IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Chesoni Ag JA)

CIVIL APPEAL NO. 91 OF 1983

BETWEEN

NGOME.....APPELLANT

AND

PLANTEX COMPANY LTD.....RESPONDENT

(Appeal from the High Court of Nairobi, Gachuhi J)

JUDGMENT

Chesoni Ag JA The appellant's suit was dismissed in the resident magistrate's court at Sheria House, Nairobi, under order IXB rule 4(1) of the Civil Procedure Rules (cap 21). The appellant and his then advocate, had failed to attend court on the day fixed for the hearing of the suit. The appellant later applied to the same court, under rule 8 of the same order, to have the dismissal order set aside, but that application was dismissed and so was the appeal to the High Court (Gachuhi J) from the refusal to set aside the *ex parte* judgment.

The question is: can a plaintiff whose suit has been dismissed under rule 4 for failure to attend court on the hearing date apply for the order dismissing the suit to be set aside under order IXB rule 8? Both Mr Kinyanjui, for the appellant, and Miss Mwangi, for the respondent, agreed that this was the issue. Mr Kinyanjui submitted that, taking into account the definition of the word "decree" in section 2 of the Civil Procedure Act (cap 21), judgment includes a dismissal of a suit under rule 4 of order IXB, but it did not include an order of dismissal for default, as envisaged under section 2(b) of the Act. He also argued that rule 7(2) of order IXB forbade the plaintiff bringing a fresh suit but did not affect an application under rule 8 of the same order to set aside a judgment given under rule 4. He added that the words "Except for good cause" used in rule 4, anticipated the plaintiff being given an opportunity to explain the reason for his nonattendance. Had the legislature intended it to be otherwise, it would have expressly said so, as it did in respect of bringing a fresh suit.

According to Miss Mwangi ,the definition of "decree" covers a dismissal for default. She contended that rule 4 used the words "shall be dismissed," and there was no provision in the rule for an opportunity for the plaintiff who failed to be present in court on the day fixed for the hearing to come later and explain the cause of his failure to attend. The door is closed completely by rule 7(2). In any event, even if the judgment sought to be set aside were set aside, the suit would be time barred, as the effect of the setting aside would be to enable the appellant to bring a fresh suit. She relied on the decision of Mead J, in

Fredrick Kibikwoi Arap Terer v Kimaiyo Magut Arap Maswai & Anor HCCC No 9 of 1980 (unreported). In that case the learned judge held:

"Dismissal under r 4 is absolute in that r 7(1) prohibits a fresh action being brought in respect of the same cause of action. I hold that r 8 does not permit the court to set aside the dismissal of a suit effected under the provisions of r 4."

There is no need for us to contrast order IXB with the English order XXXV as Mead J did, and both counsel did not refer to the English legislation. It was not necessary nor was it relevant, for them to do so. Mr Justice Gachuhi had this to say:

"The words of r 4(1) of Order IXB and r 7 are quite clear. There is no provision for revival of dismissal, except by the plaintiff filing a fresh action. Yet, any dismissal under rule 4, is a bar to a fresh suit. Rules 4(1) and 7(2) do not allow the court to entertain an application under rule 8 of the same order which is the subject of this appeal … If the legislature wished to give room for a revival of any dismissal, this could have been enacted for, but the position as it is now, there is no such procedure. The position is that the dismissal cannot be set aside."

In my opinion, a dismissal of the suit of an absent plaintiff under rule 4(1), of order IXB is not the same as a default judgment entered under order IXA against a defendant in default of entering appearance or failing to file a defence. The former is for failure to attend court on the day fixed for hearing of a suit in which pleadings have closed, whereas the latter is for failing to take an essential step in the pleadings and is entered upon the defendant's application on a prescribed form (No 26 of Appendix C). The wording of rule 4(1) is as follows:

"If on the day fixed for hearing after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

I would agree with Miss Mwangi, that the law requires the court to dismiss the suit, if the plaintiff is absent on the day fixed for hearing it, but if there is good cause, which must be recorded, it (court) is not required to dismiss the suit.

What is good cause is for the trial judge to determine. The converse of Miss Mwangi's submission therefore, gives force to Mr Kinyanjui's argument that the words "except for good cause" by implication impose on the court a duty to listen to the cause for the plaintiff's absence either before or after dismissing the suit under rule 4(1).

How is the plaintiff expected to come before the court and show his good cause? One way is by arriving just immediately after the case has been called outside the court room for hearing, but before it is dismissed. But then, there is the case of the plaintiff who may have been seriously injured in a motor accident and is lying in hospital, or whose advocate is so injured and cannot explain away his absence on the same day for hearing before dismissal of his suit. Rule 8 of order IXB says that:

"Where judgment has been entered under this Order the court, on application by summons, may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The Civil Procedure Act does not define the word "judgment". According to Jowitt's *Dictionary of English Law* 2nd edn p 1025:

"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."

