochieng Oduol represented the appellant, whereas Mr Eric Masese represented the respondent.

14. Counsel for the appellant submitted that the finding that the verifying

affidavit had been commissioned by an advocate without a practising certificate was an illegality and not a procedural lapse; that the exercise of judicial discretion cannot abet the commission of an infraction; that the learned Judge had erred in making such an order without a formal application seeking orders to correct the omission; that having found that there was an error committed on the part of the respondent, the learned Judge departed from the rule that costs follow the event without explaining why he departed from the general rule. Counsel urged the Court to allow the appeal.

15. In opposing the appeal, counsel for the respondent submitted that the main question before this Court is whether it should interfere with the learned Judge's exercise of discretionary power. Counsel cited the authority of ***<u>MBOGO V SHAH</u>, [1968] EA 93*** setting out the circumstances under which this Court may interfere with a judge's discretionary power. Counsel further submitted that the learned judge's discretionary power was founded on statute in ***Order VII rule (1)3 of the Civil Procedure Rules***; that the trial court did not need to be moved by the respondent, it was empowered to act on its own motion; that the appellant had not suffered any substantial prejudice; that for the Court to proceed as suggested by the appellant's counsel, was to sacrifice substantial justice for mere technicality; that striking out of a suit is a draconian measure that should only be exercised in the rarest of cases where a suit is so bad that life cannot be injected into it and that this was not the case here as the respondent had a valid claim.

16. On the issue of costs, the respondent argued that the learned Judge was influenced by various factors, one of which was that the appellant belatedly rushed to Court when threatened with execution of the judgment. Counsel urged the Court to dismiss the appeal so that the main suit at the High Court can proceed to be heard on its merits.

17. In reply, counsel for the appellant disagreed with counsel for the respondent that the question before the Court is that of form over procedure; counsel submitted that there was a statutory requirement under the Oaths and Statutory Declarations Act which was not complied with. Counsel posited that a suit cannot stand without a verifying affidavit and urged the Court to allow the appeal with costs.

Determination

18. This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. See ***<u>SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD</u>, [1968] EA 123 126 paras H-I; <u>KENYA PORTS AUTHORITY V</u> <u>KUSTON (KENYA) LTD</u>, [2009] 2 EA 212*** and ***<u>PIL KENYA LTD V OPPONG</u>, (2009) KLR 442.***

19. The provision of the Civil Procedure Rules (repealed), that is ***Order VII Rule 1(3),*** under which the learned Judge derived his discretionary power provided as

follows:

"(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

3. ***The court may of its own motion or on application of the defendant order to be struck out any plaint which does not comply with*** *subrule (2) of this rule.****"***

20. The learned Judge, therefore, exercised his discretionary power in making

his determination. As a general rule, this Court ought not to interfere with the exercise of judicial discretion, except where, the Court is satisfied that the judge 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 learned Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice. See ***Mbogo v Shah, (supra)***.

21. The crux of the appellant's argument is that the verifying affidavit having been commissioned by an advocate without a current practising certificate, is null and void; which renders the plaint it verifies, incompetent. The appellant also challenged the learned Judge's decision to allow the respondent to file a compliant verifying affidavit within seven [7] days, which application had not been sought.

The learned Judge determined that the verifying affidavit was:

"no affidavit at all. It is null and void as having been commissioned by a person not authorised by the Law to do so*." (Kenya Commercial Bank Ltd and another v Kenya Hotels Ltd, No. Nai 40 of 2004 (UR 24/2004)).*

22. The learned Judge proceeded to strike out that verifying affidavit and exercised his discretionary powers in opting not to strike out the plaint. The striking out of a suit/plaint, it has been said time and again, is a draconian measure that ought to be rarely exercised.

23. Ringera, J *(as he then was)* in determining a similar question in

MICROSOFT CORPORATION V MITSUMI COMPUTER GARAGE LTD & ANOTHER, [2001] KLR 470 at page 481 stated:

"... Rules of procedure are hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. … That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record."

24. In ***PASTIFICIO LUCIO GAROFALO SPA V SECURITY & FIRE EQUIPMENT CO & ANOTHER, [2001] KLR 483***, it was similarly determined by Ringera, J *(as he then was)*:

"After striking out a verifying affidavit, the Court has a discretion whether to strike out the suit or not.

In exercising the discretion, the Court should be alive to the principles of justice that procedural lapses, omissions and irregularities, unless they go to the jurisdiction of the Court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs, are not to be taken as nullifying the proceedings affected."

25. The Court of Appeal in ***SALESIO M'ARIBU V MERU COUNTY COUNCIL,***

CIVIL APPEAL NO. 183 OF 2002 determined that:

"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 and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward. ..."

Similarly, in ***KENYA COMMERCIAL FINANCE COMPANY LIMITED V RICHARD***

AKWESERA ONDITI, CIVIL APPL NO. NAI 329 OF 2009 this Court expressed itself as follows:

"This Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives."

26. In the circumstances of this appeal, we find that the learned Judge properly exercised his discretion and we find no basis to interfere with his discretion.

27. On the issue of costs, the general rule is provided for under ***section 27 of the Civil Procedure Act, Cap 21*** provides:

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. ***The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."***

28. Being discretionary power accorded to the learned High Court Judge, the extent, if any, of the interference by the Court of Appeal has been discussed in several cases. In the case ***DEVRAM NANJI DATTANI V HARIDAS KALIDAS***

DAWDA, [1949] EACA 35 it was held:

"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. ... If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."

29. This Court in the case of ***SUPERMARINE HANDLING SERVICES LTD V KENYA REVENUE AUTHORITY, CIVIL APPEAL NO. 85 OF 2006 [2010] eKLR***

expressed itself as follows:

"Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason

for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule. In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation. In our view the learned Judge's order was wrong." (Emphasis added).

30. In the end, we are of the considered opinion that the learned Judge properly exercised his discretion and arrived at the correct decision and we accordingly dismiss the appeal.

Dated and delivered at Nairobi this 8th day of May, 2015.

E. M. GITHINJI

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR