



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 771 OF 1980**

**MEDITERRANEAN SHIPPING COMPANY SA ..... PLAINTIFF**

**VERSUS**

**INTERNATIONAL AGRICULTURE ENTERPRISES**

**LTD & ETCO (MSA)LIMITED..... DEFENDANTS**

**RULING**

The action herein was for damages based on demurrage of a motor vessel “Penny S”. The damages were liquidated at Kshs132,508/=. Pleadings closed normally and directions on a summons were given. By May, 1983 the suit was ready for trial. The suit came for hearing on three different occasions, thereafter, but was on each occasion adjourned for one reason or another. Thereafter it was placed on the annual call over list for the call over which was held between 11th and 13th January, 1989 both days inclusive. It was called and was listed to come for hearing on 9th and 10<sup>th</sup> May, 1989.

On 9th May 1989 the suit was called. Mr Kabuki appeared on behalf of Mr Macharia Muhuni for the plaintiff, Mediterranean Shipping Company SA, Mr Chohan appeared for the defendants, International Agricultural Enterprises Ltd and Etc Mombasa Limited. Mr Kabuki was not ready to proceed with the hearing of the case. He successfully applied for the adjournment of the case. The case was stood over to the following day. I expressed disquietude on the conduct of counsel on record for the plaintiff because he had gone to attend to his personal matters without first informing the court of his inability to proceed with the case on the date it was scheduled to be heard, if only as a matter of courtesy. The adjournment was not, however, *sine die*. It was to the next day, 10th May, 1989, the second of the two days the case was listed for hearing. Then came 10th May, 1989. There was no change in the parties’ respective legal representations. The both parties were present. Mr Kabuki informed the court (when the case was called) that he was not offering any evidence. Mr. Chohan applied for the dismissal of the suit with costs. The defendants did not admit any part of the claim against them and so I was left with no alternative but to dismiss the claim for lack of evidence. Costs were awarded to the defendants.

On 16th May, 1989 an application by Chamber Summons was filed. It was expressed to be brought under O IXB rule 8 Civil Procedure Rules and Section 3A of Civil Procedure Act. Two orders were prayed for. The first one was an order vacating the order of 10th May, 1989, dismissing this suit. The second one was for costs. The application was supported by the affidavit of John Macharia Muhuni, counsel who had the conduct of the suit at the time of its dismissal and whom Mr Kabuki held his brief then and on the day before that. The affidavit was sworn on 16th May, 1989, the day of the application. In it Mr Macharia Muhuni deponed to the circumstances which militated against his attendance in court on both 9<sup>th</sup> and 10<sup>th</sup>

May, 1989, respectively.

The main reason for his absence on the dates of the hearing of this suit was that his daughter had been offered a place at Kambii Girls High School on 9th May, 1989. He was compelled to escort her there because she could not make it there on her own. He expected to be back by the same day to be able to conduct the trial of this case on behalf of the plaintiff on 10<sup>th</sup> May, 1989, but alas, he could not. His car developed mechanical problems with the result that he did not make it to Mombasa until later in the afternoon on 10th May, 1989 by which time this suit had been dismissed. More or less the same reasons were relied upon for seeking an adjournment on 9th May, 1989.

There was a further affidavit which he swore and filed on the morning of 24th May, 1989, the date this application came for hearing. The main deponent in it is that Mr Kabuki, who has less than 12 months experience as an advocate, did not feel confident to handle the case on behalf of the plaintiff and genuinely and honestly considered it in the interests of justice not to call and examine the plaintiff's witnesses who were present in court. Mr Kassim Shah appeared for the defendants as respondents in the application. He did not file a replying affidavit, but he did file grounds of opposition pursuant to the provisions of O L rule 16 Civil Procedure Rules. Two grounds were put forward in opposition of the application. The first ground was that the application is misconceived. The second one is that this Court lacks jurisdiction to entertain the application.

Mr. Macharia Muhuni must have reconsidered the matter upon receipt of the grounds of opposition, because on the date of hearing he applied for leave to abandon one of the provisions under which the application was expressed to be brought, and that was O IXB rule 8 Civil Procedure Rules. Mr. Kassim Shah's objection was unsuccessful. The result was that the application is presently grounded on the inherent jurisdiction of the Court. Two issues are raised by the application. Firstly whether this Court possesses the jurisdiction to entertain it. If so, secondly, whether the grounds offered for seeking the indulgence of this Court suffice. Mr Kassim Shah's submission was simple. This court is *functus officio*, he said. *Functus officio* because the suit having been dismissed because the plaintiff did not wish to call evidence no right was vested in the plaintiff to bring either an application to set aside the dismissal or to review the order of dismissal.

Mr Macharia Muhuni was, however, of the view that there is no clear provision in the Civil Procedure Act and Rules to deal with a situation like is obtaining in this matter, and, consequently s 3A of the Civil Procedure Act becomes handy.

It is trite law that the inherent jurisdiction of the court should not be invoked where there is specific statutory provision which would meet the necessities of the case. (*Hasmani v National Bank* (1937) 4 EACA 55). Section 3A on which Mr Macharia Muhuni grounded his application may not be called into the aid of a litigant in all situations not specifically legislated for. It all depends on the circumstances of each case.

It is not, however, true that the situation in the instant matter is not legislated for. O XV1 deals with the prosecution of suits and adjournments. O XV1 rule 4, is instructive. On 9th May, 1989, the suit came for trial. An application for adjournment was made on behalf of the plaintiff, and, was granted. The suit was adjourned to the next day. It was then called. The plaintiff's counsel was present with all the necessary witnesses but opted not to call and examine them. Under rule 4, above, the Court had the discretion to proceed to decide the suit, which it did. The Court having proceeded under that rule although it was not stated, the plaintiff had two options. The first one was to appeal against the refusal to adjourn the case and against the decision. Secondly, accept the decision of the Court and comply with it.

A decision of the court under O XVI rule 4 is appealable. It is not a decision by default. It is a decision on the merits and has the same status as a decision reached upon consideration and evaluation of evidence adduced. There is the procedure provided for in the Civil Procedure Act and Rules for lodging appeals. There is no lacuna as was contended.

The applicant is not challenging the exercise of the Court's discretion in refusing to grant an adjournment.

In the foregoing circumstances I agree with Mr Kassim Shah that the application is incompetent. It is struck out. Costs to the respondents assessed at Kshs 1,000/=.

Orders accordingly.

Dated and Delivered at Mombasa this 8<sup>th</sup> Day of June, 1989

**S.E.O BOSIRE**

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**JUDGE**