**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Omolo, Lakha & Keiwua JJ A)**

**CIVIL APPEAL NO 139 OF 2002**

**LUCY MOMANYI T/A L.N. MOMANYI & COMPANY .....…..APPELLANT**

**VERSUS**

**NUREIN M.A. HATIMY**

**KHADIJA SALIM…….....…RESPONDENTS**

(An appeal from a Ruling and Preliminary Decree of the High Court at

Mombasa (Ang'awa J) dated 14th October, 1997 in HCCC No 46 of 1997)

**JUDGMENT**

The 1st defendant (the appellant) had resisted a suit instituted in the superior court by the plaintiffs (the respondents) in which suit the respondents had claimed that the appellant and the 2nd defendant were jointly and severally liable to the respondents for the refund of some Kshs 2,000,000/= being the purchase price for Land Reference Number Mombasa/Block XVI/ 1367 (the suit premises) together with a refund of Kshs 60,000/= being agreed advocates fees which were both allegedly wrongfully retained by the appellant after misrepresenting to the respondents that the suit premises were free from any encumbrances and available for immediate transfer and registration. It is on the strength of such misrepresentation that the respondents were alleged to have been induced to part with the said sums and to expend another sum of Kshs 408,000/= which was also claimed in the plaint.

The appellant and the 2nd defendant were also alleged to be liable to the respondents for general damages for anxiety caused to the respondents by alleged unethical behaviour of the appellant consisting on her part, additionally, of gross negligence as the respondents' advocate. The refund was justified on the basis that the appellant had failed to make a search of the said title and in directing the plaintiffs to incur an extra expense of Kshs 408,000/= in the fencing of the suit premises. The appellant was alleged to have asked and the respondents deposited the said sums with her on the understanding that the premises would be in vacant possession and in any event the purchaser would in the event of default be entitled to specific performance of the agreement or refund of the purchase price.

In her defence the appellant has disclosed that the amount the respondents paid in respect of her fees is Kshs 80,000/= (the admitted sum) as opposed to the sum of Kshs 60,000/= claimed in the plaint on account of such fees.

It is also noteworthy to mention that the sum claimed in the application for summary judgment and, therefore, for judgment on admission on account of fees paid is the admitted sum and not that sued for in the plaint.

In our judgment an issue would arise whether, in an application brought under orders XII and order XXXV aforesaid, which usually is for the recovery of what is prayed for in the plaint, judgment can be entered for a sum, which was neither sued nor prayed for in the plaint. It seems to us that the plaint ought to have been amended to substitute the admitted sum for that sued for and in the absence of that amendment no summary or judgment on admission could properly be entered in respect of that sum.

The learned judge was therefore wrong in this respect. The defence also pleaded that the appellant together with the respondents went to Kenya Finance Bank whereat she in the presence and at the direction of the respondents deposited in the said bank the sum of Kshs 2,080,000/= (the new sum). This averment is made in the defence in contradistinction to what is averred in paragraph 4 of the plaint that the purchase price together with the Kshs 60,000/= were paid by the respondents and left with the appellant.

The defence reveals that Kenya Finance Bank has, since the deposit of the new sum, gone into liquidation making it impossible to retrieve that sum either for the completion of the sale transaction or failing such completion, release of it to the appellant so as to pass it over to the respondents. That necessitated the institution of this suit for the recovery thereof and for damages for what has been alleged to be negligent conduct and misrepresentation on the part of the appellant.

The appellant has specifically denied the allegations that she had been negligent in her conduct and has refuted the particulars thereof, contesting their applicability and relevance. She has also dealt with the allegation of misrepresentation made against her contending that the charges of negligence or those of misrepresentation cannot arise. At the time of entering into the sale agreement there were no encumbrances registered against the said title in that the sale agreement was drawn on July 22, 1996, while the caution by the third party was registered on July 25, 1996.

The appellant could not at the time have been aware of the existence of that caution which was imposed long after her search of the title. In any event the appellant applied for withdrawal of the said caution immediately its existence came to her attention.

It is quite clear from the averments in this defence that that defence is not frivolous and discloses substantial triable issues for which leave to defend ought to have been granted unconditionally. This is particularly the position in view of the allegations of negligence and misrepresentation made in the plaint, and we agree with Mr Mabeya, counsel for the appellant, that those allegations must be proved through oral as opposed to affidavit evidence as happened before the learned judge. This is particularly the position when the allegations of negligence and misrepresentation precede and are meant to found the claim for the refund of the new sum and without proof of the allegations, the claim as pleaded in the plaint might not be sustainable.

The appellant says the documents already lodged with the Land Registry were, through the connivance of the Land Registrar, fraudulently released to the 2nd defendant in order to effect a new sale agreement of the suit premises with third parties. In any event the money is still deposited in the bank and the respondents took the appellant to deposit it.

The respondents had filed a reply to this defence and contended it was immaterial to their demand for the release and return of the new sum, that the appellant has no excuse for retaining it. The respondents, in order to make good that contention, applied under orders XII rule 6 and XXXV rule 1 of the Civil Procedure Rules for judgment to be entered against the appellant in the said new sum of Kshs 2,080,000/= without waiting for the determination of other questions between the parties. The application was supported by an affidavit of Mr Master, counsel for the respondents, in which he had stated that the appellant had in her letter of August 29, 1996 addressed to the respondents herein admitted holding the said amount.

The appellant responded by filing grounds of opposition and a replying affidavit in which she stated that the defence she filed on record raised serious triable issues which could not be tried on affidavit evidence among which are the facts that the entire amount claimed was deposited in the Kenya Finance Bank on July 22, 1996 with the full knowledge and approval of the respondents and which was still deposited in that bank at the time it was placed under liquidation.

The appellant has stated in her replying affidavit that on receipt of the new sum from the respondents, the respondents accompanied her to Kenya Finance Bank and deposited the same. There is no contrary averment from the respondents regarding this statement which shows on the face of it that the respondents were at least in agreement with the decision to choose that bank for this deposit. The appellant had no reason to doubt that the said Kenya Finance Bank was of repute and financially sound in as much as money ordered for deposit by the Courts get deposited in the said bank and likewise the respondents had every confidence in the same bank otherwise they would not have accompanied her to make the deposit.

The appellant has also in the affidavit in reply denied the charge of negligence imputed to her in the plaint and has contended that it would be a grave injustice to enter summary judgment against her where the main allegation is that of negligence linked in the plaint with the deposit in question.

We see merit in this contention because the deposit of the new sum in the bank is very much intertwined with the allegations of negligence and misrepresentation. It is not a simple case like the demand of the refund of deposit in order to pass as a matter to be dealt with under the provisions of orders XII and XXXV of the Civil Procedure Rules. For order XII to apply there must be admission of facts, which entitle the plaintiff to apply for judgment without waiting for determination of any other question between the parties. We have elsewhere in this judgment pointed to the fact that the allegations of negligence and misrepresentation are tied with the issue of deposit whose refund is sought by the application under the said orders of the Civil Procedure Rules.

There is the unsupported finding by the learned judge that the appellant is only disputing an amount of Kshs 388,000/= which figure appears to have been plucked from the blues by the learned judge because the appellant disputes the whole liquidated amount as it is an integral part of the allegations of negligence and misrepresentation which the appellant has contested. We see that the learned judge mixed up dates in relation to particular steps taken or not taken by the appellant thereby allowing herself to be influenced by events, which are not part of the case before her. For instance the 90 days within which the agreement was to be concluded were to commence on July 22, 1996 and not on January 6, 1996. The learned judge was plainly wrong in stating:

“The whole sale transaction was to take 90 days to complete whilst in fact by July 1996 this had not yet been done.”

We see that before any order for the refund of that new sum is made, evidence has to be tendered regarding the allegation of the appellant’s negligence in advising the respondents to make payment for the purchase of the suit property in the circumstances outlined in the defence and replying affidavit which both raise a number of weighty triable issues.

The learned judge was, in the circumstances of this case, plainly wrong in granting the application for summary judgment on admission where liability to pay was not admitted. In the case of *Choitram v Nazari* [1984] KLR 327 this Court said:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they must result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must have no room for doubt that the parties passed out of the stage of negotiations onto a definite contract.”

We are aware the complaint in the present case concerns negligent conduct, on the part of the appellant, in tort as opposed to contract as is the issue in the case of Choitram. But when it comes to admissions, the principle is the same and the views expressed in that case apply with equal force to contract as they apply

to tort.

There is no discretion to be exercised if triable issues have been disclosed in an application for summary judgment. In the case of *Osodo v Barclays Bank International Ltd* [1981] KLR 30 this Court stated that:

"If upon an application for summary judgment a defendant is able to raise a *prima facie* triable issue as the appellant did in this case, there is no room for discretion. There is only one cause for the Court to follow, ie to grant unconditional leave to defend."

Summary judgment can only be entered in mixed claims such as in the present case where one of those claims is liquidated and severable from the rest of the claims. In the case of *Trust Bank Limited and Michael Muhindi v Investec Bank Limited* Civil Appeal No 258 and 315 of 1999 (unreported) this Court said:

"There is authority, to wit, *Gupta v Continental Builders Limited* [1978] KLR 83, that in mixed claims where one of those is liquidated, then the Court has jurisdiction, upon application to enter summary judgment only on that part of the claim which is liquidated. But, in our view, that is only possible where the liquidated claim is severable from the other claims and can be dealt with separately without doing any violence to the other claims."

There is also the issue of the use of incompetent or inadmissible affidavit under the provisions of order XXV of the Civil Procedure Rules, which require evidence of someone who can swear positively to the facts constituting the cause of action. We agree that an affidavit of an advocate is not of someone who can positively swear to the facts that constitute the cause of action in this case and Mr Master concedes as much.

This being our view of the matter we allow the appeal with costs, set aside the ruling and preliminary decree of the superior court delivered on October 14, 1997 and dismiss with costs the respondents' application dated May 21, 1997.

Dated and delivered at Mombasa this 8th day of August, 2003

**R.S.C. OMOLO**

**……..**

**JUDGE OF APPEAL**

**A.A. LAKHA**

**…….**

**JUDGE OF APPEAL**

**M.M.O. KEIWUA**

**……..**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**