



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**

**Civil Appeal 79 of 2002**

**BANQUE INDOSUEZ.....APPELLANT**

**AND**

**D.J. LOWE & COMPANY LIMITED.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Mombasa (Hayanga, J) dated 2<sup>nd</sup> January, 2002*

**in**

**H.C.C.C. NO. 35 OF 1997)**

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of *Hayanga J* delivered on 2<sup>nd</sup> January, 2002 by which the learned Judge allowed the respondent's application dated 26<sup>th</sup> May, 1999 for orders to strike out the appellant's further amended defence and to enter summary judgment in favour of the respondent as sought in the plaint filed in the High Court of Kenya at Mombasa on 6<sup>th</sup> February, 1997. The application was by way of Notice of Motion and expressed to be brought under *Order 6 Rule 13(1)(a)* and *Order 35 Rules 1 and 2* of the Civil Procedure Rules.

The facts presented before the superior court, so far, may briefly be narrated as follows: The respondent, *D.J. LOWE AND COMPANY LIMITED*, is a company locally incorporated in this country and at all times material to the suit, carried on the business of buying and selling tea in bulk. It was a customer of the appellant *BANQUE INDOSUEZ*, a leading local Bank wherein the respondent operated two Current Accounts in United States Dollars and in Kenya Shillings, in the Bank's Branch at Mombasa. In order to facilitate the smooth running of its trading activities, the respondent applied for and was granted overdraft facilities on those Accounts. The Accounts were opened in November, 1986 and since then the respondent had been granted various banking facilities through facility letters, which were secured by written personal guarantees, pledges, Debentures and Charges. It would appear from the records of accounts that from an initial low overdraft facility of Shs.2 million in November, 1986 the facilities went up various levels and on 31<sup>st</sup> January, 1994 the respondent was granted an overdraft (at call) of Kshs.10 million and another overdraft (also at call) of US\$ 500,000. The securities for those facilities were updated accordingly.

Probably due to increased business activities, the respondent sometimes overdraw in excess of the agreed limits and the unhappy appellant had to draw the respondent's attention to it with the request to remedy the situation severally. As the respondent was not able to stay within the limits of the loan overdraft of US\$ 500,000, and continued to overdraw thereon, the appellant accepted the respondent's application to increase that facility to US\$ 800,000 on the existing security arrangements.

The respondent utilised these facilities to purchase tea at Tea Auctions for which the appellant would make direct payments and in return, the proceeds from the Tea Sales by the respondent would be banked with the appellant. If the payments were not made promptly then the respondent would incur penalties for late payment and would risk debarment from Tea Auctions by the Tea Brokers Association. Between June, 1994 and July, 1996 the appellant delayed the remittance of several such payments attracting penalties in excess of Shs. 3 million against the respondent.

An event of significant importance to the dispute before us occurred on 19.6.1995, when the respondent purchased tea worth US\$215,489.68 but the appellant refused to pay for it despite requests by the respondent. As a result the respondent was debarred from further trading in Tea and it is apparent that no further facilities were granted to the respondent by the appellant.

It is averred by the respondent that the appellant was responsible for the penalties imposed on the respondent and the losses ensuing from the debarment. On the other hand the appellant denied any such blame and pointed out that it was only liable to discharge the obligations stated in the security documents and none other. It contended that the respondent was in breach of all those provisions and had exceeded its limits by 19<sup>th</sup> June, 1995.

The annexures to the application show that in or about September, 1996, the appellant demanded the full repayment of the outstanding sums on the Accounts. It also proceeded to call in the personal guarantees and pledges of the respondent's Directors. As at January, 1997 the sums owing on the Accounts were US\$ 337,898.25 and Kshs.12,990,974/= respectively on which interest continued to accrue at monthly rates in excess of US\$ 2,000 and Ksh.350,000/= respectively. The last payments made on the Accounts were in July, 1996 for the Kenya Shilling Account and November, 1996 for the US\$ Dollar Account.

