IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI,NAMBUYE & KOOME JJ.A)

CIVIL APPEAL NO. 161 OF 1999

BETWEEN

ABOK JAMES ODERA T/A A.J ODERA & ASSOCIATES………………..…APPELLANT

AND

JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES………..RESPONDENT

(Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (O'kubasu, J) dated 30th July, 1998

in

HCCC NO. 183 of 1998)

…………………..

JUDGMENT OF THE COURT

The background to this appeal is that the appellant rendered professional services to **Kenya Posts and Telecommunications Corporation** (The Corporation)as it was then called, amounting to Kshs. 296,019.767.80. The appellant and the respondent executed an agreement dated 4th day of March, 1996, vide which the respondent was retained to recover Kshs. 296,019,767.80 at agreed professional fee of 8% of the amount intended to be recovered.

The respondent filed Nairobi HCCC No.518 of 1996, on 5th day of March, 1996 **Abok James Odera T/A A.J. Odera & Associates versus Kenya Posts & Telecommunications Corporation,** seeking recovery of the sum of Kshs. 296,019,767.80 with interest at the rate of 35% p.a., costs and any other relief that the court may deem fit to grant. **Kenya Posts and Telecommunications Corporation** filed a defence and on that defence premised an application seeking to refer the issues in controversy to arbitration, which application was opposed by the appellant but allowed by the High Court resulting in an order referring the matters in controversy to arbitration.

Being dissatisfied with the order of reference to arbitration, the appellant filed Nai. Civil Appeal

No.146/96. Negotiations were thereafter commenced between the appellant and the **Corporation** culminating in a consent endorsed by the parties and filed in Nairobi CA 146 of 1996 settling the appellant's claim in HCCC No.518 of 1996 at Kshs.101, 955,962.88 in full and final settlement.

The respondent then issued a demand letter dated 16th January 1998 demanding payment of Kshs.23,681,581.35 within 7 days being 8% of Kshs.296,019,769.80, the alleged agreed professional fees pursuant to the parties agreement entered into on the 4th day of March 1996, followed by the filing of Nairobi HCCC No.183 of 1998 on 2nd March 1988 ***John Patrick Machira & Co. Advocates versus A.J. Odera T/A A.J. Odera & Associates*** seeking recovery of Kshs.23, 681,581.35 together with interest at the bank rate of 25% p.a from the 4th day of March 1996 till payment in full, costs and any other relief that the court may deem fit to grant.

The appellant paid the respondent Kshs.4, 000,000.00 (Kshs. Four million), before filing a defence to the respondents claim, dated the 11th day of February, 1998, on which he premised an application by way of chamber summons dated the 13th day of February 1998, seeking orders to strike out the respondents' suit with costs to the appellant. In the alternative, that the said suit be stayed pending the hearing and conclusion of Nairobi HCCC No.518 of 1996 with costs.

The respondent on the other hand premised on the suit an application by way of notice of motion dated the 23rd day of February 1998, and filed on the same date, seeking orders that summary Judgment be entered in favour of the respondent in the sum of Kshs. 23,681,581.35 less Kshs.4 million, already paid by the appellant after the filing of the suit) together with interest thereon as prayed in the plaint and that costs be provided for.

Both applications were consolidated and heard together resulting in a ruling of 30th day of July, 1998 in which the appellant's application for striking out the respondent's suit was dismissed with costs, but the respondent's application for summary Judgment was allowed as prayed.

The appellant was aggrieved by that decision and appealed to this Court citing eight grounds of appeal which in a summary have centered on:-

i. *Alleged infringement of the provisions of Order III rule 9(1) of the Civil Procedure Rules.*
ii. *Alleged professional negligence on the part of the respondent in the manner the respondent handled proceeding in Nairobi HCCC No. 518 of 1996 on behalf of the appellant.*
iii. *The significance of the appellant's action of moving to make payment of Kshs. Four million (Kshs.4, 000,000.00) to the respondent's advocate upon the appellant being served with the plaint and summon to enter appearance in Nairobi HCCC no.183 of 1998.*
iv. *The validity or otherwise of the agreement of 4th March,1996 executed between the appellant and the respondent.*
v. *Lack of basis of the entry of summary Judgment in favour of the respondent giving rise to this appeal.*

On the hearing date, **Mr. S.R. Adere** leading **Mr. J.K. K'opere** appeared for the appellant. While **Mr. Michael Mubea** appeared for the respondent. The appellant has urged us to allow the appeal on the grounds that the agreement of 4th March, 1996 offends the provisions of section 46 of the advocates Act cap 16 Laws of Kenya in that it amounts to an advocate purchasing an interest in a clients' property; that the said agreement offends the provisions of the stamp duty Act Cap 480, Laws of Kenya as no stamp duty was assessed and paid for it under that act; that summary Judgment was erroneously based on the amount originally claimed by the appellant of Kshs.296,019,767.80 which the respondent never recovered for the appellant; that the proceedings leading to the entry of summary Judgment were a nullity as the learned trial Judge erroneously allowed the respondent to argue the application in person before complying with the provisions of order III rule 9(1) of the Civil Procedure Rules and lastly that interest ought not to have been allowed at 25% as prayed for in the plaint as the rate of interest was never catered for in the agreement of 4th March,1996.

Mr. Michael Mubea learned counsel for the respondent opposed the appeal on the grounds that they had filed grounds under rule 91(1) of the Court of Appeal rules inviting this Court to affirm the High Court decision; that the notice of appeal on which the appeal is premised is defective; that the record of appeal is invalid for non inclusion of a primary document namely a memorandum of appearance filed in HCCC 183 of 1998; that the decision of the High Court having been made pursuant to the provisions of section 45(2) of the advocates Act Cap 16 Laws of Kenya, the same is final and the appellant has no automatic right of appeal to this Court and, lastly, that the incompetence demonstrated above, is not curable under section 3A & 3B of the Appellate Court jurisdiction Act cap 9 Laws of Kenya as these have no restrospective effect to cure defects in an appeal filed before they came into force.

Mr. Michael Mubea submitted that, alternatively, the appeal has no merit because, the appellants' complaint against the agreement of 4th March,1996 whose execution has not been denied is time barred as the same was not raised within six months of its making; that the particulars of the invalidity and or the illegality of the agreement of 4th March, 1996 were never pleaded by the appellant in his defence; that the objection raised against the respondent arguing the application in person is belated as it was never raised before the High Court; that non compliance of the agreement of 4th March, 1996 with the provisions of the stamp duty Act (Supra) is not fatal; that new issues not urged before the learned trial Judge should be ignored; that the ruling on summary Judgment is sound; and should not be disturbed; that the respondent acted professionally and diligently; in defence of the appellants interest in HCCC No. 518 of 1996.

In response to the respondents submissions, ***Mr. Adere*** for the appellant contended that the appeal before us is competent as the issue of competence had been ruled upon by this Court previously; that the appellant has an automatic right of appeal to this Court as it is an appeal against a decision of the High Court on entry of summary Judgment and not a decision of the High Court under section 45(2) of the Advocates Act (Supra); that they have never denied endorsement and or, execution and existence of the agreement of 4th March, 1996. What they contest is its validity and enforceability; that their defence raised triable issues and should not have been struck out; that there was proof of existence of professional negligence on the part of the respondent in the manner he handled the appellant's claim in HCCC No. 518 of 1996; lastly that the learned trial Judge wrongly construed the appellants payment of Kenya shillings Kshs Four million (Kshs.4,000,000.00) to the respondent as being an admission of the respondents entire claim as laid in HCCC No. 183 of 1998.

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of ***Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212*** wherein the Court of Appeal held inter alia that:-

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence***"

On our assessment, the rival rguments set out above, have tended to center on:-

(a) Lack of jurisdiction to entertain this appeal.

(b) Lack of competence of the appeal as presently placed before us.

(c) And lack of merits of this appeal as presently laid before us.

With regard to lack of jurisdiction to entertain this appeal, we wish to refer to the case of ***Rafiki Enterprises Limited versus Kingsway Tyres and Automart Limited Nai Civil Application No.375 of 1996 (UR***) wherein the Court of Appeal held inter alia that; "***Every court has a duty to determine***

whether or not it has jurisdiction in a particular matter; the case of ***Gatanga General Stores and 12 others versus Samuel Mbugua Githure Nairobi Civil Application Number Nai 101 of 1987 (UR)*** *where in* the same Court of Appeal held inter alia that ***"its appellate jurisdiction was statutorily given"*** the case of ***Kimani Wanyoike versus Electoral Commission Civil Appeal No. 213 of 1995 (UR)*** wherein the Court of Appeal ruled that :-

> "***where there is a law prescribed by either a constitution or an act of parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed"***.

Lastly in the celebrated case of ***Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1.*** At page 14 line 29-43 **Nyarangi JA** (as he then was) had this to say:-

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal ha s been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court…The moment a court determines that it has no jurisdiction it has to down its tools and proceed no further"***

Applying the afore set out principles of law and case law to the rival arguments herein on jurisdiction or lack of it, we are satisfied that we have jurisdiction to entertain this appeal because the proceedings giving rise to this appeal had not been undertaken by way of a chamber summons directed to and determined by a single High Court Judge sitting with two assessors under section 45(2) of the Advocates Act (Supra) procedures. The appeal arises from a determination of an application for summary Judgment under order XXXV of the Civil Procedure Rules as it was then. Such a decision is appealable to the Court of Appeal as of right under the provisions of order XLII rule (1) and (2) of the Civil Procedure Rules. We are in the premises satisfied that we are properly seized of this appeal and shall proceed to determine its merits accordingly.

With regard to lack of competence or otherwise of this appeal, we wish to refer to the case of ***Pepco Construction Company Limited versus Carter & Sons Limited Nairobi CA No. 80 of 1979 (UR)*** wherein the Court of Appeal made observation that:-

> "***A notice of appeal is what gives this court jurisdiction in any appeal. It is a primary document in terms of rule 85(1) of the Rules. A record of Appeal must contain a valid copy of the notice of appeal. The omission to include a valid copy renders the appeal incompetent….;*** the case of ***Joseph Limo & 86 others versus Ann merz Civil Application No.295 of 1998*** **Omollo JA** made observation that:-"***A notice of appeal is the document which initiates an appeal it indicates who is aggrieved by the decision or part of the decision of the Superior Court and is or are therefore appealing*** *in* the case of ***Parsi Anjumani versus Mushin*** **Abdulkarim Ali** Civil Application Nai 328 of 1998 (UR) there was observation that:-"***a notice of appeal is a primary document within the meaning of rule 85(1) of the rules …;*** and lastly **Nuru Ibrahim Amrudin versus Amir Mohamed Amir** Civil Appeal No. 23 of 1998 (UR) the Court of Appeal ruled that "***an appeal can only be against a decree or an order***

not against a Judgment or ruling…"

The initial notice of appeal filed herein was faulted in a ruling dated the 9th day of July,1999 because it was duplex in that it had expressed dissatisfaction with the ruling and order of the ***Honourable Mr. Justice E. O. Okubasu*** given on 30th day of July, 1999, and yet it went a head to state that they wished to appeal against the whole decision. In a ruling made on the 30th day of June, 2000 this Court declined to fault the record of appeal as then filed for failure to include pleadings in HCCC No. 518 of 1996 and by reason of the notice of appeal having been signed on behalf of the defendant. Whereas in a ruling of this court of 24th day of May, 2002 this Court declined to strike out this very entire record of appeal on account of inadequacy of the notice of appeal, and lack of jurisdiction on the part of this Court to entertain the entire appeal. In that Ruling the Court confirmed the ruling of this same Court of ***Tunoi , Shah and Bosire JJA*** of 20th day of April,2000 wherein the Court of Appeal though agreeing that the notice of appeal filed and on the basis of which this appeal had been premised was defective in that it did not conform to form D of the Court of Appeal forms in so far as it described the appellant as a "***defendant"*** and the notice as an "***appeal"*** declined to strike it out because the defects noted were curable.

The complaint on lack of inclusion of the memorandum of appeal as a primary document in the record of appeal is genuine but we however note that this issue is being raised for the first time on appeal. We also wish to confirm that the defects noted in the notice of appeal on which this appeal is premised, were not cured as advised by this court in its rulings of 20th April, 2000 and 24th May, 2002.

The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the appellate jurisdiction Act (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into or otherwise incurably defective appeal as per the contention of the respondent.

On the applicability of the overriding objective principle in the appellte jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (***See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)***; The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of ***Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);*** that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sence of justice and fairness (See the case of ***Kariuki (Supra);*** that in applying or interpreting the law or rules made there under, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of ***Deepakc Manlal Kamami and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009)***; that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of ***Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004***); that the overriding objective principle is intended to re-energize the process of the court, a encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are "*0_2*" compliant (see the case of ***Hunter Trading Company limited versus ELF Oil Kenya Limited Civil Application No. Nai 6 of 2010 (UR3 (2010);*** that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of ***Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR).*** And, lastly, that the "***O_2"*** principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilactory tactics or acts constituting abuse of the court process (See the case of ***Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010***

On the basis of the above assessment of principles of case law, we find it perfectly in order to invoke these principles and apply them to the rival arguments herein to breath life into this appeal, for purposes of ameliorating the harshness of the consequences of the appellants' non compliance with this court's directive in the ruling of 20th April, 2000 and 24th May, 2002, with regard to the appellants failure to cure the defect in the notice of appeal on the basis of which the appeal is premised and secondly excuse the appellants failure to include the memorandum of appearance, a primary document in the record of appeal.

Our reasons for finding so, are that case law interpreting application of the overriding objective principles to appellate litigation, illustrated above tend to indicate clearly that these were applied in proceedings filed before sections 3A and 3B (Supra) came into force. On this footing they are applicable to this litigation not withstanding that this appeal was filed long before the said sections 3A and 3B (Supra) came into effect. Aruling in favour of sustaining the appeal will therefore be in line with the overriding objective principle because if the appeal is struck out on account of incompetence, the striking out order will not finally determine the issues in controversy as between the parties. It will simply restore the parties to the pre-appeal stage before the alleged offending notice of appeal was filed. The net effect of this restoration will be that the appellant will be at liberty to reinitiate the appellate process a fresh, premised on a form D compliant notice of appeal. Such an action is likely to lead to a delay in the disposal of the real issues in controversy as between the appellant and the respondent. There will also be considerable costs to be borne by both parties both for these proceedings and the proceedings to be reinitiated. This will also result in the clogging of the justice system as the reinitiated appeal will have to be re-presented to this same Court based on the same set of facts and as soon as it is presented it will start competing for time for disposal.

It is our considered opinion that, such a move will not guarantee justice and fairness to the parties on equal arms (footing) considering that the defect in the notice of appeal is not misleading as found by this Court in the two rulings of 20th day of April, 2000 and 24th day of May, 2002. This is borne out by the fact that the respondent has not pointed out any prejudice or injustice he may have suffered as a result of the said defect in the notice of appeal, as the case the respondent is expected to meet herein, is clearly set out in the grounds of appeal contained in the memorandum of appeal contained in the record of appeal, served on the respondent and to which the respondent has responded ably and thoroughly both in their written as well as oral submissions to this court.

As for lack of inclusion of the memorandum of apppearence in the record of appeal, though we agree that this is the correct position, we note that the respondent is however raising this issue belatedly for the first time during the submissions at the hearing of this appeal. We also do not see how the lack of inclusion of the memorandum of appearance in the record of appeal can be used to fault the entire record of appeal considering that entry of appearance or lack of it was not one of the issues in controversy in the High Court nor in this appeal, as neither the High Court nor this Court was and or has been invited to make a determination on the appellants appearance filed in the High Court. In the premises, we find that that defect is not fatal as it does not go to the root of the issues in controversy in this appeal. More so when it is not being disputed that the appellant entered appearance to the respondents claim in HCCC No.183 of 1998. We think such an omission cannot be held to be so fundamental so as to oust and or override the need to do justice to the parties by disposing off this appeal on its merits. We therefore overrule the objection to this appeal on the grounds of incompetence and rule that the appeal is competent and we shall proceed to dispose it off on its own merits.

MERITS

Turning to the merit of the appeal, a perusal of the record reveals that the respondent though having counsel on record who was supposed to appear for him had occasion to appear in person and represent himself; on the 24th March,1998 on the 30th day of April, 1998 and on the 11th day of May, 1998. On 11th day of May, 1998 the respondent appeared in person as usual, whereas ***Mr. K'opere*** appeared for the appellant. ***Mr. K'opere*** started his address thus:-

“***We have agreed that we start with my application…”*** By the use of the word “***we”,*** it meant learned Counsel ***Mr***. ***K’opere who*** was representing the appellant and the respondent who was appearing in person. Both Learned counsel ***K’opere,*** and the respondent made their full representations to court and concluded. On all these occasions no objection was raised by the appellant against the respondent appearing in person when in fact he had an advocate on record. The appellant is therefore deemed to have waived his right to complain later on about the respondent’s manner of representing himself in the absence of the filing of a notice to act in person, and also deemed to have held the respondent out as being competent to represent himself in the manner done. See section 120 of the evidence Act cap 80 Laws of Kenya which provides:-***“When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing***.

We also note that order III rule 9(1) Civil Procedure Rules does not make provision for penal consequences for non compliance with that provision. It simply provides in part that “***where a party intends to act in person in the cause or matter he shall give a notice stating his intention to act in person.”*** We therefore have no business imposing penal consequences against the respondent for the alleged breach. The appellant has not also demonstrated to us existence of any prejudice or injustice suffered by reason of the said personal representation by the respondent. Neither has he asserted that the learned trial Judge would have arrived at a contrary decision had the respondent been represented by a counsel. We therefore find no fault in the learned trial Judge’s action in allowing the respondent to argue the application in person not withstanding that he had not filed a notice to act in person under the said Rule.

With regard to the alleged professional negligence, lack of prudence and diligence attributed to the respondent in the discharge of his professional duties to the appellant arising from an alleged failure on the part of the respondent to refer issues in controversy in HCCC No. 518 of 1996 to arbitration; it is confirmed that there is no letter or any other communication from the appellant to the respondent instructing the respondent to refer to arbitration all issues in controversy in HCCC No. 518 of 1996; that no such mandatory condition was placed in the undoubted executed and attested agreement of 4th March,1996 that the respondent was to refer the matters in controversy in HCCC No. 518 of 1996 to arbitration, instructions given to the respondent in that agreement was to file a suit to claim the amount indicated. This is borne out by the fact that when the corporation presented an application in HCCC No. 518 of 1996 to refer the matters in dispute therein to arbitration, the appellant opposed that move, and when an order to refer the matter to arbitration was granted by the High Court in HCCC No. 518 of 1996, the appellant appealed against that order vide Nai No. 146 of 1996.

With regard to the alleged appellants admission of the respondents entire claim in HCCC No. 183 of 1998, we wish to refer to the case of ***Choitram versus Nazari (1984) KLR 32),*** which has laid down the parameters of what does or does not amount to an admission. In a summary, an admission must be premised on the provisions of order XII rule 6 Civil Procedure Rules as it was then (now order 13 rule 2); that the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically failed to deal with allegations of fact in the plaint , the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words “***or otherwise”***

When the above parameters or ingredients are applied to the rival arguments on the significance of the appellant’s payment of Kshs. 4,000,000.00 (four million), we are satisfied that the appellant’s conduct in moving to pay the said amount does not amount to an admission of the respondents entire claim in terms of order XII rule 1 and 2 Civil Procedure Rules as it was then (now order 13 rule 1 and 2) because, it was not contained in a pleading; there was no letter accompanying the payment admitting the entire amount claimed by the respondent in HCCC No.183 of 1998 with a rider that, that was part payment of the

amount claimed. Neither did the respondent premise his relief on order XII rule 6 Civil Procedure Rules. The learned trial Judge did not also premise his findings on order XII rule 6 but on order XXXV of the Civil Procedure Rules.

With regard to allegations of the invalidity or otherwise of the agreement of 4th March, 1996, on account of non compliance with the provisions of the stamp duty Act cap 480 Laws of Kenya, we have on our own revisited and construed sections 19(3) (a) (b) and (c), 20 and 21 of the said Act and considered this construction in the light of the rival arguments on this aspect of this appeal. We are in agreement that the agreement of 4th March, 1996 though subject to the stamp duty Act (Supra) and that duty is payable on it, it does not fully comply with the above cited provision, but such non compliance is not however fatal to the enforcement of the said agreement.

Our reasons for finding so are that indeed the agreement only had adhesive stamps and not stamp duty stamps. This condition not withstanding the court is enjoined under section 19 (3) (a) (b) and (c) not to reject such an agreement in totality, but to receive it and either assess the stamp duty itself and direct that it be paid. Or alternatively the court can impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment. There is also provision for payment or waiver of payment of penalties on late payment of duty as the stamp duty collector may direct at his discretion. The stamp duty collector also has a discretion to extend time within which the stamp duty assessed should be paid where he is satisfied that the omission or neglect to pay stamp duty was not from the intention to evade payment of stamp duty or otherwise to defraud the Authority concerned. The stamp duty collector also has a discretion to charge additional stamp duty on top of what may have been assessed as the stamp duty payable on the such an agreement. There is also a safety valve vide which the defaulter has a right of appeal to the relevant minister against the collection directive on the payment of the stamp duty assessed, additional stamp duty assessed or penalties imposed.

What the learned trial Judge should have done and which we are also mandated to do as a first appellate Court, is simply to impound the said agreement, either assess the duty ourselves, collect it, and then forward the duty collected to the stamp duty collector together with a penalty or direct that the agreement be submitted to the stamp duty collector for purposes of assessment and payment of the resulting duty payable.

As for the invalidity of the agreement of 4th March, 1996 on account of its infringement of section 46 (a) of the Advocates Act cap 16 Laws of Kenya, our finding is that in order for this provision to operate to fault the agreement of 4th March, 1996, the appellant has to demonstrate that the client interest on the basis of which the agreement of 4th day of March, 1996 was based, was in fact a subject of either a "***suit"*** or failing which any other ***contentious proceedings***.

We have noted that both the words ***"suit"*** or "***contentious proceedings"*** have not been defined by the provision of (section 46 (a) of the advocates Act (Supra). The word "***suit"*** is however defined in the Civil Procedure Act Cap 21 laws of Kenya as means "***all Civil Proceedings commenced in any manner prescribed." "Contentious proceedings"*** or "***proceedings"*** perse has not been defined. Our interpretation of this provision, (section 46(a) of the advocates Act (Supra) when read in conjunction with the definition of ***"suit"*** in the Civil Procedure Act (Supra) is that, it means that in order for the caveat in section 46(a) to hold to defeat the intention of the parties in the agreement of 4th March,1996, the said agreement ought to have been made during the pendence of a "***suit"*** in which the amount on the basis of which the said agreement was made formed the subject claim.

The subject agreement was made on the 4th day of March, 1996. The plaint filed in HCCC No. 518 of 1996 is dated the 4th day of March, 1996 but filed on the 5th day of March,1996. It therefore means that as at the time the agreement of 4th March, 1996 was executed and attested, there was no "***suit"*** or "***contentious proceedings"*** in existence in which the appellant had an interest, as the right of interest in a "***suit"*** and or "***contentious proceedings"*** accrued to the appellant on the 5th March 1996, when HCCC

No. 518 of 1996 was filed. We therefore hold that the agreement of 4th March, 1996 is valid and enforceable.

Turning on the issue of lack of basis for the entry of summary Judgment in favour of the respondent, we find that the respondent, premised his application for summary judgment on order XXXV rule 1(1) (a) of the Civil Procedure Rules as it was then (order 36 as it is now). It is now trite that this summary procedure is available to a claimant seeking a liquidated demand with or without interest. Under sub rule 2 of the same order, the defendant has leave to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit, which has to be discerned from the pleadings filed by the parties. The plaint in HCCC No. 183 of 1998 indicates clearly that the respondent claimed a liquidated claim of Kshs. 23,681,581.35 with interest. The appellant sought leave to defend that claim by his defence filed on the 11th day of February, 1998. The triable issues allegedly relied upon by the appellant as guaranteeing him a right to defend the suit basically form the basis of the clustered grounds of merit arguments on appeal already set out above.

Case law has crystallized the parameters within which a relief of summary Judgment can either be granted or with held. In the case of ***Osodo versus Barclays Bank International Limited (1981) KLR 30*** it was held inter alia that:-

> "***Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionality"***. In the case of ***Magunga General Stores versus Pepco Distributors Limited (1987) 2KAR 89*** ,the Court of Appeal held inter alia that
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> "***An appellate court will not interfere with a trial Judges' exercise of his/her discretion on an application for summary Judgment unless the exercise was wrong in principle or that the Judge acted wrongly on the facts."***

See also the case of ***Nairobi Golf Hotels (Kenya) Limited Civil Appeal No. 5 of 1997 (UR)*** wherein the Court of Appeal made observations that

> "***it is now trite that in applications for summary judgment under order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing prima facie the existence of bonafide triable issue or that he has an arguable case. On the other hand it follow a plaintiff who is able to show that a defence raised by a defendant in an action falling within the provision of order XXXV is shallows or a sham is entitled to summary judgment".***

Lastly, the case of ***City Printing Works Kenya Limited versus Baclly (1977) KLR85*** wherein the predecessor of this court, the Court of Appeal for Eastern Africa made observations inter alia at page 86 that:-

in an application for summary Judgment, the court weighs the balance of probability carefully as well as taking into account the bonafides of the parties in particular in a case where the plaintiffs claim is for a liquidated demand supported by documentary evidence…" At page 87 the court went on:-"***the general rule is that leave to defend should be given unconditionally unless there is good ground for thinking that forward are no more than a them and it must be more than mere suspicious…"*** Further that: - ***a defendant may successfully revisit an application if he can satisfy the master that he has a good defence to action on the merit"***

In finding for the respondent, the learned trial Judge made the following observations:-

> ***" His arguments was that the agreement relied upon was invalid. The court has considered the agreement and found it to be lawfully within section 45(1) of the Advocates Act cap 16 Laws of Kenya. Reference was made to HCCC No.518 of 1996. I have looked at that case and it is obvious that the plaintiff herein is not party to that suit. He has nothing to do with***

that case… As regards notice of motion application dated 23rd day of February,1998 all I can say is such that the plaintiffs claim is based on a valid written agreement and as the defence filed contained mere denials, I find there is no valid defence to this suit. More so when the defence filed contains mere denials. I find there is no valid defence to this suit. More so when we consider the fact that the defendant upon receiving the summary and copy of the plaint rushed to the plaintiff with a payment of Ksh.4, 000,000.00. Consequently there will be an order for summary Judgment prayed in the said notice of motion application dated 23rd of February 1998"

Our findings on the reasoning of the learned trial Judge in the light of the facts that had been placed before him are firstly that the learned trial Judges was right in holding that the basis of the respondents claim in HCCC No.183 of 1998 was the agreement of 4th March, 1996 and that the said agreement was validly executed under section 45(2) of the advocates Act (Supra) and that the same was enforceable. We on our own have already ruled so and we confirm this finding. The learned trial judge was however in error when he made observation that the issues in Nairobi HCCC no.518 of 1996 were distinct from the issues in HCCC no.183 of 1998 and that the respondent had nothing to do with the issues in HCCC no.518 of 1996. To us, the correct position should have been that these two claims are interrelated. Both stem from the agreement of 4th March, 1996, in that the said agreement is the authority on the basis of which the respondent initiated the litigation in HCCC no.518 of 1996 on behalf of the appellant. It is this initiation of the litigation in HCCC No. 518 of 1996 on behalf of the appellant that formed the basis of the respondent's laying a basis for his claim for professional fees in HCCC no.183 of 1998.

We have no doubt that it is this error on the part of the learned trial Judge which led to the learned trial Judges failure to take note and address two crucial aspects of the agreement of 4th March, 1996 which if he had so considered and addressed, would have had an impact on the final outcome of the extend of the final figure which should have formed the final summary Judgment figure in favour of the respondent. The two aspects are that the agreement of 4th day of March, 1996 is silent as regards the rate of interest the amount forming 8% payable to the respondent as professional fees was to attract and as from when. Likewise the said agreement is also silent as regards whether the respondent was entitled to the recovery of 8% of Kshs.296, 019,767.80 as claimed in HCCC No.518 of 1996 irrespective of whether the respondent succeeded in recovering the said amount of Kshs.296, 019,767.80 in full in favour of the appellant or not.

By saying that these were crucial issues which should have been addressed and reconciled by the learned trial Judge, we do not think that their determination, consideration and or reconciliation should have called for a full trial by way of adduction of evidence. They were and still are capable of being resolved on the basis of the facts as they were before the learned trial Judge and as they are before us and we are going to address them as such; but bearing in mind the fact that these aspects being in relation to an agreement validity executed by the parties which agreement the learned trial Judge held that it was valid, which holding we have confirmed, care has to be taken to ensure that reconciliation and or determination of the said two crucial issue does not amount to a re writing of the agreement of 4th March,1996 for the concerned parties. See the case of ***Richard Akwesere Onditi versus Kenya Commercial Finance Company Limited Kisumu CA No. 329 of 2009 (UR)*** wherein the court of appeal made observation inter alia thus:-

"***These were terms agreed between the parties in respect of the loan and ordinarily it is not in the province of the courts to re-write those terms for the parties however onerous they may be to one of them."***

We also wish to be guided by the reasoning of this court in the case of ***Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934*** thus:-

"***Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords***

in ***<u>Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.</u>***

"***It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"***

Again in ***<u>Peters versus Sunday Post Limited (1958) EA424,</u>*** a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, ***P*** said at page 429:

"***It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses"***

Bearing the above principles in mind, we make no hesitation in finding that the learned trial Judge made an error in awarding interest as prayed in the plaint at the rates of 25% from 4th March, 1996 when the same had neither been provided for in the said agreement or justification made for its claim by the respondent both in the plaint filed, affidavit in support of the application for summary Judgment and or oral highlights in court at the time of the respondents request for the said summary Judgment.

We appreciate that section 26 (1) of the Civil procedure Act Cap 21 Laws of Kenya tended to give the learned trial Judge a wide discretion with regard to the award of interest. It reads:- ***Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rates as the court deems reasonable to be paid on the principal such adjudged from the date of the suit to the date of decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit…."***

The above discretion not withstanding it is now trite that the exercise of the judicial discretion donated by this section 26(1) above is not absolute. It has to be exercised judiciously, not with caprice or whim but with reason. Herein the learned trial Judge gave no reason as to why he awarded interest at the rate of 25% from the pre-claim period.

In the absence of both the respondent and the learned trial Judge having shown basis and justification for an award of interest at the rate of 25% from the pre-claim period, in the wake of the silence on the rate of interest applicable in the agreement of 4th March, 1996, we find this rate of interest was granted in error and should not be allowed to stand. Failure to intervene on our part would offend the principle of justice and fairness as it is enshrined in the overriding objective principle (Supra). The interest of justice and fairness to both appellant and the respondent, in the peculiar circumstances of this case demanded and still demands that interest on the resulting figure forming the 8% professional fees due from the appellant adjudged in favour of the respondent should have attracted interest at court rates. we so order that the resulting figure forming the 8% professional fees recoverable by the respondent from the appellant will carry interest at court rates.

The Kshs.296, 019,767.80 forming the appellants claim in HCCC no.518 of 1996 fell into the category of claims known to law as special damages. It is now trite that these must be specifically pleaded and strictly proved. See the case of ***<u>Hann versus Singh (1985) KLR 716</u>*** wherein the Court of appeal held inter alia that:-

"Special damages must not only be specifically claimed but also strictly proved. The degree of certainity and the particularity of proof depend on the circumstances and the nature of the acts themselves"

It is our considered view that both the appellant and the respondent were alive to the fact that firstly the appellant would be required to strictly prove his claim as laid in HCCC no.518 of 1996 and the possibility of a lesser sum being arrived at was not remote. And secondly that this scaling down

would in turn affect the final figure which would inform the 8% figure to cover the respondents professional fees. To us the only reasonable inference which can be drawn from the parties conduct fees may be as to why the parties placed no caveat in the agreement of 4th March 1996 guaranteeing the 8% fees entitlement in favour of the respondent irrespective of whether the appellant realized the whole amount claimed of Kshs.296,019,767.80 or not is because they anticipated proof of either the amount claimed or a lesser amount which would in turn form calculation of the 8% professional fees.

This is fortified by the fact that when the respondent participated in the negotiations which scaled down the appellants claim from Kshs.296, 019,767.80 to Kshs.101, 955,962.88 he placed no caveat that the scalling down of the appellant's claim in HCCC No. 518 of 1996 would not affect his entitlement to fees at 8% of the original amount claimed of kshs.296, 019,767.80. It is only prudent and logical to find that by their conduct in so negotiating in the wake of the silence in the agreement of 4th March, 1996 on this aspect, that the parties intended that the scalling down of the appellants claim in HCCC No.518 of 1996 would commensurably scale down the figure on the basis of which the 8% professional fees payable by the appellant to the respondent would be calculated.

In finding as above, we are not re-writing the agreement of 4th March, 1996 as between the appellant and the respondent. But we are simply construing the silence noted above and relating it to the conduct of the parties towards each other and then arriving at the conclusion that the inference drawn by us is the correct position of the parties intention as to why there was such a silence in the agreement of 4th March, 1996.

It is our opinion that had the learned trial Judge done so he would have certainly come to the conclusion as we hereby do that justice and fairness to both parties herein be met by entering summary Judgment for the respondent for his professional fees at 8% of the scaled down figure of Kshs.101,955,962.88.

In the result and for the reasons given in the assessment, we partially allow this appeal, set aside the global order on the entry of summary Judgment entered by the High Court on the 30th day of July,1998 and substitute it with the following specific orders:-

1. Summary Judgment be and is hereby entered in favour of the respondent as against the appellant at the rate of 8% of Kshs.101,955,962.88 total being Kshs.8,156,477.05 less the Kshs.4,000,000.00 earlier paid.
2. The said sum will carry interest at court rates from the date of filing of the suit till payment in full.
3. As the respondent's claim has been substantially reduced, he is entitled to half the costs of the suit in the High Court.
4. The respondent be and is hereby directed to submit the agreement of 4th March, 1996 to the stamp duty collector for the assessment of the duty payable, which should be paid in the normal manner.
5. The appellant who has succeeded partially in this appeal will have half costs of the appeal.

Dated at Nairobi this 11th day of October, 2013.

E.M. GITHINJI

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JUDGE OF APPEAL

R.N.NAMBUYE

……………………….

JUDGE OF APPEAL

M.K. KOOME

…………………………….

JUDGE OF APPEAL

I certify that this is a

true copy of original.

<u>DEPUTY REGISTRAR</u>