



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 395 of 2002

STORM CHEMICALS INDUSTRIES LTD.....APPELLANT

VERSUS

MOSES MAINA.....1ST RESPONDENT

FALCON SECURITY LIMITED.....2ND

RESPONDENT

J U D G M E N T

1. The appellant Storm Chemicals Industries Ltd is dissatisfied by the order made by the SRM on the 24th July, 2002 in the CM's Court at Milimani in Civil Case No.6956 of 1998 dismissing the appellant's suit. The record of the lower court reveals the following: -
2. The appellant filed his claim against Moses Maina and Falcon Security (hereinafter referred to as 1st and 2nd respondents) on the 24th August, 1998. Interlocutory judgment in default of appearance was entered on 15th October, 1998. Pursuit to an application made by the respondents the interlocutory judgment was set aside on the 15th April, 1999. the suit was thereafter fixed by consent of both parties for hearing on 26th October, 1999. On that date neither the plaintiff nor his advocate was in court and the suit was therefore dismissed for non-attendance of the plaintiff. On the appellant's application the order of dismissal was set aside by the consent of both parties. On the 17th August, 2001, the suit was fixed for hearing on 11th September, 2001, but the hearing did not however proceed on that date as counsel for the defence was said to be held up. On 22nd January, 2002 the suit was fixed for hearing on 24th July 2002. The date was taken *ex-parte* as only a representative of the plaintiff attended court for taking the date.
3. On 24th July, 2002, counsel for the plaintiff applied for adjournment explaining that his office had inadvertently failed to contract the plaintiff for the hearing. The defence counsel did not oppose the application for adjournment explaining that they were not served with a hearing notice. Notwithstanding that concession the trial magistrate refused the application for adjournment observing that the suit had been put off severally as the plaintiffs were not ready to proceed and that there was no reason why counsel did not inform his client of the hearing date. The appellant's counsel then informed the court that he was leaving the matter to the court. It was then that the court made the order dismissing the appellant's suit with costs.
4. From the above, it is evident that on 24th July, 2002, the appellant's suit was not dismissed for non-

attendance of the appellant under Order IXB Rule 4 of the Civil Procedure rules. The appellant who is a limited liability company was present in court through its counsel. It is the appellant's witnesses who were not present in court. Although the trial magistrate was not specific, it is apparent that upon her refusal of the application for adjournment and the inability of the appellant's counsel to proceed with the hearing due to the handicap of not having contacted his client for witnesses, the trial magistrate dismissed the suit for want of evidence. Thus the appellant could not apply to set aside the order of dismissal under Order IXB rule 4 of the Civil Procedure Rules but had to appeal against that order

5. In this regard the circumstances of the appellant's case is distinguishable from that in the case of ***Ngome vs Plantex Co. Ltd (1984) KLR 792***, where the suit was dismissed under Order IXB Rule 4 of the Civil Procedure rules as both the plaintiff and his advocate failed to attend court. Thus the appellant is properly before this court by way of appeal.

6. The appellant has challenged the order of the trial magistrate made on 24th July, 2002 on the following 4 grounds which were set out in the memorandum of appeal.

(i) The learned Senior Resident Magistrate erred in law and in fact in failing to give consideration to the consequences that would result from a refusal to grant adjournment to the appellant, namely, that the order made would defeat the rights of the appellant and deprive the appellant of the opportunity of being heard on the merits of its case.

(ii) The learned Senior Resident Magistrate erred in law and in fact in refusing to grant an adjournment notwithstanding the fact that the respondents would not be prejudiced by an adjournment and in any event the respondents would be adequately compensated by an award of costs.

(iii) The learned Senior Resident Magistrate erred in law and in fact in visiting the error of the advocates upon the appellant and thereby denying the appellant of the right and the opportunity of having its case heard at all.

(iv) The learned Senior Resident Magistrate erred in law and in fact in refusing to grant an adjournment to the appellant in the circumstances of this case and thereby exercised her discretion capriciously.

7. It is obvious that the dismissal of the appellant's suit was a consequence of the exercise of the trial magistrate's discretion in refusing the application for adjournment which was sought by the appellant's advocate. Thus the appellant's appeal is principally against the order refusing the application for adjournment. The decision whether to grant the adjournment or not was an exercise of discretion vested upon the trial magistrate. In exercise of such a discretion, the trial magistrate was under an obligation to act judiciously taking into account all the facts before her. As was stated by the Court of Appeal in ***Mugachia vs Mwakibundu (1984) KLR 572*** and ***CMC Holdings Limited vs Nzioki (2004) 1 EA 8***, on an appeal the appeal court will not interfere with the exercise of a trial court's discretion, unless the exercise of the same was wrong in principle and the court had acted perversely on the facts.

8. In this case the trial magistrate appears to have based her decision to refuse the adjournment on the fact that the suit had been filed in 1998 and had been put off severally as the plaintiffs were not ready to proceed. However the court record shows that although the suit was filed in August, 1998 and was therefore as at 24th July, 2002 about 4 years old, it had only come up for hearing on 3 occasions including 24th July, 2002. In actual fact the application for adjournment made on 24th July, 2002 by the appellant was the second such application by the appellant. The trial magistrate therefore misdirected herself in holding that the case had been put off severally as the appellant was not ready to proceed.

9. Secondly, the trial magistrate appears to have totally ignored the explanation which was given by the appellant's counsel which clearly showed that the failure to advise the appellant of the hearing date was due to an administrative lapse in the counsel's office. Thus it was obviously that the failure of the appellant to send witnesses for the hearing was not due to any deliberate attempt on the appellant to delay the trial but was due to a mistake on the part of its counsel. The trial magistrate did not consider the drastic consequences of visiting this mistake on the appellant, i.e. that the appellant's right to a hearing

will be lost, nor did the trial magistrate note that the respondent who had previously been accommodated by being granted an adjournment, had no objection to the appellant's application.

10. In the case of *Abulrehman vs Almaery (1985) KLR 287*, it was held that an adjournment ought to be granted as long as it is not unreasonable and no apparent miscarriage of justice is likely to arise.

11. I find that the trial magistrate did not exercise her discretion judiciously as she failed to take into account the circumstances of the case before her. As was stated by Chesoni J in *Mugachia vs Mwakibundu* (Supra),

“The court should indeed discourage unnecessary adjournment of cases set down for hearing but that must not be done at the expense of proper and judicious administration of justice with fairness to the parties.”

12. The upshot of the above is that I allow the appeal, set aside the order of dismissal made on 24th July, 2002 and order that the original file from the lower court be returned forthwith for the hearing of the suit to proceed before any magistrate of competent jurisdiction. Each party shall bear his own costs in the appeal.

Those shall be the orders of this court.

Dated and delivered this 29th day of January, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Otieno for the appellant

Advocate for the respondent absent