Mulla's *Indian Civil Procedure Code*, 13th Edn Vol 1 p 798 says:

"Judgment" means the statement given by the judge on the grounds of a decree or order;

"Judgment - In England, the word judgment is generally used in the same sense as decree in this code."

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceeding or a suit under rule 4(1) of order IXB or under any other provision of law. A dismissal of a suit, under rule 4(1), is a judgment for the defendant against the plaintiff. An application under rule 8 of order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See rule 7(1) of order IXB. This, I think, clearly shows that rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under rule 4(1) only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under rule 8. It does not make sense to allow an absent plaintiff under rule 2 to apply under rule 8 to set aside a dismissal and to deny him a similar remedy when he was absent under rule 4(1). In *Herman Mugachia v Hamis Mwakibundu & Another* Civil Appeals Nos 59 and 89 of 1983 (unreported) this court said *obiter*:

"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 provisions under which an application to set aside such *ex parte* judgment under Order IXB may be made."

I can read no prohibition in rules 7(2) and 8 to a plaintiff applying under rule 8 to set aside a dismissal of a suit under rule 4(1). Mulla on Indian Civil Procedure Code (*ibid*) p 802, paragraph 2, states as follows:

"A plaintiff whose suit is dismissed under rule 8 for default of appearance on the day fixed for the hearing, cannot appeal from the order of dismissal, as such an order is not a decree ….. but may -

(1) .....

(2) apply under this rule for an order to set aside the order of dismissal."

Rule 8 of order IX of the *Indian Civil Procedure Code* (*ibid*), whose marginal note is "procedure where defendant only appears" is substantially similar to our order IXB rule 4(1).

I wish to mention that rule 8 has been amended by Legal Notice 16/84 and now allows for an application to set aside a dismissal, although this was still permitted by the former rule 8.

It is apparent, from what I have said, that the application under rule 8 to set aside the order made on December 10, 1981, dismissing the suit under rule 4(1) was conceivable and competent. The appellant explained the grounds of his absence in support of his application in the affidavits he swore on November 30, 1981, and April 13, 1983. The first affidavit was in support of the application filed by DM Mareka, advocate, but withdrawn on March 3, 1983, and the second affidavit was in support of the renewed application which the appellant himself filed in April, 1983, and was dismissed by a resident magistrate on April 29, 1983, as being misconceived and incompetent, which dismissal was upheld by Mr Justice Gachuhi, as I have already said.

In his second affidavit, which is the one relevant for the purpose of this appeal and the contents of which are identical to those of the first one, the appellant deponed that his illusive counsel, Miss Mwangi, informed him that his case had been fixed for hearing on November 19, 1981, and he (counsel) would attend court on that day. Although the appellant was told by Miss Mwangi that he did not have to be present in court on November 19, 1981, the appellant, all the same went to the resident magistrate's court in November, but before November 19 to verify his counsel's information. He then learnt of the dismissal on November 10, 1981, of his suit. So, according to what the appellant has deponed to his suit was dismissed before the date he was informed by his counsel the suit had been fixed for hearing. By dismissing the appellant's application as incompetent, in that it could not be preferred under rule 8, both

the magistrate and learned judge, did not consider it's merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion: See *The Elamria* [1981] 2 *Lloyd's Reports* p 123, which this court followed in *Carl Ronning v Societe Navale Chargeurs Delmas & another* Civil Appeal No 16 of 1982 (unreported) and as said by Hancox JA in *Herman Mugachia, supra*, by visiting the error of his advocate on the unfortunate appellant, the two lower courts denied him the right of having his case heard at all. That, as said by Ainley J (as he then was) in *Sodha v Hemraj* [1952] Uganda LR Vol 7, p 11, should be the last resort of any court.

I would hold that, both courts below have, in the circumstances and on the facts of this case, exercised their discretion on wrong principles and as justice did not result from the exercise of the discretion, this court should interfere: *Mbogo & Anor v Shah* [1963] EA 93 and *Mohindra v Mohindra* (1953) 20 EACA 56. In the result, I would allow the appeal, set aside the High Court judgment on appeal and also set aside the resident magistrate's order of April 29, 1983 dismissing the appellant's application under rule 8 and direct that the appellant's original suit in the resident magistrate's court be set down for hearing according to law. The respondent should pay the appellant's costs in this court, the High Court and the resident magistrate's court relating to the application under order IXB rule 8 originating by the chamber summons of April, 1983.

Kneller JA. I agree and as Hancox JA does too, the orders proposed by Chesoni Ag JA are the orders of the court.

Hancox JA. I also agree.

Dated and Delivered at Nairobi this 10th day of July 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

.....

JUDGE OF APPEAL

Z.R.CHESONI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR