IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 26 OF 2019

BETWEEN

KWANZA ESTATES LIMITED.....APPELLANT

AND

DUBAI BANK KENYA LIMITED*(IN LIQUIDATION)*..... **1ST RESPONDENT**

KENYA DEPOSIT INSURANCE CORPORATION..... 2ND RESPONDENT

HASSAN AHMED ABDULHAFEDHI ZUBEIDI ..... 3RD RESPONDENT

(Being an appeal from the Ruling and part of the Orders of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) made on 18th January, 2019 ***in HCCC No. 44 of 2013****)*

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JUDGMENT OF THE COURT

1. In a ruling dated and delivered on 18th January 2019, the High Court at Mombasa (***P.J.O. Otieno, J.***) set aside an ex-parte default interlocutory judgment that had been entered in favour of the appellant on 21st May 2013 on grounds that the same was entered prematurely; was irregular; and was entered in excess of jurisdiction of the Deputy Registrar who granted it. In the same ruling, the Judge set aside the formal proof proceedings that ensued upon entry of the interlocutory judgment; declined to order the removal or striking out of the 2nd respondent from the suit; and allowed the joinder of the 3rd respondent as a co-defendant in the suit. Consequently, the court directed the appellant to amend its plaint within 14 days of the ruling by adding the 3rd respondent as the 3rd defendant in the suit and to file a fresh bundle of documents and witness statements. The respondents were directed to file their respective statements of defence within 15 days of service of the amended plaint.

2. The appellant was dissatisfied with that ruling and lodged the present appeal. The 2nd respondent has cross appealed against that part of the ruling by which the court declined to strike it out from the suit. The appeal and the cross appeal were heard before us on 7th May 2019.

3. It is not in dispute that by the time the interlocutory judgment in default of appearance in favour of the appellant was granted on 21st May 2013, a memorandum of appearance by the 1st respondent had already been filed on 17th May 2013 even though that memorandum of appearance was filed a couple of days after the expiry of the 15 days within which the 1st respondent should have filed the appearance. Nonetheless, learned counsel for the appellant ***Mr. Paul Buti*** faulted the Judge for setting it aside.

4. Mr. Buti submitted that the application by the 1st respondent to set aside the interlocutory judgment was not made promptly;

that the initial application in that regard was abandoned and a second application filed; that a scheduled formal proof hearing before ***Kasango, J.*** on 10th September 2014 was adjourned at the instance of the 1st respondent on terms that the 1st respondent would be restricted to move the court to set aside judgment within 7 days failing which the appellant was at liberty to fix the matter for formal proof; that the 1st respondent disobeyed the orders given by ***Kasango, J.*** withdrew its applications and filed another application on 17th September 2014; that in the circumstances the High Court did not have jurisdiction to deal with that application.

5. It was submitted that even though the courts attention was drawn to the fact that the 1st respondent had disobeyed the orders given by ***Kasango, J.*** on 10th September 2014 when the formal proof hearing was adjourned, the learned Judge did not, in the impugned ruling, make any reference to the matter and his decision should therefore be reversed; and that by setting aside the interlocutory judgment, the court thereby rewarded the 1st respondent for disobeying court orders.

6. It was further submitted that as the 1st respondent was placed in liquidation on 25th August 2015, under the Insolvency Act, 2015, leave of the court was required for any advocate to act for the 1st respondent; that absent such leave, all pleadings filed and any action by such advocates was vitiated. To support the contention that the sanction of the court before appointment of an advocate was required, the decision of the Court in ***Trade Bank Limited* (In Liquidation) vs. L.Z. Engineering Construction Ltd** was cited.

7. It was also submitted that an application dated 27th June 2018 filed by the firm of Oraro & Company advocates that sought the setting aside of the ex parte judgment and for removal of the 2nd respondent from the suit, among other prayers, was incompetent; and the court did not have jurisdiction to consider it because Order 9 rule 5 and 6 of the Civil Procedure Rules regarding change of advocates had not complied with when Oraro & Company advocates took over representation of the 2nd respondent from the firm of S. Musalia Mwenesi Advocates.

8. The appellant's other grievance with the impugned ruling, it was submitted, is that the 3rd respondent should not have been made a party to the suit. It was submitted that no explanation was given why it took the 3rd respondent six years to apply to be joined in the suit; that the object of joining the 3rd respondent is to frustrate and prejudice the formal proof that was nearing conclusion; and that the 3rd respondent cannot properly be joined in the action in order to assist the 1st respondent in its defence.

9. Opposing the appeal learned counsel for the 1st respondent ***Mr. Mwenesi*** submitted that court sanction is not required for advocates appointed by the liquidator; that the liquidation of the 1st respondent is by the Central Bank of Kenya under Section 54 of the Kenya Deposit Insurance Act, 2012 and not a liquidation by the court for purposes of Section 464 of the Insolvency Act, 2015; that the power to appoint professionals by the liquidator under Section 55 of the Kenya Deposit Insurance Act is not subject to approval of the court; and that the right to appoint advocates to assist the Kenya Deposit Insurance Corporation is not subject to the Insolvency Act.

10. Counsel submitted that the decision by the Judge to set aside the interlocutory judgment and all consequential proceedings is

well founded; that the request for judgment in default was made under Order 10 rule 6 of the Civil Procedure Rules, yet there was no liquidated claim, but a claim for permanent injunctions, declarations and general damages; that the *ex parte* judgment given on 20th May 2015 was irregular and the Deputy Registrar who granted it overstepped his authority and the judgment was a nullity ab initio.

11. It was submitted that the Judge correctly relied on the decision of this Court in ***James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR*** in setting aside the judgment which in any event was liable to be set aside as a matter of right; that to have allowed the appellant to proceed with the formal proof founded on a default judgment entered without jurisdiction would have resulted in a miscarriage of justice; that in setting it aside, the Judge took into account all the circumstances, and the course that is now open is for the parties to prepare the matter for trial as directed by the Judge.

12. On the joinder of the 3rd respondent to the suit, counsel submitted that given the claims made in the plaint, the 3rd respondent is a proper party in the action and his presence as a party will enable the court to effectually and effectively determine the issues in controversy.

13. On the cross appeal, ***Mr. Mwenesi*** submitted that the joinder of 2nd respondent was by consent entered into on 28th October 2015; that there is no illegality or mistake or fraud in that consent so as to justify removal of the 2nd respondent from the proceedings.

14. For the 2nd respondent learned counsel ***Mr. Muchiri*** submitted that under Section 55(o) of Kenya Deposit Insurance Act, the 2nd respondent cannot be sued in its name as a liquidator; that the joinder of the 2nd respondent in the suit violates the law and should be removed. Citing Section 56(3) of Kenya Deposit Insurance Act, counsel submitted that the object in joining the 2nd respondent is to create a special class of depositors contrary to Sections 28 and 33 of Kenya Deposit Insurance Act; that the consent entered into on 28th October 2015 was *per incuriam* and the parties cannot thereby confer jurisdiction on the court that it does not otherwise have. The case of **KPA vs. Modern Holdings *Limited [2017] eKLR*** was cited.

15. On the question of legal representation of the 1st and 2nd respondents, Mr. Muchiri agreed with Mr. Mwenesi that the Insolvency Act has no application to banks as cash deposit taking financial institutions whose insolvency is governed by the Banking Act and Kenya Deposit Insurance Act; and in any event, the 2nd respondent is not under any liquidation and the Insolvency Act has no application to it.

16. On the setting aside of *ex parte* judgment in favour of the appellant, it was submitted that there is no basis for interfering with the decision of the Judge; that the Judge properly exercised his discretion; that the judgment was irregular and a nullity from the start; that there are triable issues in the suit that merit a hearing.

17. For the 3rd respondent, ***Ms. Audrey Ogutu*** submitted that claims have been made against him in the plaint and he is therefore a necessary party in the action; that the rules of natural justice and Article 50 of the Constitution demand that the 3rd respondent should have an opportunity to be heard; and that the 3rd respondent is a necessary party for purposes of effectually determining the claim and the Judge was justified in allowing the joinder of the 3rd respondent.

18. We have considered the appeal and the submissions. Although the rather argumentative memorandum of appeal raises a myriad complaints against the ruling of the High Court given on 18th January 2019, the primary issue for our determination is whether the Judge erred in setting aside the interlocutory judgment entered in favour of the appellant in default of appearance and

the consequential formal proof proceedings. Other secondary issues are whether the 2nd and 3rd respondents are proper parties to the suit before the High Court and whether advocates representing those respondents are properly on record.

19. We begin with the question whether the Judge erred in setting aside the interlocutory judgment entered in favour of the appellant in default of appearance and the consequential formal proof proceedings.

20. In its request for judgment dated 16th May 2013, the appellant requested for judgment against the 1st respondent "who has failed to enter appearance and file a defence within the requisite time despite having been served with Summons to Enter Appearance." The appellant prayed in that request "*for interlocutory judgment for permanent injunctions, declarations and general damages as prayed in the Plaint dated 25th April 2013*." That request was made under Order 10 Rule 6 of the Civil Procedure Rules, 2010 which provides that:

"**Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be**." [Emphasis]

21. In accordance with that request, the Deputy Registrar entered judgment for the appellant on 21st May 2013. The motion by the 1st respondent dated 16th September 2014 and filed on17th September 2014 on the basis of which the interlocutory judgment and the consequential formal proof proceedings were set aside, was based on Order 10 Rule 11 of the Civil Procedure Rules, 2010 which provides that:

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order *upon such terms as are just"* *[Emphasis]*

22. The power of the court to set aside an interlocutory judgment under that provision is discretionary. See ***CMC Holdings Limited vs. Nzioki [2004] 1KLR173***. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because the he acted on matters on which he should not have acted or because the he failed to take into consideration matters which he should have taken into consideration. [**See Mbogo and *another vs. Shah [1968] EA 93***.]

23. In reaching the decision to set aside the interlocutory judgment, the Judge considered that by the time the default judgment was granted by the Deputy Registrar, there was already a memorandum of appearance filed by the 1st respondent; that to the extent that the appellant's request for interlocutory judgment dated 16th May 2013 was based on the 1st respondent's failure *"file a defence within the requisite time"*, the right to do so had not accrued because the time limited for filing defence had not lapsed; that the only competent prayer that the appellant could have made under Rule 6 of Order 10 of the Civil Procedure Rules, 2010 would have been *"limited to the prayer for general damages and not the declarations or injunction"* and that in the circumstances the appellant's request for judgment was not only premature but irregular.

24. In our view, the factors which the Judge took into account are undoubtedly relevant matters for consideration in an application to set aside an *ex parte* judgment with which the court was dealing. We are fully in agreement with the Judge when he expressed:

"**The request for the default judgement was premature, irregular and overtly untenable. Where such facts present themselves to court, the court has no discretion to exercise. It can only answer to the principle of law that nothing put on a nullity can stand. The court has a duty to set aside the judgement as a matter of right and ex debito justitiae**."

25. The position taken by the Judge is consistent with the decision of this Court in the case of ***James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR*** on which the Judge relied to the effect that once it comes to the notice of the court that a judgment is irregular, the court does not have to be moved to set it aside. It can do so *suo motto* without venturing into considerations whether the intended defence raises triable issues or whether there was delay in applying to set aside the irregular judgment.

26. We are not persuade by the submission by the appellant that because an application to adjourn formal proof was granted on terms that the 1st respondent would move the court to set aside the judgment within 7 days of that order failing which the appellant was given liberty to fix another hearing date for formal proof, took away the power of the court to set aside the irregular judgment. As already stated, the judgment was irregular and the court was entitled to set it aside, even without be moved by any party to do so. In our judgment therefore, there is no merit in the complaint that the Judge erred in setting aside the interlocutory judgment and we accordingly reject that ground of appeal.

27. As regards the joinder of the 2nd respondent in the suit, there is merit in the contention that the only basis upon which it is concerned with the suit is on account of it having been appointed as liquidator of the 1st respondent and the appellant ought to have maintained its suit against the first respondent, Dubai Bank Kenya Ltd (In Liquidation). But the reason the court declined to allow the 2nd respondent's application to strike out its name was because there was a court order issued by the same court on 19th February 2016, albeit pursuant to an earlier consent recorded on 28th October 2015, allowing the joinder of the 2nd respondent, and it was therefore not open to the same court to sit on appeal over its own decision. We are unable to fault the Judge on taking that approach.

28. The contention that the consent to join the 2nd respondent in the action is tantamount to an attempt to circumvent statutory provisions of the Kenya Deposit Insurance Act is a matter that will have to be canvassed by the trial court. We are therefore unable to interfere with the decision of the court in that regard and accordingly reject the cross appeal.

29. As to the joinder of the 3rd respondent in the action, there are clearly claims by the appellant, particularly at paragraphs 9 *et al* of the plaint, against the 3rd respondent that entitle him to defend himself and therefore render him a necessary party to the action for purposes of effectually and completely adjudicating upon all questions in the suit in accordance with Rule 10(2) of Order 1 of the Civil Procedure Rules, 2010 which provides that:

"***(2)*** **The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually andcompletely to adjudicate upon and settle all questions involved in the suit, be added**."

30. The upshot of the foregoing is that the appeal and the cross appeal fail. Accordingly, we hereby dismiss the appeal with costs to the respondents. The cross appeal is hereby dismissed with no orders as to costs.

Orders accordingly.

Dated and delivered at Mombasa this 21st day of August 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR