**IN THE COURT OF APPEAL**

**AT MOMBASA**

**( Coram:Hancox JA, Chesoni & Nyarangi Ag JJA )**

**CIVIL APPEAL 59 & 89 OF 1983**

**BETWEEN**

**MUGACHIA.....APPELLANT**

**AND**

**MWAKIBUNDU.....RESPONDENT**

**(Appeals from the High Court at Mombasa, Aragon Ag J)**

## JUDGMENT

On August 18, 1980, the appellant in this appeal was struck by a vehicle driven by the first respondent and owned by the second respondent. He filed a suit claiming damages for negligence on April 3, 1981, and a defence was filed on behalf of both the respondents on June 19, 1981. Some eight months later a defence on behalf of the second respondent was purportedly filed by state counsel for the Attorney General, but no further steps were taken by him and we are now told that for the purposes of the proceedings before Aragon Ag J from whose decisions these appeals are brought, and of these appeals, that Messrs Atkinson Cleasby and Satchu, who filed the original defence, are properly on record as representing both the respondents. Thereafter the case has had an unfortunate history from the point of view of the appellant. On October 29, 1982, Messrs AYA Jiwaji and Jiwaji, who have throughout acted for the appellant, sought confirmation that the case was listed for hearing on November 16, and not merely for the purposes of the call-over, only to be told that their case number 214 of 1981, and not this case (which is High Court Civil Case No 314 of 1981) had been so listed.

This case was, however, in the annual call-over list for January 1983 in the High Court and was listed for hearing on the July 5, 1983. The clerks to both advocates' firms are recorded as being present. This hearing date was confirmed at the call-over on June 9, 1983 at which the attendance of both firms is again recorded. It then transpired, however, that the appellant's medical witness, Mr Hermant Patel, a surgeon, who was essential to the case, was out of Kenya on the hearing date. Mr Satchu, for the respondent, agreed that there had been some preliminary discussions with a view to settlement but that at no time were any proposals accepted and in particular that he was not asked to agree to any medical report. Neither did Mr Satchu admit that the medical witness was necessary for his own client's case. Accordingly, when the case was called on before Aragon Ag J on July 5 the following dialogue is recorded as having ensued:

"Coram: Aragon – J.

Plaintiff: Jiwaji Present

Defendant: Satchu Present

Clerk: Mutua.

Jiwaji: I told my client not to come as the Doctor is not here and so I thought the case would not go on. I apply for adjournment.

Court: Application refused. The court is being taken for granted. The mere fact that the Doctor is abroad does not mean that case cannot start and all other evidence taken. In any event I am now informed that the defendant does not contest medical evidence.

E. F. ARAGON

5.7.83

Jiwaji: I offer no evidence.

Court: Suit dismissed with costs.

E. F. ARAGON

5.7.83"

In view of this disastrous turn of events, the appellant's advocate then filed an application to set aside Aragon Ag J's decision, purporting to do so under rules 4 and 8 of order IX B of the Civil Procedure Rules (cap 21), once again, however, they were unsuccessful for on August 30, 1983 Aragon Ag J held that there was nothing that had occurred under order IXB to be set aside. He held that there was no question of non-attendance on the earlier date, (correctly, because the appellant had attended by his advocate) and that the suit was dismissed because Mr Jiwaji offered no evidence; maybe under pressure from the Bench, but that was nevertheless the course that he took.

Both decisions of Aragon Ag J have been the subject of appeals to this court, leave for the second appeal having been granted by the full court on October 14, 1983, having been first refused by Aragon Ag J. No leave was needed for the first appeal and they were consolidated by order of this court on January 27, 1984, but, in the event, Mr Jiwaji rightly conceded when the appeals came up for hearing, that the decision of Aragon Ag J of July 5 was not made under order IX B rule 4. Consequently, as Chesoni Ag JA whose judgment I have had the advantage of reading in draft has said, the appeal against the decision of August 30 dismissing the application to set aside the earlier one must fail.

Sympathetic as I am to Mr Jiwaji, and even more so for the plight of his wretched client, I am bound to say that in my view, the advocates, in not having their own client available on the day fixed and indeed confirmed, for hearing anticipated the decision of the court. They took a dangerous course for as is shown on the affidavits, no compromise had been reached. It might be that if the appellant had been in court, an adjournment for the further attendance of the surgeon, who belongs to a class of witness who are frequently engaged elsewhere, would have been difficult to refuse, but that is a matter for conjecture.

