IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & SICHALE, JJ.A)

CIVIL APPEAL NO. 138 OF 2007

BETWEEN

TEA BOARD OF KENYA ……..……APPELLANT

AND

GIDEON ASIRIGWA MBAGAYA…….....…….... RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Honourable Lady Justice R. Nambuye) dated 25th May 2007)

in

HCCS NO. 1292 OF 2004)

****

JUDGMENT OF THE COURT

1. This is an appeal against the ruling and order of the High Court of Kenya at Nairobi issued on 25th May, 2007 by Lady Justice R. Nambuye (as she then was) in which she set aside the judgment on the following terms:

> ***a) the plaintiff is hereby allowed to proceed with execution for the admitted sum of Kshs.941,708.00***
>
> ***b) The balance of the claim be reopened for the defence to go for trial***
>
> ***c) The defendant is hereby given 21 days from the date of the ruling to file and serve a defence.***
>
> ***d) The Plaintiff/Respondent will have costs of the application***
>
> ***e) Thereafter parties to proceed to according to law".***

The plaintiff in the High Court proceedings, (now the respondent) had obtained judgment in his favour on 3rd February, 2006 in the sum of Shs.1,684,400/=. The matter had proceeded by way of formal proof, the

claim not being liquidated, on the basis of interlocutory judgment entered on 31st January 2005, the defendant, (now the appellant) having been found not to have entered appearance or filed a defence. The plaintiff consequently testified before the trial court and was granted all the prayers sought in his plaint with the damages assessed in the aggregate sum of Shs.1,684,400/=.

2. When the plaintiff sought to execute the judgment for the decretal amount against the defendant, the defendant moved to the High Court under certificate of urgency seeking, *inter alia*, orders to set aside the interlocutory judgment and the final judgment entered against the defendant. The defendant also sought unconditional leave to defend the suit.

3. Upon hearing the application, the learned Judge issued orders setting aside the judgments and granted conditional leave to defend in the manner set out above. In her ruling, the learned Judge found the service of process in favour of the defendant to have been irregular and proceeded to set aside the final judgment of 3rd February, 2006. The trial Judge nevertheless entered judgment against the plaintiff for the admitted sum of Shs.941,708.00. As we shall discuss later, the admission is contested by the plaintiff in this appeal.

4. The appellant being dissatisfied with that ruling and consequential orders filed the appeal now before us. The appellant in its filed memorandum of appeal lists five grounds of appeal. It mainly contends that the learned Judge erred in law and in fact in holding that the appellant had admitted the sum of Shs.941,708.00 as due to the respondent. The appellant also contends that the trial Judge erred in granting the appellant conditional leave to defend the suit despite having faulted service of summons, which meant that the *ex parte* interlocutory judgment was irregularly obtained and should have been set aside *ex debito justitiae*. The appellant further contends that the learned Judge erred in failing to determine whether or not the Plaint met the standard of pleadings for special damages.

5. During the hearing of the appeal before us, **Mr. M.O. Omuga** learned counsel for the appellant reiterated the grounds of appeal contending that **paragraphs 8 and 10** of the supporting affidavit by **Phrasia Wambui Mwangi** considered by the trial Judge of the High court did not amount to admission. In his submissions, counsel contended that the trial Judge had wrongly inferred admission yet there had been no admission of liability by the appellant as admission needed to be clear and unequivocal to form a basis for judgment. He further argued that there was no application that had been made to vary or review the decree. In addition, counsel submitted that service had been faulted by the trial judge and this entitled the appellant to unconditional leave to defend. Counsel referred us to the appellant's list of authorities in support of his arguments. In support of his argument that an admission has to be clear and unequivocal before a court of law can act by entering judgment on it, counsel referred us to this court's decision in **Postal Corporation of Kenya v Inadmar & 2 others [2004] 1KLR 359.** Counsel also cited this court's decision in **Joseph Gicheru Muchiri v Chairman Kiangima Trading Centre & 2 others [2015]eKLR** with respect to the appellant's ground as to whether the pleadings met the standard of pleadings for special damages. He urged us to grant the appellant unconditional leave to defend the claim.

6. Learned counsel for the respondent, **Mr. S.M. Keyonzo** in his response submitted that the sum of Shs.941,708/= had been admitted clearly and unequivocally. **Mr. Keyonzo** referred us to **paragraph 8** of the affidavit by **Phrasia Wambui Mwangi** and in particular the annexure thereto headed ***"Analysis of account of Gideon Mbagaya".*** Learned counsel supported the judgment of the trial court and submitted that service of process on the appellant had been proper. Counsel concluded that the trial judge was correct in granting the appellant conditional leave to defend as service of summons was proper. He urged us to dismiss the appeal so that the matter can revert to the High Court for conclusion. We were not referred to any authorities by the respondent.

7. We have considered the record, respective submissions by both learned counsel and the authorities cited by learned counsel for the appellant and are now at an opportune moment to render our decision. Our mandate on a first appeal is set out in **Rule 29 (1)** of the Court's rules which is to re-appraise the evidence and draw our own inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated **Selle v Associated Motor Boat Company Ltd [1968] EA 123**; that we will not interfere unless we are satisfied with the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be

manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. That principle is the same in **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014]eKLR.**

8. From the submissions by respective counsel, both parties appear to be in agreement with the trial Judge's decision to set aside the final judgment. None of the parties addressed us on the failure by the trial Judge to make a determination on the appellant's prayer to set aside interlocutory judgment. The point of departure is the manner in which the trial judge exercised her discretion subsequently. Having perused the record and heard from respective counsel, we find the following to be the issues for our determination:

- ***Whether the trial judge erred in entering judgment on admission in the sum of Shs.941,708/=;***

- ***Whether the trial judge erred in granting the appellant conditional leave to appeal.***

The memorandum of appeal raises a further ground on whether or not the plaint met the standard of pleadings for special damages but we shall explain this later in this judgment. We however wish to point out that none of the respective counsel addressed us on this particular issue.

9. Despite arguments on service of process by both parties affecting the granting of interlocutory judgment, we note that the trial Judge did not make a determination on the appellant's prayer to set aside interlocutory judgment. Be that as it may, the trial judge found that service was irregular.

In **Kavindu & another v Mbaya & another [1974] eKLR, Muli J** as he then was held as follows; concerning irregular judgments;

> ***"… for, if the judgment was irregularly obtained, the court on its own motion can set it aside as being null and void."***

The trial judge having made a finding that service of summons was irregular, it was incumbent upon her to set aside the interlocutory judgment *ex debitio justitiae* for the reason that the same was an irregular one, based as it was on irregular service. Failure to set aside the interlocutory judgment limited the course of the proceedings to assessment of damages only. This court has, in **Felix Mathenge v Kenya Power & Lighting Company Ltd [2008] eKLR** held that: the role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.

We emphasis "*regularly obtained*" to contrast this with what the case was in **Felix Mathenge v Kenya Power & Lighting Company Ltd**.(supra).

It is on that basis that the matter proceeded for assessment of damages. Agreeing with the trial judge's findings on the demerits of service of process as was considered by the trial Judge, we must agree with submissions by the appellant's finding within an order setting aside the irregularly obtained judgment and granting the appellant unconditional leave to defend.

10. The trial Judge found paragraphs 8 and 10 of the supporting affidavit by **Phrasia Wambui Mwangi,** the appellant's acting managing director as amounting to an admission to empower the trial Judge's entering of judgment on admission. To put the matter in perspective, paragraph 8 of the said affidavit provides as follows:

> ***8. THAT between 23rd April 2004 and 31st December 2004, the defendant held 3 (three) Board Meetings and 2 (two) Tender Committee Meetings which if the Plaintiff had attended his total allowances would have been Kshs.245,000/=, while in 2005, there were 8 (eight) Board Meetings and 4 (four) Tender Committee Meetings which if he had attended he would have collected Kshs.696,708/=, annexed hereto is my tabulation of the same, showing that the total amount of***

allowances he missed was Kshs.941,708/= and not the judgment sum of Kshs.1,684,400/=, ANNEXTURE "E"

Paragraph 10 of the supporting affidavit on the other hand provides as follows:

10. THAT I am advised by the Defendant's advocates on record and I verily believe the same to be true that although the Plaintiff had a duty to tell the Court truth on oath he misled the Court into believing that;

i) . . .

ii) . . .

iii) he had suffered a loss as to entitle him to award of damages, amounting to Kshs.1,684,400/= when the maximum amount he could have earned would have been Kshs.941,708/=.

11. Could the above qualify as admissions? In **Agricultural Finance Corporation vs Kenya National Assurance Company Limited (in receivership)[1997] eKLR**, this court held that:

"Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional (emphasize supplied). A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion".

This court further held in **Herta Elizabeth Charlotte Nazari Vs Herta Elizabeth Charlotte Nazari [1984] eKLR** that:

"Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact had been made whether on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced".

Counsel for the appellant contends that the contents of paragraph 8 and 10 do not amount to an admission while counsel for the respondent considers the said paragraphs to be admissions. Our plain reading of paragraph 8 of the supporting affidavit reveals the use of the phrase "***which if he had attended he would have*** …" and paragraph 10 uses the phrase ".. ***he could have earned*** …" It is clear in our minds beyond peradventure that that is no admission by whatever description constrained. The amount of Shs.941,708/= would only accrue to the respondent if indeed he had attended those meetings and further if there was a determination on the respondent's entitlement. Besides, the contents of paragraph 8 in themselves were inviting the court to in any event consider an alternative tabulation to that set out by the appellant.

12. Our analysis and understanding of the previous decisions by this court in **Herta Elizabeth Charlotte Nazari (supra)** is that the learned Judge was expected to analyse the entire pleadings before her and not just portions of any one of them in isolation. There must be a purposive application of the pleadings in order to infer an admission as to enable the court act on it. The learned Judge put emphasis on paragraphs 8 and 10 of the supporting affidavit in isolation without considering the affidavit as a whole. At any rate the contents of paragraphs 8 and 10 are not admissions, rather they are propositions of what would have been. From our perusal of the judgment, it is evident that the trial judge appears to have made a conclusion on the admission and therefore she did not see the need to analyse the same but instead focused on other issues such as service on corporations, setting aside of judgment and the award of damages.

13. In its decision in **Herta Elizabeth Charlotte Nazari (supra)**, this court cited the case of **Gilbert vs Smith, (1976) 2 C.D. 686 at pp.688 – 689 Melishih, L.J.** and then said:-

> ***"It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued."***

The import of the above decisions is that the trial Judge was expected to consider clear admissions of facts only. Where the pleadings raised a question of law, then the same did not afford judgment on admission. From our perusal of the documents on record including the supporting affidavit, we come to the only conclusion that the appellant disputed the nature of the respondent's claim and the entitlement to the orders sought i.e. declaratory and injunctive orders. In addition, the appellant disputed liability for the respondent's claim at the High Court. To our minds, these issues amount to legal issues that go to the root of the dispute, determination of which was necessary before delving into the question of assessment of damages, whose entitlement is also in dispute. Damages can only be assessed upon determination of liability. As we have noted above any irregular judgment should be set aside the effect of which is to allow the defendant to unconditionally defend the suit. The interlocutory judgment was irregularly obtained the trial Judge having faulted service. We do not agree with Mr. Keyonzo's submission that the description of "*Analysis of the account of Gedion Mbagaya*" in the respondent's annexure to the supporting affidavit should carry more weight than the contents of paragraph 8. These matters would in our view have at best been determined at the trial, had the appellant been granted an opportunity to defend the claim. On this basis therefore, we are satisfied that the plaintiff was not entitled to judgment on admission and respectfully fault the trial Judge's finding in this respect.

14. As regards whether the appellant should have been granted unconditional leave to defend, we note that it is the court's unfettered discretion to give conditional leave to defend the suit. See **Stockman Rozen (K) Limited & Another V Alora Flowers Limited & Another [2008] eKLR.** This court has previously held in **Continental Butchery Limited v Nthiwa [1978]KLR** that a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.

15. As discussed earlier, we are satisfied that the supporting affidavit which is a reiteration of the draft defence has raised several triable issues. It was not for the court at that stage to consider whether the defence must succeed. In this respect we are guided by the decision of this court in **Kenya Trade Combine Ltd v Shah Civil Appeal No.193 of 1999** which was cited with approval by a differently constituted bench of this court in **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania [2014] eKLR**. In the **Harit Sheth case (supra)**, the court reiterated that where *bona fide* triable issues have been disclosed, the court has no discretion to exercise in regard to the defendant's right to defend the suit and the defendant therefore was entitled to unconditional leave to defend.

16. From the foregoing, we are of the persuasion that the learned Judge in exercising her discretion to grant conditional leave to defend proceeded on her conclusion that the respondent had made an admission of Shs.941,708/= as due and owing to the appellant. However having faulted the admission, we find it inevitable that the appellant should be allowed to defend the suit fully before the trial court. We do not see any prejudice being occasioned to the respondent if the matter were defended save for delay occasioned by these proceedings which we nevertheless find necessary in the greater interests of justice.

17. As we had mentioned earlier, the memorandum of appeal raised as a ground of appeal the issue of whether or not the plaint met the standard of pleadings for special damages. We point out that having found that the appellant was entitled to unconditional leave to defend the claim, the defendant could raise this issue in his defence and pursue the same through trial. We therefore find it premature at this juncture to address our minds to the issue and reserve it for the trial Judge.

18. We are satisfied that the trial judge overlooked clear triable issues that had been disclosed by the appellant's draft defence and supporting affidavit. This was therefore not a suitable case for entry of

judgment on admission or conditional leave to defend. Accordingly, we allow the appeal, set aside the High Court ruling and order of Lady Justice R. Nambuye (as she then was) dated 25th May, 2007 and substitute therefor an order allowing the appellant's Chamber Summons application dated 6th March, 2006 with costs. We grant the appellant 21 days from the date of this ruling to file and serve a defence and the matter to proceed before the High Court. We order that the costs of this appeal shall abide the High Court determination of the suit.

Dated and delivered at Nairobi this 31st day of July,2015.

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR