



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 20 OF 2003

BETWEEN

TRUST AGENCIES LIMITED 1ST APPELLANT

AJAY I. SHAH 2ND APPELLANT

M. BILLING Practicing as GURAM & COMPANY, ADVOCATES3RD APPELLANT

AND

CHIMNLAL K.N. SHAH 1ST RESPONDENT

VANDANA C.K. SHAH 2ND RESPONDENT

RAKSHIT C.K. SHAH 3RD RESPONDENT

DEPESH C.K. SHAH 4TH RESPONDENT

***(Being an appeal from the ruling and order/decreed of the High Court of Kenya, Commercial and Tax
Division – Milimani, Nairobi (Mbaluto, J.) dated 10th December, 2002***

in

H.C.C.C.NO.1387 OF 2001)

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court, **Mbaluto, J.** dated 10th December, 2002 in High Court **Civil Number 1387 of 2001.**

The background facts are well set out in the plaint and the intended defence. The respondents at the material time held bank accounts in the bank then known as Trust Bank Ltd which accounts held substantial money deposits. Upon the request of the 1st appellant, the respondents jointly and/or severally agreed to lend to the 1st appellant part of the said deposits by assignment to the extent of Kshs.89,022,637. In order to perfect the arrangement the respondents and the 1st and 2nd appellants jointly and/or severally entered into an agreement dated 20th June, 2000 wherein it was agreed *inter-alia* that the sum repayable by the 1st appellant by way of scheduled instalments would be Kshs.105,848,960 inclusive of agreed interest commencing 31st July 2000 and ending 31st December 2002. The second appellant guaranteed in writing the said repayment in his personal capacity and it was further agreed by the parties that such repayment would be made in full by the 3rd appellant, an advocate of the High Court of Kenya, through his client account by way of postdated cheque drawn on the account.

What transpired thereafter according to the appellants is that the 1st appellant paid Kshs.22,764,627 leaving a balance of Kshs.66,235,373 and at that point the respondents instituted recovery measures. Following the 1st appellant's intervention the respondents had agreed not to take any default steps to facilitate a negotiated settlement by the parties. However, notwithstanding the said undertaking, the respondents obtained a default judgment on 29th November, 2001 in the sum of Kshs.94,171,446.20 and had a certificate of costs signed by the Deputy Registrar in the sum of Kshs.1,408,564.98 by way of taxed costs. Immediately after the judgment, the respondents applied for execution of the decree in order to recover Kshs.95,580,011.00 which sum included interest calculated at the rate of 25% per annum. However, the interest was not claimed in the body of the plaint but was only set out in the prayer. It is the appellants' contention that the agreement dated 20th June 2000 between the parties only provided for the payment of Kshs.89,022,637 being the principal amount together with interest in the sum of Kshs.16,826,323 and that the principal and interest add up to a maximum debt of Kshs.105,848.96 which sum is described in the agreement as the "assignment debt."

Aggrieved by the state of affairs as described above, the appellants filed an application in the superior court on 28th May 2002 which application sought to set aside the default judgment dated 20th November, 2001 and further sought leave to file their defence.

By a ruling dated 10th December, 2002 **Mbaluto, J.** dismissed appellant's said application and delivered himself in the main as follows:-

"In an application for an order to set aside a default judgment, the applicant must show why no appearance was made and or defence filed whichever the case. The applicant must also show that he has an arguable defence for obviously no purpose would be served in setting aside a default judgment if the defendants defence is a bogus one. In a case where the relief sought is an order of stay of execution of a decree, the conditions laid down in 41 Rule 4(2) of the Civil Procedure Rules must also be satisfied. These include the establishment of a substantial loss if no order of stay is made and the bringing of the application without unreasonable delay. It is my view that the appellants have wholly failed to satisfy any of the above requirements and consequently this application must fail. It is dismissed with costs."

During the hearing, **Mr Billing** represented himself and also appeared for the other appellants, whereas **Mr Donald Kipkorir** appeared for the respondents.

The appellants' grounds of appeal are:-

- 1. THAT the learned Judge erred in fact and law by declining to exercise his discretion in favour of the appellants.**
- 2. THAT the learned Judge erred in law by holding that the appellants had no reasonable defence.**
- 3. THAT the learned Judge misdirected or did not direct himself sufficiently or at all to the facts laid before him.**
- 4. THAT the learned Judge misdirected himself on law, when he declined to grant stay of execution.**
- 5. THAT the learned Judge erred in fact and law by failing to consider all the evidence and facts laid before him.**

At the hearing the appellants' counsel opted to rely on grounds 1, 2, 3 and 5 and abandoned ground 4. The thrust of Mr Billing's submission is principally that the parties provided for the payment of interest in a lump sum once and for all and that there was no legal basis for charging interest at the rate of 25% p.a. or any other rate since there was no written agreement to charge such interest. In addition, his clients were ready and willing to pay the balance of the outstanding balance as set out in the agreement between the parties.

On the other hand, Mr Kipkorir urged that since the parties had entered into a commercial contract and the appellants had failed to repay as per the agreement, interest at the then commercial rate of 24% was payable from 31st July 2002 which was the last repayment date and consequently, the judgment as entered by the court was proper and beyond challenge.

We have carefully considered the submissions of the learned counsel for the parties. In our view, we have before us only one central issue which is whether in the circumstances the appellants were entitled to leave to file the defence disputing the levying or charging of interest. In this regard, we note that the agreement dated 20th June 2000 was exhibited in support of the appellants' application to set aside the default judgment. On our part although this being an interlocutory appeal our scope for intervention is, for good reasons, obviously restricted the appellants' arguments concerning the charging of interest are not frivolous. In our view, the judgment of the lower court makes no reference to the contents of the agreement at all and we consider the omission a fatal one since the issue of interest was central to the appellants' defence yet the appellants were prevented from articulating the point on merit. In the circumstances, and with great respect, the superior court ought not to have given any conditions for the appellants to file their defence. We think they should have been given unconditional leave to defend. Surely where as is apparent in the circumstances of this case, that, the appellants were seeking leave to defend and they had raised a substantial legal issue as to whether or not interest is payable at common law if not provided for in a written agreement, no fetters ought to have been placed to bar them from defending the suit on merit.

In our view, the superior court could in future assist this Court greatly in reducing the number of unnecessary interlocutory appeals by embracing fully the overriding objective (O₂) and applying it as far as it is practicable. In the circumstances of this case, it was plainly unjust to bar the appellants from articulating an arguable defence.

At the hearing of the appeal, Mr Billing, learned counsel for the appellants intimated that the appellants had abandoned the appeal against the decretal sum and that the appeal is against the issue of interest only. He further stated that the appellants were prepared to pay Kshs.15,764,000.00 as interest in terms of the agreement but that the respondents were claiming over Kshs.56,000,000.00 as interest.

In the light of the foregoing, the appeal is allowed only as it relates to the issue interest payable on the decretal sum.

Accordingly, the order of the superior court dismissing the entire application is set aside. The appellants' application dated 28th May 2002 is allowed to the extent only that part of the judgment and

decree of the superior court given on 20th November, 2001 awarding interest on the decretal sum at the rate of 24% per annum is set aside; leave is granted to the appellants to file and serve defence relating to the interest applicable on the decretal sum within 14 days.

The suit relating to the question of interest to be heard by any other Judge.

Since the appeal has succeeded to a very limited degree, we make no orders as to the costs of the appeal and of the application in the superior court.

It is so ordered.

DATED and delivered at Nairobi this 9th day of July, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR