IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, J. MOHAMMED & ODEK, JJ.A.

CIVIL APPEAL NO. 204 OF 2012

CONSOLIDATED WITH

CIVIL APPEAL NO. 205 OF 2012

BETWEEN

CFC STANBIC LIMITED ..... APPELLANT

AND

JOHN MAINA GITHAIGA

PAUL KIBUNYI MUTIRO T/A ORIENT TRANSJOPA SAFARIS.....RESPONDENTS

(An appeal from the rulings & orders of the High Court of Kenya at Nairobi (Mutava, J) dated 1st March & 24th April, 2012 in

HCCC NO. 400 OF 2011)

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JUDGMENT OF THE COURT

By a consent dated 6th March, 2013, the parties agreed to consolidate **Civil Appeal Nos. 204** and **205 of 2012**, pursuant to ***Rule 103 of the Court of Appeal Rules***. Accordingly, the two appeals were heard together and one judgment is hereby rendered in respect of the two appeals.

The appeal before us is against:

> *(i) the ruling and order of the High Court at Nairobi [Mutava, J] dated 1st March, 2012, wherein the learned judge declined to set aside the ex parte judgment entered against the appellant on 8th November, 2011. The ex parte judgment was entered as a result of the appellant failing to enter appearance and file a defence; and*
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> *(ii) the ruling and order of the High Court at Nairobi, [Mutava, J] dated 24th April, 2012, wherein the learned Judge dismissed the appellant's application dated 16th March,*

2012, which sought to review and set aside the court's order of 1st March, 2012, and substitute the same with an order setting aside the ex parte judgment.

The background to this matter is that in 2003, the respondents herein opened a business account in the name of ***ORIENT TRANSJOPA SAFARIS*** with the appellant's Kenyatta Avenue Branch. On or about October 2003, the respondents claimed that they received KShs.18 million from a client and the same was credited into the above stated account. The respondents claim that they withdrew about Kenya Shillings three million [KShs.3,000,000/=] from the said account leaving a balance of about Kenya Shillings fifteen million [KShs.15,000,000/=]. Thereafter, the appellant filed a complaint with the Banking Fraud Investigation Unit and imposed a caution on the said account denying the respondents access to the funds therein. The respondents were later charged with the offence of stealing in Criminal Case No. 3038 of 2003 in the Chief Magistrate's court at Nairobi. They were subsequently acquitted of the criminal charge on 16th July, 2007, for lack of evidence under ***Section 210 of the Criminal Procedure Code***.

Following an application by the respondents under ***Section 121 of the Criminal Procedure Code***, the criminal court on 16th August, 2007, ordered the appellant to remove the caution and allow the respondents access to the said account and the funds therein.

Thereafter, the appellant herein, vide judicial review proceedings **Misc. Civil Application No. 991 of 2007**, sought *inter alia*, an order of *certiorari* quashing the order dated 16th August, 2007 and the order of prohibition prohibiting hearing of any contempt proceedings in respect to the said order. The High Court dismissed the said judicial review proceedings on 8th February, 2010.

Despite the foregoing, the appellant refused or ignored to give the respondents access to the said account and the funds therein. This prompted the respondents to file a suit vide a plaint against the appellant in the High Court at Nairobi being **HCCC NO. 400 of 2011**, seeking *inter alia* payment of the balance of KShs.15 million together with interest thereon at commercial bank rates, compounded monthly from 1st November, 2003, until payment in full. The plaint and summons to enter appearance were served upon the appellant on 19th October, 2011. Subsequently, *ex parte* judgment was entered on 8th November, 2011, after the appellant failed to enter appearance and file a defence.

After being served with the notice of judgment, the appellant filed an application dated 21st November, 2011, seeking *inter alia* setting aside of the *ex parte* judgment and leave to defend the suit therein. The appellant maintained that the failure to enter appearance and file a defence was as a result of the inadvertent mistake of its counsel.

The learned Judge [Mutava, J], in his ruling dated 1st March, 2012, declined to exercise his discretion in favour of the appellant on the grounds that the appellant's proposed defence raised issues that had been competently and conclusively determined by previous courts.

Aggrieved by this ruling, the appellants filed an application dated 16th March, 2012, seeking orders of the High Court to review and set aside its order of 1st March, 2013 and substitute the same with an order setting aside the ex parte judgment. The appellant maintained that there were serious errors on the record apparent in the ruling and order made on 1st March, 2013. The learned Judge in his ruling dated 24th April, 2012, dismissed the appellant's application on the grounds that the substantive findings of the court cannot be classified as obvious and self evident errors. In his view, the matters he was expected to review did not form plausible grounds of review.

Aggrieved by these two rulings, the appellant filed the two consolidated appeals.

The appeal was heard before this Court on 6th March, 2013. Mr Allen Waiyaki Gichuhi, learned counsel for the appellant, submitted that the learned Judge erred in finding that the issue of ownership of KShs.18 million which was credited into the respondents' account was *res judicata* as it had been determined both in the criminal case and in the judicial review proceedings. He contended that the two courts did not

determine who owned the money and further, there was no proof of how the money was acquired. He maintained that ownership of the said amount was in contention. He further contended that the figures indicated in the plaint as the amount of interest owing were not supported by any documentary evidence and that the respondents did not prove the actual contractual interest rate between the parties. He maintained that the applicable interest rates ought to have been proved by the respondents through evidence. Therefore, according to Mr Gichuhi, the learned Judge should have set aside the *ex parte* judgment.

Mr Gichuhi further stated that the appellant's failure to enter appearance and file defence was due to the inadvertent mistake of its counsel. He explained that the appellant had given instructions through e-mail to the said advocate in good time. It was the advocate who inadvertently failed to enter appearance within the requisite period. He submitted that the advocate's mistake should not be visited upon the appellant. He further submitted that the draft defence raised triable issues which the learned Judge failed to take into account. He stated that a total of Kenya Shillings eighteen million was transferred to the respondents' account. The said transfer was internal and therefore, raised suspicion. He maintained that in such a scenario, there should be a sound explanation of the source of funds. He urged this Court to allow the appeal to enable the parties to ventilate their respective cases in the High Court.

Mr Mark Nduati, learned counsel for the respondents in opposition to this appeal, submitted that the proposed defence raised issues that were *res judicata*. He stated that the main issue advanced by the defence was with regard to ownership of the funds which in his view, had been determined. He maintained that this issue had been determined by both the criminal court and the High Court in the judicial review proceedings and urged this Court to dismiss the appeal.

We have carefully considered the grounds of appeal, the submissions by the learned counsel and the law.

Before this Court can interfere with the discretion of the learned judge, it must be satisfied that the learned Judge misdirected himself in some matter and as a result, arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter.

The predecessor of this Court in ***MBOGO & ANOTHER V SHAH, (1968) EA 93*** at page 95, pronounced itself as follows:

> *"A court of appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge had been clearly wrong in the exercise of his discretion and that as a result there has been misjustice." [Sir Newbold P]*

See also ***AHMED V COMMISSION OF CUSTOMS & EXCISE, (2000) 2 EA 93*** and ***HOUSING FINANCE COMPANY OF KENYA V RICHARD NDERE JOHNSON, [2010] eKLR***.

Setting as an *ex parte* judgment is a discretionary relief. Before a court can exercise its discretion and set aside an *ex parte* judgment, it needs to consider the following: whether the proposed defence raises triable issues which raise a *prima facie* defence; whether the default judgment was as a result of an inadvertent or excusable mistake or error; and whether it is in the interests of justice to do so.

In ***CHEMWOLO & ANOTHER V KUBENDI, (1986) KLR 492***, this Court held:

> *"The concern of the court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion. However, where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a* ***prima facie*** *defence which should go for trial."*

In the instant appeal, we do not find evidence that the appellant has deliberately sought in any way to obstruct or delay the course of justice. In our view, there are triable issues which raise a *prima facie* defence which should go for adjudication.

On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant.

This Court is guided by the case of ***LEE G MUTHOGA V HABIB ZURICH FINANCE (K) LTD & ANOTHER, CIVIL APPLICATION NO. NAI 236 OF 2009***, where this Court held:

> *"It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight."*

In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.

In view of the fact that the respondents have contended that the issue of the ownership of funds is *res judicata*, it is important for this court to consider this matter. A reading of the draft defence reveals that the main issue advanced by the appellant for failing to grant the respondents' access to the said account and the funds therein, is that ownership of the said funds had not yet been established. The learned Judge and the respondents consider that the issue has been determined in previous suits and is therefore, *res judicata*.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya provides that:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."*

The doctrine of *res judicata* has been elucidated by this Court in a number of cases.

For the doctrine of *res judicata* to apply the following conditions must be met as set out in the case of ***KENYA HOTEL PROPERTIES LTD V WILLISDEN INVESTMENTS LTD & 4 OTHERS, [2013] eKLR***:

- *The matter must be 'directly and substantially' in issue in the two suits;*
- *The parties must be the same or the parties under whom any of them claim, litigating under the same title; and*
- *The matter must have been finally decided in the previous suit.*

Mulla Code of Civil Procedure 16th Edition Vol 1 states at page 161:

> *"… the general doctrine is founded on consideration of high public policy to achieve two objectives namely, that there must be a finality to litigation and that the individual should not be harassed twice over with the same account of litigation. … The test is whether the claim in the subsequent suit or proceeding is in fact founded upon the same cause of action to which was the foundation of the former suit or proceeding. …"*

In the instant case, the respondents herein were charged in Criminal Case No. 3038 of 2003, at the Chief Magistrate's Court at Nairobi. The respondents were acquitted for lack of evidence under ***Section 210 of the Criminal Procedure Code***. The appellant herein moved to the High Court for review of the orders of

the criminal court in Judicial Review Misc. Application No. 991 of 2010, in which the said application was dismissed on 8th February, 2010, leaving the ruling of the criminal court in place. The issues for determination were:

i. *Whether the was non-disclosure of material facts;*
ii. *Whether the respondent [Chief Magistrate's court at Nairobi] acted in breach of the rules of natural justice; and*
iii. *Whether the court's decision was unreasonable.*

The appellant, despite being a party in the judicial review proceedings was not a party in the criminal proceedings. The issue of ownership of funds, in our view, should be heard and finally determined on its merits.

On the issue of interest, the respondents compounded the same at 15% monthly yet there was no computation of figures. ***Sections 26*** and ***27 of the Civil Procedure Act, [CPA],*** lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.

In ***SHAH V GUILDERS INTERNATIONAL BANK LTD, [2003] KLR***, the Court of Appeal regarding ***S 26 (1) of the CPA*** held:

> *"This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:*
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> *(1) the period before the suit is filed;*
>
> *(2) the period from the date the suit is filed to the date when the court gives its judgment; and*
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> *(3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.*
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> *We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."*

Accordingly, the High Court should in its discretion award and fix the rate of interest payable.

Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by ***S 26 of the CPA*** and subject to evidence produced to support the claim. It is a cardinal point of law that special damages must be pleaded and proved.

In our view, in the interest of justice, this claim which involves a colossal sum of money and which raises triable issues should be determined on merit, at the High Court after all the parties are heard.

Accordingly the appeal is allowed. We further order as follows:

1. *The order of the High Court dated 1st March, 2012, is set aside and replaced with an order allowing the application dated 21st November, 2011.*
2. *The order of the High Court dated 24th April, 2012, is set aside and replaced with an order allowing the application dated 16th March, 2012.*
3. *The ex parte judgment entered on 8th November, 2011 is set aside.*
4. *The appellant is granted leave to defend the suit in the High Court and to file and serve the memorandum of appearance and defence within fourteen [14] days of the date of this judgment.*
5. *Costs of this appeal and before the High Court to the appellant.*

Dated and delivered at Nairobi this 19th day of July, 2013.

W. KARANJA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

J. O. ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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