REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 31 OF 2004

JAMES A. MOHOL……..…..……..…..…APPELLANT

AND

KENYA BREWERIES LIMITED…….....…….....…….…….RESPONDENT

(An appeal from the Orders of the High Court of Kenya at Nairobi (Kuloba, J.) dated 29th day of July, 2003

in

HCCC NO. 1958 OF 1999)
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JUDGMENT OF THE COURT

JAMES A. MOHOL, the appellant herein was the plaintiff in Nairobi HCCC No. 1958 of 1999. By a plaint dated 7th May 1999, he sued **KENYA BREWERIES LIMITED**, the respondent herein for several reliefs arising from what he termed as unlawful termination of employment by the respondent.

The respondent denied liability putting forth the defence that it had acted strictly within the appellant's contract of employment which contained a termination clause. After the close of pleadings, the parties who were both represented by counsel, complied with the formal procedures of taking directions, filing the list of documents etc. as provided for under the civil procedure rules.

On 31st May 2000, the representatives of both counsel took hearing dates by consent. The matter was fixed for hearing on 17th and 18th October 2000. The record does not indicate what happened on those days but the matter did not proceed to hearing as assigned nor did it take off on two subsequent occasions when other hearing dates had been given.

Ultimately, the matter came up for hearing before Kuloba J, (as he then was) on 9th October 2002. On that day, learned counsel *Mr. Nyamogo* appeared for the appellant while learned counsel *Mr. Gachuhi* appeared for the respondent.

When the matter was called out, counsel for the appellant prayed for an adjournment saying that his client was not present in court. He addressed the court thus:-

"Am not ready to proceed, although we took this date and again confirmed it by consent. I wrote to my client on 20th September 2002 after the matter had been confirmed. The letter was registered. It was received by him. He contacted me three days ago, saying he is bereaved. He is not in a position to

travel to Nairobi. I communicated this fact to my learned friend."

On his part, *Mr. Gachuhi* conceded the application for adjournment saying that he had been informed.

The learned Judge nonetheless in a rather strongly worded ruling declined to allow the adjournment saying that no evidence of bereavement had been placed before the court to justify the application for adjournment. According to the learned Judge,

"Not every death in the vicinity or clan or other geographical area or party should be allowed to disrupt court business. And not every allegation, not proved, of bereavement should justify the putting off the hearing of a case."

The learned Judge directed that the matter proceeds to hearing. Faced with a situation where the plaintiff was not available to testify, *Mr. Nyamogo* informed the court that he had no evidence to offer. *Mr. Gachuhi* on the other hand informed the court that the claim was not admitted and he had no counterclaim.

The learned Judge then proceeded to prepare a "judgment" and made a finding that ***"since the claims are not admitted, and there is no evidence to prove any aspect of the claims, the suit is dismissed in its entirely".***

A subsequent application filed under **Order 1XB Rule 8** seeking to set aside the said judgment was dismissed by the learned Judge in a short order in the following words:

"This suit not having been dismissed for non-attendance, but on account of lack of evidence to prove the disputed claim the application made under order 9B Rule 8 is inappropriate and is struck out without costs."

It is that order dated 29th July 2003 which provoked this appeal in which the appellant relies on only two grounds as hereunder:-

(1) ***The learned trial Judge erred in law by striking out the appellant's notice of motion without giving the appellant an opportunity to argue the application on merit.***

(2) ***The learned trial Judge misdirected himself by holding that the appellant suit was not dismissed for non-attendance.***

He urges this Court to allow the said appeal and reinstate the suit before the High Court for hearing on merit. In his submissions before us, *Mr. Nyamogo* faulted the learned Judge for proceeding with the hearing in the absence of the plaintiff and thereafter refusing to set aside the impugned judgment even after the evidence of bereavement was placed before him by way of a burial permit. He submitted that if the appeal is allowed and the said judgment set aside, the parties will have the opportunity to be heard and the matter will be determined on merit. He submitted that the respondent will not suffer any prejudice that cannot be compensated by way of damages. He went on to submit that the claim involves a colossal amount of money and this Court should invoke the overriding objective under **Section 3A** and **3B** of the **Appellate Jurisdiction Act** to ensure that substantive justice is done in the matter.