I have considered all the grounds in the first memorandum of appeal, condensed as they were by Mr Jiwaji in argument before us. It cannot be gainsaid that Aragon Ag J adopted a hostile approach to Mr Jiwaji's application for an adjournment. But equally it cannot be denied that Mr Jiwaji, with full knowledge that the case had been fixed for that date and confirmed, took it upon himself to advise the appellant not to attend. He frankly admitted this to the judge and to us. That was undoubtedly his fault, but I nevertheless think that in exercising his discretion to refuse an adjournment even until the afternoon, the learned Acting Judge failed to take into account a consideration which he should have taken into account (see Brandon LJ in *The Elamria* (1981) 2 Lloyds Reports page 123), namely that by visiting the

error of his advocate on the unfortunate appellant, he denied him the right of having his case heard at all, which surely, as Ainley J (as he then was) said in *Sodha v Hemraj* (1952) Uganda Law Reports, Vol 7 page 11, should be the last resort of any court. A reading of Mr Hemant Patel's reports show that the injuries, if proved to have been sustained, can certainly not be classed as trivial. In my judgment, even though the advocate was to blame, the decision of Aragon Ag J if allowed to stand, would result in grave injustice to one of the parties, in that he would be shut out from a hearing of his case. It may be that no evidence was offered for the appellant, but that flowed directly from the refusal of the adjournment.

Mr Jiwaji cited several decisions regarding the exercise of the discretion to grant or not to grant an adjournment in *Baldevkumar Mohindra v Mathur Advi Mohindra* (1953) 20 EACA 56, the Court of Appeal for East Africa upheld the trial judge's decision to refuse an adjournment. In *Manubhai Bhailalbhai Patel v Gottfried*, at page 81 of the same volume, where the adjournment had been sought on medical grounds, the decision went the other way. It is difficult not to echo the words of this court in *Abdulrehman v Almaery* Civil Appeal 36 of 1977 where it said:

"On the other hand, in so far as the defendants were concerned, the refusal of the adjournment deprived them of all opportunity of making their defence and we do not have the benefit of the court's reasons for that refusal. Did the defendants deserve such order. With respect, we think not."

It is very much easier for a Court of Appeal to appreciate the reasons for a judge's exercise of his discretion to refuse an adjournment, if those reasons are stated, as was done, for example, in another case cited by Mr Jiwaji, by that much respected judge, Sheridan J, in *Abdala Habib v Harban Singh Rajput* [1960] EA at page 326.

In the instant case, we are told by both counsel that the judge saw both counsel in his chambers, during which discussion presumably about a possible settlement, took place, of which no record had been made, save that Mr Jiwaji made some nine pages of notes. After nearly an hour, Mr Jiwaji revealed the true state of affairs, namely that he had told his client not to come. It may be, as Mr Satchu says, that this was what upset the judge, particularly as he had been to some extent deceived and his decision taken for granted. Mr Jiwaji, now overflowing with frankness, has told us that he was wholly responsible for the non-attendance of the plaintiff. Whatever the judge may have felt about being misled, and having his time wasted when he no doubt had a heavy list to get through, provided no warrant, in my respectful view, for taking a course which resulted in one party not having his rights litigated at all. This as I have said, was in my judgment, an incorrect exercise of the discretion and resulted in a denial of justice. As the authorities have shown, there are cases in which that extreme course can be taken, but this was not one of them.

For the foregoing reasons I would allow the appeal against the judge's decision of July 5, set aside his order dismissing the suit and order it to be heard by another judge. As regards costs, I would award costs of the lower court proceedings of July 5 to the respondents in any event, since it is manifest both from the record and from Mr Satchu's affidavit that they were not informed of the appellant's position as regards his witnesses until almost the end of the informal proceedings in Aragon Ag J's chambers. They behaved with absolute correctness throughout, though Mr Satchu says that had it arisen, he would have opposed the adjournment then sought. I would also award the costs of the second appeal, No 89 of 1983 which, as I said earlier, must be dismissed, to the respondents.

Different considerations arise regarding the first appeal, number 59 of 1983. In that case the appellant had no choice, given the situation in which he was placed largely through his advocate's fault, but to appeal. Again, as I think, the respondents are not to blame. I would therefore order that each party bear their own costs of the first appeal. As both Chesoni and Nyarangi Ag JJA agree with these results it is so ordered.

**Chesoni Ag JA**. The appellant filed a suit against the defendants claiming damages for personal injuries sustained from a traffic accident between a motor vehicle owned by the second respondent and driven by the first respondent and himself. At the hearing of the case on July 5, 1983, the appellant's advocate unsuccessfully applied for an adjournment because the plaintiff and his key witnesses, a medical surgeon, who had examined him, were not present. The surgeon was overseas and in view of that, the appellant's counsel not anticipating an unfavourable attitude by the court to an application for adjournment, told his

client not to turn up. The court, however rejected the application for adjournment as a result of which the appellant's advocate offered no evidence and the suit was dismissed with costs. The appellant then later applied for judgment and decree, entered in the matter to be set aside under order IX B rules 4 and 8 of the Civil Procedure Rules. That application was dismissed by the same judge, Aragon Ag J, and the plaintiff appealed against both the judgment in the suit passed on July 5, 1983 and the order of August 30, 1983.

Rule 4 provides for entering judgment in default by the plaintiff to attend court on the day fixed for hearing his case and rule 8 is the provision under which an application to set aside such *ex-parte* judgment under order IX B may be made. When the adjournment application was refused, the plaintiff's advocate remained in court and did conduct the case. He said he had no instructions to withdraw. In *Din Mohamed v Lalji Visram & Co* (1937) 4 EACA 1 it was held that on the date fixed for the hearing, if counsel duly instructed, on being refused an adjournment, elects to leave the court and takes no further part in the case that fact does not constitute the proceedings *ex-parte*. Here, though the counsel did not leave the court he elected to offer no evidence, which did not constitute the proceedings *ex-parte* and the learned judge had no alternative but to enter judgment for lack of evidence. Mr Jiwaji must take blame for the imprudent course he took. He has conceded that his decision to offer no evidence did not constitute the proceedings before the acting judge *ex parte*. The application to set aside the judgment of July 5, 1983 under order IXB rule 8 was in the circumstances misconceived and the appeal against the order dismissing that application must fail.

On July 12, 1983, the appellant took the correct course against the court's order dismissing the case and lodged a notice of appeal. He subsequently filed the appeal which was consolidated with the appeal against the order of August 30, 1983. There are eight grounds of appeal, but I need not list them.

The decision by the appellant's advocate to offer no evidence was improper and ill-thought. Nevertheless, the affidavits of both counsel for the appellant and the respondents in the application for setting aside the decision show that the ground for seeking adjournment on July 5, 1983 was genuine as Mr Patel was out of the country then. He was the appellant's key witness and it was irrelevant whether the defence needed or did not need him. There was no evidence, let alone any suggestion, that the plaintiff or his counsel was instrumental to Mr Patel's absence. The judge does not appear to have carried out a sufficient inquiry into the matter before refusing the adjournment. As properly stated in the grounds of appeal no adjournment to the afternoon of the same day to enable the plaintiff personally to attend and testify was even considered. Such an adjournment was reasonable and desirable. The learned judge should not have been so anxious to dispose of the suit without giving the parties an opportunity to be heard, which is a cardinal rule of natural justice. The decision of the appellant's advocate to offer no evidence, though improper appears to have been made under extreme but unfair pressure from the Bench. From the record of July 5, 1983 Mr Satchu was not even given an opportunity to be heard on the application for adjournment. It cannot be said that in the circumstances of this case the acting judge observed the principles of natural justice, the appellant had a fair trial and justice, though, it might have been done, was seen to be done. These considerations constrain me to associate myself with the sentiments of my learned brother Hancox JA in deprecating the attitude adopted by the learned judge in this case. The court should indeed discourage unnecessary adjournments 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. The case of *MB Patel v Gottfried* (1953) 20 EACA 81 at 84 stated the principles involved in refusing an adjournment. See also *AA Abdul Rehman & Another v Almaery* Civil Appeal No 36/77.

The granting of an adjournment involves an exercise of a discretion by the presiding judge and this court will not interfere with the presiding judge's exercise of the discretion unless he has either acted on wrong principles or exercised his discretion unjudiciously: *Mbogo and Another v Shah* [1968] EA 93. *Mohindra v Mohindra* (1953) 20 EACA 56. In this case the judge exercised the discretion unjudiciously.

I would , for the reasons stated allow the appeal against the learned judge's decision dismissing the suit, but dismiss the appeal against the order of August 30, 1983. I would set aside the judge's order of July 5, 1953 and direct the suit to be heard by another High Court judge. As to costs I agree with the orders proposed by Hancox JA in his judgment.

**Nyarangi Ag JA**. I have had the advantage of reading the judgment of Hancox JA and Chesoni Ag JA and I agree with the two judgments and with the orders proposed and I have nothing useful to add.

**Dated and Delivered at Mombasa this 1st day of February 1984.**

**A.R.W.HANCOX**

**.....**

**JUDGE OF APPEAL**

**Z.R.CHESONI**

**.....**

**AG. JUDGE OF APPEAL**

**J.O.NYARANGI**

**.....**

**AG. JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**