A final demand for payment of the above sums was made by the appellant in January, 1997 and in February, 1997 it threatened to appoint a Receiver and subsequently to sell the respondent's assets. This triggered the lodgment of the suit before the superior court. The respondent contended in the main that the appellant was in breach of fiduciary and other duties of care and was responsible for the predicament facing the respondent. It averred that the respondent should not be allowed to proceed with the enforcement of the securities held. The respondent also claimed that the accounts between it and the appellant were far from settled and were still under discussion and therefore the purported Statutory Notice was a nullity. It sought both special and general damages; a declaration that the Statutory Notice was invalid, null and void; and a permanent injunction to restrain the appellant from appointing a Receiver or dealing in any way with the property securing the Banking facilities.

The records laid before us show that the respondent instituted and prosecuted several applications before both this Court and the superior court seeking temporary orders. The first in the series is the Chamber Summons filed with the plaint under *Order 39 Rules 1,2,3 and 9 of the Civil Procedure Rules* (the Rules) seeking orders to restrain the appellant from selling by public auction the property known as sub-division NO. 1280 of Section 1, Mainland North Mombasa Title No. C.R.11898 pending the hearing and determination of the suit, and also; orders to debar the appellant from appointing a receiver.

The learned Judge *Waki J* (as he then was) dismissed the application on 31<sup>st</sup> October, 1997, holding that there is evidence to show that various amounts of money were outstanding on the Accounts held by the respondent with the appellant Bank before demand notices were served upon it and that the dispute alleged to exist on the actual balance payable is not a relevant consideration before him, and also that it was not material that funds belonging to one of the Directors of the company were unlawfully diverted into the respondent's Account with the appellant or that the sureties have been discharged for whatever

reasons. He observed that neither the Director nor the sureties are parties to the suit.

The learned Judge accepted the submission by Mr. Gor, then acting for the appellant, that the respondent was in breach of various covenants in the security documents and that the appellant was entitled to invoke the relevant provisions contained in the Debenture and the Charge instruments.

The learned Judge finally concluded that the respondent had not established a case with a probability of success and that even if it had, it would be difficult to see how the losses it alleges it will suffer can be irreparable. He dismissed the application made by the respondent, but, nevertheless, the learned Judge, on the basis of what he termed more out of charity than merit, gave the respondent an opportunity to obtain the same orders if it deposits the decretal amount within a limited period. That offer was not taken up and so the respondent's application stood dismissed with costs. The respondent, indeed, filed a notice of appeal intending to appeal against that ruling but it is common ground that no appeal was ever lodged. However, it transpired that the respondent filed another application for review of the ruling dated 31<sup>st</sup> October, 1997. It filed a Notice of Motion under *O44 r 1* of the Rules and S. 3A of the Civil Procedure Act on 5<sup>th</sup> May, 1999.

The main ground canvassed by the respondent in the review application was that it had discovered new and important matter which could not have been produced at the time when the previous application was heard and determined. That evidence was said to be in the nature of a sum of US\$ 291,857.34 which was allegedly received by the appellant for the credit of the respondent but which amount was never credited to the respondent's account. The discovery was said to have occurred only during correspondence exchanged between parties' lawyers and only after delivery of the ruling. It was averred that such correspondence took the better part of four months until the appellant eventually admitted in February 1998, that it had indeed received the said sum of money but did not credit it to the respondent's account. This denial was said to explain the delay in making the application for Review.

The learned Judge in dismissing the application for review acquitted himself thus:-

*“All these findings of fact and law have not been challenged on Appeal or at all. But I am now asked to revisit them because there is a specific figure of the amounts earlier alleged to have been in dispute and therefore casting doubts on the accuracy of the amount demanded by the Bank. In the first place that is not a new issue even though a specific amount is now mentioned. In the second place, and on the material before me, that information has always been within the knowledge of the company. The documents in support were produced by the company. As the onus is on the company to show due diligence in presenting such evidence to the court, I am not satisfied that the company exercised diligence in auditing its accounts and unearthing the evidence now it says was discovered in February, 1998. In point of fact the information is contained in a letter dated 17.11.97 and it is not clear why the matter was not presented to the court soon thereafter. The delay in bringing the Application is in the circumstances unreasonable.*

*I am not satisfied either that the company has shown that there would be conclusiveness that there would be no amount due to the Bank if the new evidence is taken into account.*

*The company has demonized the Bank as incompetent and fraudulent. That may well turn out to be the case when the trial is put underway and witnesses are cross-examined.”*

Upon the refusal to review by the superior court, the respondent promptly filed a notice of appeal and lodged an application before this Court for an injunction order under *Rules 5(2)(b)* and 42 of the Rules of this Court. In its ruling dated 9<sup>th</sup> October, 1998, the Court in upholding the decision of the superior court observed that there had been no merit in the application for review and that it saw no arguable point that the respondent could possibly put forward in the intended appeal. It dismissed the application. It is this ruling which *Mr. Oraro*, counsel for the appellant, referred us to in his opening remarks when he started arguing this appeal.

After the seemingly futile interlocutory applications, mainly to forestall the realization of the security

and other collaterals, the respondent sought and obtained leave to amend and to further amend its plaint.

In its further Amended Plaint dated 26<sup>th</sup> February, 1998, the respondent averred, inter alia; that:-

*“(4) The plaintiff at all material times operated current account in Kenya Shillings and in United States Dollars with the Defendant at its Mombasa branch on terms and conditions required by the Defendant for the opening and operating such accounts (hereinafter referred to as “the contract”) and which the plaintiff operated solely for the purposes of and in connection with its said trading activity.*

(5) -----

(6) -----

(7) -----

(8) -----

*(9) The Defendant under the terms of the contract operated by the Plaintiff was obliged to pay for the cost of the tea purchased by the Plaintiff at tea auctions and in return proceeds from the tea sold by the plaintiff were banked with the Defendant.*

(10) -----

*In breach of the contract the Defendant between June, 1994 and July, 1996 did not comply with the time limits to pay for the purchase of tea made by the plaintiff whereby the plaintiff suffered loss of Kshs.3,401,307/35 by way of interest payments made to various Brokers particulars of most of these payments are known to the Defendant and which said sum the plaintiff claims from the Defendant.*

*Due to the failure and/or delay in payment for purchases of tea made by the plaintiff in its course of business by the defendant, the plaintiff was debarred from trading between July, 1995 to April, 1996 whereby the plaintiff suffered loss of income , profits and prestige by not being able to trade in its activity of buying and selling tea in the regions of Kshs.25,000,000/=.*

(11) *And the plaintiff claims general damages .....*

*(20A) Further and in addition to paragraph 20 of the plaint and without prejudice to the foregoing the defendant has failed to credit US\$291,857.34 to the plaintiff’s account meaning that the plaintiff’s cheques drawn in favour of its debtors were dishonoured while actually the defendant was holding the above-mentioned monies. As a result the plaintiff has suffered immeasurably by way of loss of reputation and further it has been unable to engage in any contracts which would require them to expend monies so the plaintiff therefore claims damages for loss of business. Particulars of this loss shall be supplied at the hearing hereof.”*

The prayers in the further Amended Plaint were substantially the same as those in the plaint and to which we have already adverted hereinabove.

On 15<sup>th</sup> March, 1999, the appellant filed a further Amended written Statement of Defence to the further Amended Plaint. It averred that in the course of time the maximum amounts of the overdraft facilities granted to the respondent were Kshs.10,000,000.00 and US\$800,000.00 for which the respondent had provided securities in the form of:-

(a) A Debenture and supplementary Debenture for a total amount of Kshs.50,000,000.00.

(b) A Charge and Further Charge over its property being sub-division NO. 1280, section 1, Mainland North for a total amount of Kshs.20,000,000.00.

(c) Personal guarantees and indemnities of its three directors each for the sum of Kshs.50,000,000.00.

It is further averred that the respondent continually overcommitted itself beyond its overdraft limits in the tea trade without the prior knowledge or consent of the appellant and in spite of the appellant's warnings not to do so and having made such commitments, failed to pay for the same on the promises so made. The appellant, however, met the financial commitments of the respondent in excess of the overdraft limits on the aforesaid pleas and promises of the respondent. It is pleaded that in spite of the promises the respondent failed to credit its accounts with the appellant so as to bring them within its overdraft limits.

The appellant also averred that the respondent was not able to pay its debts by reason whereof execution proceedings had been commenced against it and attachment against its goods levied. The appellant denied that it was under any obligation to pay for the purchases of the tea made by the respondent when it had exceeded its overdraft limits or made breaches of the covenants contained in the Debentures and Charges and also facility letters. The appellant avers that it had never refused to pay the tea purchases made by the respondent when the respondent was within the limits of its overdraft facilities and had not breached the covenants and agreements.

The appellant admitted that the amounts totaling US\$291,857.34 were omitted to be credited to the respondent's account but that an amount of US\$444,201.95 was paid out by the appellant on the instructions of the respondent and this latter amount was not debited into its account. The appellant averred that the transactions, in any case, did not offset the amounts overdrawn by the respondent.

The appellant pleaded that failure to credit the said amount of US\$291,857.34 into the respondent's account with the appellant bank was not the cause of the dishonour of any of the respondent's various cheques but because the respondent's account was at all times overdrawn and even if the said sum of money was credited the account still remained overdrawn.

On 26<sup>th</sup> May, 1999, the respondent by a Notice of Motion expressed to be brought under *Order VI Rule 13(1)(a)* and *Order XXXV Rules 1* and *2* of the Rules sought orders:-

1. To strike out the appellant's further amended defence;

and

2. To enter summary judgment for the respondent as prayed in the plaint.

The grounds upon which the application is premised are that the appellant has categorically admitted the sum claimed by the respondent to the tune of US\$842,669.84 in its further amended defence and that the defence filed thereto is a mere denial, shadowy and raises no triable issues and consequently is merely aimed at delaying the finalization of the suit. The hearing of the application was indeed protracted. It was argued before the learned Judge *Hayanga J.* as from 23<sup>rd</sup> November, 1999 and was adjourned from time to time and was finally concluded about a year later on 27<sup>th</sup> November, 2000. The ruling was reserved for 19<sup>th</sup> January, 2001, but was postponed again from time to time. It was eventually delivered about a year later on 2<sup>nd</sup> January, 2002.

In his considered ruling the learned Judge was of the view that the defence not only omitted to traverse the claim of the receipt of US\$291,857.34 but had in effect admitted it; and also, that it had not sufficiently supported any claim to set off or counterclaim for it. He held:-

*"Looking at this defence the issue of set off is maintained merely as a side wind without intention that it be relied on for any legal consequence. Besides the whole averments under paragraph 21 of the further amended defence are narrations merely that do not cumulatively (sic) or singly amount to defence in fact to accept these averments for any purpose is to accept evasive pleading."*

The learned Judge further held:-

*“In my judgment there is no reasonable defence to the claim of Kshs.10,000,000 and US\$291,857.34 or US\$842,669.84 for one reason because there has been an admission for having received US\$291,857.34 and where there is an allegation of fact in a plaint and is not denied specifically or by necessary implication or stated not to be admitted in the pleading of the defendant same shall be taken to be admitted except as against a person with disability. The defence in this case with respect has admitted, evaded and omitted to deny claims specifically as set out by the plaintiff.”*

While considering the second limb of the application the learned Judge stated that he was entitled to look at the documents annexed to the application together with the affidavit of the respective parties and their arguments. He held that the appellant could not disclaim liability as it was indebted to the respondent it having received money on its behalf. He thought that the defence was contradictory and not a good one. The learned Judge then concluded:-

*“I have reverted to the pleadings here the documents and the oral submission of counsel. In my view there is no reasonable defence to the claim and I am satisfied that summary judgment should be entered as prayed and I hereby do so together with costs and interest.”*

Being aggrieved by the ruling, the appellant has preferred this appeal citing eighteen grounds of appeal the main ground being that contained in ground 1. Mr. Oraro for the appellant has argued that the learned Judge erred in awarding to the respondent judgment as prayed in its plaint pursuant to an application under *Order 35 rules 1 and 2* of the Rules made by the respondent when in its plaint it had made claims both for a liquidated demand together with some other unliquidated claims and consequently the learned Judge could not in law or procedure enter interlocutory judgment in respect thereof without compliance with *Order IXB*. Mr. Oraro submitted that the Amended Plaint filed on 26<sup>th</sup> February showed that the claim was for combined damages for loss of business whose “particulars shall be supplied at the hearing hereof” and also for liquidated damages. The claims specified, he averred, were both pecuniary and non-pecuniary and was a mixed claim and as the defence was part admission, the summary procedure as provided for under *Order 35* was not applicable as *Order IXB* would be offended. In the circumstances, Mr. Oraro submitted, the respondent had to prove its case.

Mr. Nyaoga counsel for the respondent submitted in reply that the issues canvassed before the learned Judge focused on four specific claims. Firstly, the claim for Shs.3,100,000.00 and interest for failure to remit moneys to the tea brokers; secondly, general damages for loss of business from delay to remit moneys to the tea brokers (see paragraph 20A of the further amended plaint); thirdly, the claim for \$291,000.00 and fourthly; the claim for \$ 550,000.00 for the credit of the respondent. Mr. Nyaoga contended that looking at the whole aspects of the case, though non-pecuniary claims were incorporated, the defence raised no triable issues and the learned Judge could not be faulted in applying summary procedure.

*Order 35 rules 1 and 2* read:-

35.(1) *In all suits where a plaintiff seeks judgment for –*

(a) *a liquidated demand with or without interest; or*

(b) *the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach or covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.*

(2) *The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.*

(3) .....

2. (1) *The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.*”

The issue under this ground of appeal, therefore, is whether the learned judge should or should not have allowed the appellants’ application for summary judgment under *Order XXXV rule 1* of the Rules.

It is trite that the basis of an application for summary judgment under *Order XXXV* is that the defendant has no defence to the claim. See ZOLA AND ANOTHER VS. RALLI BROTHERS LTD AND ANOTHER [1969] EA 691. Rule 2(1) of *Order XXXV* requires the defendant to show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit. It is manifest that the onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and that he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. Again, he must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice. If the application is not one that should have been brought under *Order XXXV* then the court has no option but to dismiss the application. On the other hand, if the defendant establishes what he is required to do under *rule 2(1)* of *Order XXXV* the court should grant him conditional or unconditional leave to defend the suit.

What is the position as far as the matter before us is concerned?

The pleadings herein show that the respondent did not seek only a liquidated demand. It sought a mixed claim, both liquidated and unliquidated. Also, looking at the whole of the appellant’s replying affidavit it is evident that the appellant had placed before the learned Judge some reasonable ground of defence and indeed, had shown some triable issues. In the circumstances, the learned Judge erred in not refusing the application presented before him by the respondent.

*Mr. Oraro* has submitted in *grounds 2, 8 and 17* that it was wrong to strike out the plaint under *Order VI rule 13(1)(a)* when the respondent had not only abandoned its application under that order but had additionally failed to make any submission in respect thereof. Moreover, *Mr. Oraro* asserted, the appellant having based its defence, on there being a balance due from the respondent after taking account of all the claims made by the respondent in the plaint, the learned Judge must have erred in finding that such a plea could not be considered unless it was made as either a counterclaim or by way of set-off. *Mr. Oraro* also contended that striking out a defence does not automatically lead to entering judgment. Probably, he argued, all that the court could do was to enter part judgment, and enter interlocutory judgment for the balance and proceed to formal proof. Moreover, he submitted that *Mr. Gikandi*, then acting for the respondent, stated before the court when he urged the application that he was only proceeding under *Order 35* and never at any time did he refer to *Order 6 rule 13*. In the circumstances, *Mr. Oraro* submitted that the latter Order had no application, and the respondent having sought two prayers in the alternative, it was incumbent upon it to make an election.

As shown in this judgment *Order 6 rule 13(1)(c)* entitles a court to strike out a pleading if it tends to prejudice, embarrass or delay the fair trial of the action, while *Order 35* provides a summary procedure whereby the court is empowered to enter judgment for the claim of the plaintiff subject to there being no bona fide triable issues which would entitle the defendant to defend. The basic object of these two rules is to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property. See CONTINENTAL BUTCHERY LIMITED VS. SAMSON MUSILA NTHIWA, C.A. No. 35 of 1977 (unreported)

The learned Judge appreciated that the prayers sought by the respondent evoke two different procedural rules. But when it came to canvassing them the record shows that the counsel for the respondent did not at any stage of his submission urge the court to grant any prayer under *Order 6 r 13*. It was patently clear that he was proceeding under *Order 35*. It is further shown by the record that the notice of motion was said to be under *Order 35* and *Order 6 rule 13(1)(a)*. However, in the course of the

hearing the respondent appears to have abandoned, but without application or leave of the court, the prayers under *Order 6 rule 13(1)(a)*. Also, the learned Judge in his ruling; and erroneously so, proceeded to deal with the application as if it had been underpinned on *Order 6 rule 13(1)(a)*. Though no application is to be defeated by use of wrong procedural mode, however, it ought to be clear under what order or rules and upon which grounds the application was made. In the absence of an election as to which prayers were being sought it would seem that the learned Judge misdirected himself in considering matters that were not raised before him. See JOHNSON KINYANJUI & ANOTHER V. RACHEL WAHITO THANDE & 2 OTHERS C.A. 284 of 1997 (unreported).

In this regard, therefore, the submissions by Mr. Oraro are meritorious. We would agree with him.

We think we can dispose of *grounds 4 to 7* which in essence complain that the learned Judge erred in awarding summary judgment in respect of claims which were not liquidated. We appreciate that these grounds have been alluded to by us earlier on in this judgment. The statement of claim setting out a contract between the parties claimed damages, both special and general; and; injunctions. In his ruling the learned Judge, without any hearing or formal proof entered judgment for general damages together with interest and costs. In our view this was wrong for no final judgment could have been decreed by the court. All it could do in the event of successful application was to enter judgment against the appellant for the claim in the case of a liquidated demand, a final judgment and in the other claims an interlocutory judgment subject to formal proof. It must follow therefore that the judgment obtained by the respondent in the present case was irregular.

As an auxiliary issue to the above grounds, Mr. Oraro has also argued that the learned Judge erred in not finding that special damages had not been specifically pleaded and since the parties had not agreed upon them it was incumbent upon the respondent to prove them.

Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by BOWEN LJ IN RATCLIFFEE V. EVANS (1892), 2 QB 524, 532, 533, Lord Macnaghten in STORMS BRUKS AKTIC BOLAG V. JOHN & PETER HUTCHINSON, [1905] AC 515, 525, 526 Lutta JA in KAMPALA CITY COUNCIL V. NAKAYE, [1972] EA 446, 447 and Chesoni, J in OUMA V. NAIROBI CITY COUNCIL [1976] KLR 294, 304 and in SANDE CHARLES C. V. KENYA CO-OPERATIVE CREAMERIES LTD. Civil Appeal No. 125 of 1996 (unreported). With respect, therefore, we think that the learned Judge was wrong to grant the sums under the heading of special damages.

It is apparent from the record that the respondent hereto applied for an injunction and a review of the orders the superior court had made at interlocutory stage both of which were dismissed by that court when it found that there were issues which ought to proceed to trial. It is submitted before us by Mr. Oraro that the respondent having failed to file an appeal in connection therewith it was not open for the respondent to make the application for summary judgment or the application to strike out for to do so would offend the cardinal principle of *res judicata*. It is to that issue we now turn to consider.

*Res judicata* is aptly put in section 7 of the Civil Procedure Act:-

“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 prohibition against hearing a matter or issue which is considered to be *res judicata* is in absolute terms:-

“No court shall try ....”

The section gives various explanations as to the meaning of *section 7* and we venture to quote some of those explanations.

*Explanation (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not, it was instituted before it.*

*Explanation (3) The matter above referred to (in Explanation 1) must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the either.*

*Explanation (4) Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”*

In the first ruling made on 31<sup>st</sup> October, 1997, the learned trial Judge *Waki, J* set out the historical background of the dispute between the parties and also the reliefs claimed.

The learned Judge was satisfied that the respondent’s application did not meet the first two standards set in the *Locus Classicus* Case of GIELLA VS. CASSMAN BROWN [1973] E.A. 358 in that the respondent had not established a prima facie case with a probability of success and that if the injunction was not granted loss that is uncompensatable in damages will ensue. He was also satisfied that even if he were to consider the case *ex abundanti cautella*, on the third standard, he would still find for the appellant. He then declined to issue the injunctions sought by the respondent.

But, on 2<sup>nd</sup> January, 2002 another learned Judge *Hayanga, J* in his ruling held, in essence, that there were no triable issues in the suit; that the debt was admitted and that the defence was a sham. These holdings were in fact contradicting the holdings in the ruling of *Waki, J*. The parties to the two applications were the same, the subject matter of the dispute was the same and the issues involved in the case before *Hayanga, J* had been determined by a court of competent jurisdiction which had heard and determined the two applications before it way back in 1997 and in 1998. It is clear therefore from explanation (3) that *res judicata* became applicable. We would think that the application before *Hayanga, J*. could not be held outside the purview or operation of the doctrine of *res judicata*. Having held that all the issues raised before *Hayanga, J* were *res judicata* we do not think it is necessary for us to consider whether the application was an abuse of the process of the court. Of course it is correct to say that a party who brings for the decision of the court matters which have already been determined, more or less in such circumstances, as these can truly be said to be abusing the process of that court. We would agree with Mr. Oraro that the same issues having been previously determined by *Waki, J*, *Hayanga, J* was not entitled to try those issues once again. Moreover, it would be wrong to suggest that a matter can only be treated as *res judicata* if a hearing is held.

It was further submitted by Mr. Oraro that the learned Judge erred when he held against the appellant for failing to lodge a counterclaim or set up a defence by way of a set-off. Mr. Oraro referred us to *Order 8 rule 2* of the Rules and submitted that, according to that rule, it was optional for a defendant in a suit to set off or set up by way of counterclaim against a claim by a plaintiff. He argued that a defendant was not bound to counterclaim. It was open to him either to do so in that action or to bring a separate and fresh action for his claim, as in any case, a counterclaim is a cross-action. There was nothing, he submitted, to preclude the defendant in the previous action from bringing his claim against such a plaintiff after disposal of the plaintiff’s action. He placed much reliance in the case of KARSHE VS. UGANDA TRANSPORT CO. [1967] EA 774 at page 779 where the court said:-

“Here the defendant has not set up any defence by way of set off or counter-claim in its pleading  
.....

*He was entitled to the option of either counterclaiming in the previous suit or of bringing a fresh action for recovery of his loss or damage if any.”*

A set-off is available to a defendant under *Order 8 rule 2*. But a defendant cannot be compelled to plead a set-off, he can if he wishes, enforce his claim by an independent action. See Halsbury's Laws of England, 4<sup>th</sup> Edition Vol 34P. 398. Equally so, it is wrong to give judgment for the plaintiff due to the defendant's failure to plead set-off.

It seems that the effect of *Order 8 rule 2* is from the point of view of pleading to assimilate a counter-claim with a plaint in a suit and is therefore governed by the same rules of pleading as a plaint. It must follow therefore that a counter-claim is substantially a cross-action, an independent action and not merely a defence to the plaintiff's claim. Though the defendant cannot be compelled to plead a counterclaim, the court in appropriate cases may direct a set-off or counter-claim to be tried separately. See KARSHE (IBID) and MULLA: Code of Civil Procedure Vol.2, 16<sup>th</sup> Edition P 1976.

We would think that in view of the principles established by the various authorities and in virtue of *Order 8 rule 2*, the learned Judge had erred in holding that the appellant was bound to have pleaded set-off or counter-claimed in its defence to the plaint.

In view of the orders of which we are about to make it would not be appropriate for us to express any views on the other remaining grounds of appeal, but, we hasten to add that our omission to consider them would not have made us to depart from the decision we have already reached.

In the result, this appeal is allowed. The ruling of the superior court dated 2<sup>nd</sup> January, 2002 is hereby vacated and set aside. The suit shall proceed to hearing according to law in the superior court. The costs of this appeal and in the superior court are awarded to the appellant.

*DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of OCTOBER, 2006.*

*P.K. TUNOI*

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*JUDGE OF APPEAL*

*E.O. O'KUBASU*

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*JUDGE OF APPEAL*

*W.S. DEVERELL*

.....

*JUDGE OF APPEAL*

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

DEPUTY REGISTRAR