Mr. Gachuhi on his part insisted that the suit was not dismissed on the ground of non-attendance as the appellant's counsel was present in court. He maintained that the same was dismissed on merit. For that reason he argues that the appellant ought to have appealed against the judgment of the High Court instead of applying for it to be set aside. He also argued that the burial permit presented to court ought to have been annexed to the appellant's affidavit instead of that of counsel. At any rate he dismissed it as it was issued two days after the judgment in question.

We have considered the pleadings before the trial court, the impugned judgment and ruling giving rise to this appeal, the grounds of appeal, the submissions of both learned counsel and the applicable law.

The facts as to what happened before the trial court are not disputed at all. Indeed our understanding of this matter is that the appeal revolves around the question whether the judgment in question was an ex-parte judgment pursuant to the then **Order 1XB Rule 4** or it was a proper judgment given on the merit of the case. The adjunct to this issue is whether under **Order 1XB** of the former Civil Procedure Rules a "plaintiff" included counsel or other agent. We note that the word actually used was "defendant" and "plaintiff" and there is no reference to counsel or any other representative or agent. An advocate cannot testify in place of a plaintiff or defendant in a suit where *viva voce* evidence is to be adduced.

In this case therefore, counsel for the plaintiff who was in court could not adduce evidence in place of the plaintiff. Under **Order 1XB Rule 4** in the absence of the plaintiff, the matter could only be dismissed under that rule. There is no provision for the matter being dismissed on "merit" as having not been proved while in actual fact there was no evidence adduced. In our view, the matter was not decided on merit. The constructive interpretation of the proceedings before the learned Judge is that the suit was dismissed as was provided for under **Order 1XB**

Rule 4 of the then **Civil Procedure Rules**. This was not a matter that can be said to have been decided on merit. It was therefore, a judgment that was amenable to setting aside under **Rule 8 of Order 1XB**. Counsel for the appellant was therefore right when he moved the court to set aside the said judgment under **Order 1XB Rule 8** of the **Civil Procedure Rules**. The learned Judge therefore erred when he made the finding that the suit had "not been dismissed for non-attendance, but on account of lack of evidence to prove the disputed claim". With respect to the learned Judge, there could not have been evidence to prove the claim if the plaintiff was not present.

We also find that the plaintiff was denied an opportunity to be heard on a matter which in our considered view was not frivolous at all. He should have been given an opportunity to be heard so that his suit could be determined on merit.

We appreciate *Mr. Gachuhi's* apprehension that due to the age of this matter, the defendant may not even be in a position to avail witnesses to testify and defend the suit. We note however, that the respondent is actually a limited liability company and it must still have its records in respect of plaintiff's claim. The claim is against the company and not against a specific person and so there should be no difficulty in the respondent getting the necessary records and witnesses to defend the suit.

In sum, we find that this appeal has merit and the same succeeds. In our view the application for setting aside the judgment in question which the learned judge dismissed without giving the parties an opportunity to be heard had merit and it should have been heard and allowed. Rather than set aside the said ruling and send the file back to the High court for the hearing of the said application, we feel that in the wider interests of justice and pursuant to the provisions of section 3A and 3B of the Appellate jurisdiction Act, the order that commends itself to us is one allowing the appeal, setting aside the order dated 29th July 2003 in HCCC No. 1958 of 1999, and ordering that HCCC NO.1958 of 1999 be and is hereby reinstated for hearing on merit.

The costs of this appeal shall abide the outcome of the main suit.

Dated and delivered at Nairobi this 9th day of November, 2012.

E. M. GITHINJI
…….
JUDGE OF APPEAL

W. KARANJA
……..……..

JUDGE OF APPEAL

D. K. MARAGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR