IN THE COURT OF APPEAL

AT NAKURU

(CORAM: HANCOX, NYARANGI JJA & PLATT AG JA)

CIVIL APPEAL NO. 101 OF 1984

WANGUHU …… APPELLANT

VERSUS

KANIA…….RESPONDENT

(Appeal from the High Court at Eldoret, Patel J)

JUDGMENT

Platt Ag JA The High Court came to the right conclusion on first appeal.

The problem arose out of a judgment by default having been entered under order IXA Rule 3 of the Civil Procedure Rules, and two subsequent attempts to set that judgment aside. The claim was for a liquidated sum and the defendant failed to enter appearance. Consequently on June 12, 1983 judgment was signed. An application for execution of the decree followed, and a warrant of attachment was served upon the court broker.

An application was then brought to set aside the default judgment together with all subsequent orders and process issued pursuant to the judgment. It was brought under order IX Rule 8 and 10 and order XXI Rule 22 of the Civil Procedure Rules.

Mr Njuguna for the appellant criticised this heading rightly but to no great effect. The application should have been headed order IX A Rules 3 and 10. That great favourite of counsel when in doubt, order XXI Rule 22 had no application whatsoever, because the stay of execution to be granted there, is granted only when a decree has been sent from one court to another for execution. That had no application to the present circumstances. It is of mild interest to note that Mr Njuguna himself fell into the same error, as will presently be seen. Probably some of these errors would have been corrected, if the application had been heard. Unfortunately, on August 12, 1983 counsel for the applicant was unable to attend, and asked for an adjournment through another counsel. That was opposed, and the senior resident magistrate took the view that as the applicant's counsel had undertaken to serve counsel for the respondent with all the papers which undertaking he had not complied with, he was not entitled to a further adjournment. So the adjournment application was disallowed and the chamber summons dismissed.

Mr Njuguna then brought a second application asking for the "*ex parte* judgment" to be set aside, a stay of execution, and unconditional leave to defend.

The senior resident magistrate dismissed this application saying that a similar application had been dismissed, and until that order was removed by an appeal or review, it stood, and it was not possible therefore to deal with the new application.

The applicant appealed from that order to the High Court, which upheld the Ruling.

The central finding was that the second application was in substance the same as the first application, and it was therefore an abuse of the process of court to bring the second application until the problem of the first application had been dealt with. For instance, the reinstatement of the first application could have been considered, with reasons for nonattendance on its hearing date. The High Court therefore dismissed the appeal.

The applicant appeals again to this court with some twelve grounds of appeal. They may be condensed to the following propositions. The learned magistrate's order was undated. It was required to be dated by order XX Rule 3 of the Civil Procedure Rules. It not being dated, it was not an order, and the lapse could not be explained away as an accidental slip.

Even if it were an order, which the High Court could uphold, it was wrong to hold that the two applications were substantively the same. Therefore it would have been proper to allow the second application to be heard upon its merits. The next topic need not be adverted to, namely, that ground 7 had not been dealt with, because it was in the findings by the learned judge, that the learned magistrate gave brief but effective reasons for dismissing the second application. That is so, and nothing more needs to be said. Finally there are the issues of *res judicata* and an abuse of the process of the court.

While order XX specifically refers to judgments, it may be taken as offering a guide to the manner in which interlocutory orders should be given, and of course, orders should be dated. It is true to say that the order in question, presumably given on 2nd September, 1983, was not dated. That irregularily, however, did not vitiate the ruling, having in mind the nature of the complaints raised in the appeal. Nothing is said as to any fundamental effect of a lack of date. It has not inconvenienced any party in taking any procedural step; it has not inconvenienced the parties in appearing at the time of delivering the order; it is not darkly suggested that the order was not in fact given. It is simply an irregularity which embarrassed no one, and cannot be dressed-up to the extent of vitiating the order. It was, as the High Court held a curable slip; and indeed, the formal order drawn up gave the date, 2nd September, 1983. The arguments of greater interest lie in the circumstances in which successive interlocutory applications of the same sort, can or cannot be made.

It will be right to emphasise at the beginning that the first application was not heard upon its merits. It was dismissed because the applicant had not complied with his undertaking to serve Mr Anossi (for the respondent) with the papers, and because he was seeking to adjourn the hearing. The impression left upon the Court must have been that the applicant was not seriously attending to this application, which therefore ought to be dismissed for want of prosecution. It has been questioned whether the dismissal of the application could lead to reinstatment as the learned judge thought to be correct. In his view, the simple procedure of re-instatement should be taken first, before resort to review and appeal as the learned magistrate mentioned in his short ruling. Both lower courts were at one, however in principle, that the first order dismissing the application should be removed before the second application was brought. In that there is no doubt that they are right, as will be explained shortly. At stake at the moment, is the method by which this result can be achieved.

Under what process did the learned magistrate dismiss the application, and under what powers did the learned judge suggest re-instatement? The application was made under order IX A. Judgment by default had been entered under Rule 3 and it was now to be set aside under Rule 10, all of the Civil Procedure Rules order IXA does not envisage that the applicant for setting aside will find himself in the position of the applicant in the case. There is no sanction of dismissal set out in the Rule and it follows that there is no provision for re-instatement. One must then consider order L which deals with applications. There are several powers dealing with adjournments. There is almost a power of dismissal in Rule 4, but "Dismissal" in the marginal note is not borne out by the text; so there is no power of dismissal and

therefore of reinstatement in that order.

There is no other power specifically given. Does it mean therefore that the court faced with the position of the learned magistrate in this case, can only adjourn the matter? If that were so, it would follow that any party to an interlocutory matter could appear or not appear as he wishes. That surely cannot be the position. There are the powers of a court to control its proceedings and prevent abuse.

It would lead to very serious injustice if a court could not control a party who appeared to be failing to prosecute an application. Equally it would be a serious failure of justice not to restore the application to hearing if there were good reasons why the applicant had been prevented from moving or applying to the court.

The court is not powerless. It is an inherent power in the court to control its process for the ends of justice. Section 3A of the Civil Procedure Act (cap 21) preserves the inherent powers when there are no rules. It is within the discretion of the court to dismiss for want of prosecution, and to reinstate the application after receiving a satisfactory explanation. The learned magistrate in this case found that the applicant had failed in an undertaking and had failed to appear. It seemed to the magistrate that the applicant was guilty of negligence and want of prosecuting his application. He decided to dismiss it. That was within his discretion, whether or not it was wise to do so. But the High Court was also right to point out that the home-spun method of reconsidering this matter would be by an application for reinstatement. At this level the facts would emerge and the magistrate would be able to fully control the process of this court.

Applications for review and appeal take longer and are more difficult and expensive. The High Court was rightly pointed to the most expeditious and economic procedure.

This is not of course the first time that this has happened. Dismissal and re-instatement have been methods of control even from the days of the application of the Indian Civil Procedure Code. Mulla in his *Commentaries on the Code of Civil Procedure* 13th Ed. Vol. 1 under Section 151 (the predecessor of Section 3A of Civil Procedure Act) has set out examples of the use of the inherent powers. He notes cases where such powers were used to restore a suit dismissed for default in cases not provided for by order 9 Rule 9. That was a very similar Rule to the present order IX A Rule 10 which is relevant to this case (see note 31 on page 580). If a court can restore a suit, surely it can restore an application! It proceeds to note (31), to restore a suit dismissed for not furnishing particulars; note (32) to restore a civil revision petition dismissed for default; note (33) to restore an application under order 9 Rule 13 which had been dismissed for default. Equally note (46) reveals that it is within the inherent power to refuse to restore an execution dismissed for default. There is note (48) where power to set aside an order dismissing an application under order 21 Rule 66 for non-appearance was used, i.e in objection proceedings to execution. There are many examples from the Indian practice.

As far as East Africa is concerned, *Rawal vs Mombasa Hardware Ltd* (1968) EA 392 may be compared. It was a case concerned with the dismissal of a case for want of prosecution under order XVI Rule 6 of the Rules. That is a cognate problem to the present case, since in this case dismissal followed a want of prosecution. Of course action under order XVI Rule 6 of the Rules, is a different action to the dismissal of an application on the failure of a request for an adjournment. But it was held by this court that the trial court had the power to re-instate in its inherent jurisdiction. Sir Charles Newbold said at p 394-

“I do not think that Rule 6 should be so construed. I would agree entirely with the very clear and able judgment of Rudd, J to which my brother Law has already referred as showing that this Rule shall be construed in a way which would not take away the jurisdiction of the court to remedy an injustice should it be satisfied that such an injustice exists. Rudd, J emphasized that the Rule related to an informal order of the court itself. We all know that a court has control over its order until it is perfected. Even if the order is made in the presence of the parties and after argument, it is urged that Rule 6 is to be construed in such a way as to prevent the court from exercising control over its own order made, not only without argument, but, indeed, without even the knowledge of the parties and informally. I cannot accept such a construction.

The principle must extend to the present situation *a fortiori* where dismissal has been ordered to safeguard the controlling process of the court, in circumstances where the prosecution of proceedings has not lapsed to the great extent as envisaged by order XVI.

On the other hand, if there is still doubt, that there is inherent jurisdiction to dismiss for want of prosecuting an application, and reinstatement for cause shown, then order L should be immediately reconsidered, and direct power granted to the lower courts who will otherwise be unable to control the process of interlocutory applications before them. But it is my opinion that Patel J was entirely right to point out that the simplest course would have been for the applicant to apply for re-instatement.

There is perhaps a further aspect. After the adjournment was refused, it is not clear whether the order was given *ex-parte* or still a part of the *inter partes* argument. Supposing it to have been made *ex-parte*, once again the Court could re-instate the matter for good reason being shown by the applicant.

The next inquiry concerns the content of the two applications. The only real addition in the second application is the prayer to be allowed to defend unconditionally. Now how is that a matter which did not arise under the first application? If the judgment is set aside under order IXA Rule 10 of the Rules, does it not follow that leave to appear and defend will be granted; or leave to defend will be granted where there has been an appearance but no defence filed? The adjective "unconditionally" adds nothing of signifance in the circumstances of this case, because the advocate was attempting to explain that the lack of appearance and defence was entirely an oversight in his office and no fault of the defendant himself at all. If that were accepted, then leave would be granted to appear and defend as a necessary corollary of setting aside the judgment. Once again the learned judge was right.

The final hurdle is whether the second application had been taken on a matter which was *res judicata*, or whether it amounted to an abuse of the process of the court. The first application was not decided upon its merits. It was dismissed after an application for an adjournment was refused, and neither side was heard upon the merits. It was therefore not a *res judicata*; (*John Kiplangat Kibogy vs William Chemweno* Civil Appeal 418 unreported). It was not a matter finally disposed of and without redress by way of re-instatement. If a party to a suit does not appear to prosecute his application, and it is dismissed can he be allowed to bring a second application? Obviously not, since there would be no end to litigation. Having failed to appear, he must seek to explain to the court why he failed to appear and thus pray for re-instatement. It is an abuse of the process of the court, to ignore its order given when the party is at fault and simply, bring further proceedings without explaining or redeeming the fault. (Compare *Lawrance vs Lord Norreys* (1888) 39 CH.D 221 at page 237 as to an abuse of the court in duplicated proceedings). It might also lead to later judges sitting on appeal over their previous decisions or those of other judges; on the question of whether an adjournment should have been granted (compare Civil Appeal No 25 of 1977 *Mburu Kinyua vs Gachini Tuti*).

If re-instatement were refused, there would be an appeal with leave under order XLII of the Rules. There could also be review of the orders. No steps to remedy the situation were taken. Nothing new emerged on the second application. It was rightly dismissed. In the result, I would dismiss the appeal with costs to the respondent.

Hancox JA. I agree in substance, subject to that which I shall say below, with the judgment of Platt Ag JA, which I have had the advantage of reading in draft and that VV Patel J, was right in making the order he did. The reasons he gave for doing so were otherwise unexceptionable.

I do not, however, agree that this was a case where the court's inherent jurisdiction under section 3A of the Civil Procedure Act could be invoked. It is a residual jurisdiction which should only be used in special circumstances, (see *Symbol Park-Lane v Steggles Palmer* [1985] Law Gazette 13th March) in order to put right that which would otherwise be a clear injustice. Such circumstances were not present here.

Moreover, I doubt whether there was any power to reinstate an application to set aside, as seems to have been envisaged by Law JA in *Mburu Kinyua v Gachini Tuti*, Civil Appeal No 25 of 1977, and as VV Patel, J, said in this case. I note that in *Kinyua's* case Wambuzi JA, reached the conclusion, after

considering the authorities cited, that there was nothing in law to justify the second application.

I agree that the appeal should be dismissed with costs. As Nyarangi JA, also agrees it is so ordered.

Nyarangi JA. I have read the judgment prepared by Platt Ag JA in draft.

I desire to add my own comments.

The first four grounds of appeal which were argued together were the basis of a submission that the ruling of the learned SRM the subjectmatter of this appeal is invalid because the ruling was not dated and not signed in open court as required under order 20 rule 3 of the Civil Procedure Rules. The failure to date and sign the ruling was a serious omission capable of being exploited mischievously and unlawfully. The language in order 20 rule 3 has a mandatory tone and I think it must have been intended to convey the message of the importance of strict compliance with the particular order. However, failure to sign a judgment which has been pronounced is not so significant as to invalidate the judgment: *Matemba v Matemba* [1968] EA 646.

The ruling notwithstanding its brevity satisfies rule 4 of order 20 because in its totality it is a decision obtained in an action: *Sheikh v Halima* [1959] EA 500 and *Onslaw v Commissioner of Inland Revenue* (1890) 25 PBD 465 at page 466.

The chamber summons under order 9A r.8 and 10 was dismissed on the ground that Mr Ndegwa had not served Mr Anassi with the application. In opposing the application Mr Anassi specifically asked for dismissal and for execution to proceed. The senior resident magistrate agreed with Mr Anassi to the extent of granting the dismissal.

When a matter is dealt with in the rules, the Courts should regard that as excluding their inherent power some of the exceptions being where there is evidence of new and important matter or evidence: *Mulji v Jadavji* [1963] 217 at p 218, letter I and *The Bank of India Ltd v Manibhai M Patel Ltd* [1965] E A 638. Also inherent powers could not be invoked where there is another remedy available: *Sal Danah & Others v Bhailal & Co* [1968] EA 28. The decision in *Rawal v The Mombasa Hardware Ltd* [1968] EA 392 turned, “in the special circumstances of this case”- see p 393 letter H: I agree with Hancox JA that there is no circumstance in this case which would warrant the invocation of inherent power, which jurisdiction can only properly be exercised not always, but after a basis is laid, to prevent abuse of the process of court and to avoid injustice: *Mukisa Biscuit Co v West End Distbrs* [1969] EA 696. I too am doubtful if the second application was valid.

I agree that the appeal should be dismissed with costs.

Dated and Delivered this 30th Day of May, 1985

A.R.W. HANCOX

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JUDGE OF APPEAL

J.O. NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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Ag JUDGE OF APPEAL