



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: TUNOI, O'KUBASU & GITHINJI, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 273 OF 2008

BETWEEN

1. CHANNAN SINGH CHATTHE
2. SATWANT SINGH CHATTHE
3. SUKHWINDER SINGH CHATTHE
4. RAGHBIR SINGH CHATTHE (All T/A CHANNAN AGRICULTURAL CONTRACTORS)
5. CHARNJIT SINGH HAYER
6. RAJNIKANT KARSANDAS SOMAIA APPLICANTS/RESPONDENTS

AND

DELPHIS BANK LIMITED (now Oriental
Commercial Bank Limited) RESPONDENT/APPELLANT

(Application to strike out the record of appeal from the order of the High Court of Kenya at
(Tanui, J.) dated 4th May, 2005
in

H.C.C.C. NO. 164 OF 2003)

RULING OF THE COURT

This is an application under **Rules 80 and 85 (1)** of the *Court of Appeal Rules* for orders that the notice of appeal and *Civil Appeal No. 273 of 2008* be struck out on the main ground that no leave was granted to appeal against the decision of Tanui, J. dismissing the appellant's counter-claim.

Sometime in December, 2003, four persons filed *Kisumu High Court Civil Suit No. 164 of 2003* against **Delphis Bank** (now **Oriental Commercial Bank Ltd.**) (bank), the appellant herein, relating to the alleged loan of Shs.40,000,000/= advanced by the bank to Kibos Sugar Industries on the security of land parcel No. South Wanga/Lureko/1892. The plaintiffs averred, inter alia, that the bank did not advance Shs.40,000,000/= to Kibos Sugar Industries and sought various declarations regarding the security including an order directing the appellant to discharge the charge.

The bank filed a defence and counter-claim maintaining that Shs.40,000,000/= was advanced to Kibos Sugar Industries. The bank further averred that after the partnership of Kibos Sugar Industries was dissolved the outstanding debt to the bank was apportioned as follows:

Charanjit Singh Hayer

- **Kshs.19,908,507.00**

Raghibir Singh Chatthe - **Kshs.19,908,507.00**

Rajnikan Karsindas Somaia - **Kshs.28,751,691.40.**

The appellant counter-claimed for those sums of money from each of the three when the suit came for hearing before Tanui, J. on 4th May, 2005. Mr. Menezes appeared as counsel for the 1st defendant in the counter-claim. Miss. Edith Muriu who appeared for the bank raised objection to Mr. Menezes representing the 1st defendant to the counter-claim on the ground that he was the one who drew the impugned charge and was therefore a potential witness. The trial judge overruled the objection and ordered the trial to proceed.

Thereafter, Mr. Wasuna, learned counsel for one of the parties applied that the bank should give evidence to prove its case first. But despite the objection by Miss. Muriu the trial judge ordered the defendant to begin. Thereupon Miss. Muriu applied for leave to appeal which was granted. Thereafter Miss. Muriu applied for adjournment and a stay of proceedings for 7 days to enable her to file a formal application. The latter application was disallowed and the trial judge ordered the trial to proceed. The record shows that the trial resumed at 2.30 p.m. but Miss. Muriu was not in court. An application for dismissal of the counter-claim was made. The trial judge acceded to the application and dismissed the counter-claim with costs. Thereafter the trial judge heard the plaintiffs' case. The bank has filed this appeal against the order dismissing the counter-claim.

It is submitted in support of the application that the dismissal of the counter-claim was under **Order IXB Rule 4 (1)** of the *Civil Procedure Rules* (now **Order 12 Rule 3 (1)**); that Miss Edith Muriu decided to withdraw from the case and walked out of the court without leave of the court; that the bank did not make an application under **Order IXB Rule 8** to set aside the *ex parte* order, nor obtain leave to appeal against the order and that the appeal is incompetent.

The bank has filed a replying affidavit explaining, among other things, that Miss. Edith Muriu deemed it prudent to withdraw from the proceedings following the decisions of the trial judge; that the bank has in addition filed *Civil Appeal No. 180 of 2008* against the decision allowing Mr. L. G. Menezes to participate in the proceedings and *Civil Appeal No. 179 of 2008* against the order directing the bank to adduce evidence first. It is deposed that after Edith Muriu withdrew the proceedings proceeded *ex parte*, Mr. Marete, learned counsel for the bank submitted, *inter alia*, that the bank has undoubted right of appeal from the dismissal of the counter-claim and that it is a speculation that the counter-claim was dismissed under **Order IX Rule 4 (1)** since the record does not indicate so.

The respective counsel did not cite any relevant authority. Our research has yielded two relevant authorities. The first is **Din Mohamed vs. Lalji Visram & Co.** [1937] (4 EACA) 1 a Kenya case. In that case, the defendant's counsel applied for adjournment of the plaintiff's suit on the ground, *inter alia*, that the principal defence witness was ill. The application for adjournment was disallowed whereupon the defendant's counsel withdrew from the case. The trial court heard the plaintiff's case and ultimately entered judgment for the plaintiff. A subsequent application to set aside the "*ex parte judgment*" was dismissed by the trial court on grounds that the judgment so entered was not *ex parte*.

On appeal to the superior court, the decision of the trial court was reversed. On further appeal to the predecessor of this Court, it was held that, if a counsel duly instructed, on being refused an adjournment, elects to leave the court, and take no further part in the case, that fact alone does not constitute the proceedings *ex parte*. In the course of his judgment, Dalton, C.J. with whom the other members of the court agreed, said at page 5 last paragraph:

“The defendants cannot say that they had no opportunity of putting their case before the court. Whatever label is given to the proceedings of that date, the Magistrate on refusing an adjournment could only have proceeded to hear the case as he did, and if the plaintiff proved his case, enter judgment for him. On the facts here that was not in my opinion an *ex parte* judgment and the remedy of the defendants was to appeal and not to apply under Order IX Rule 24”.

That case was followed by this Court in **Mugachia vs. Mwakibundu** [1984] KLR 572 which is even more relevant as “*counter-claim*” is considered as an independent suit.

In that case, the plaintiff’s advocate applied for adjournment of the suit on the hearing date. The application for adjournment was disallowed whereupon the plaintiffs advocate stated that he had no evidence to offer. The trial Judge unhesitatingly dismissed the suit. Thereafter, the plaintiff applied for the setting aside of the judgment under **Order IXB Rules 4 Civil Procedure Rules**. The application was dismissed by the trial Judge on the ground that there was no question of non-attendance. The appellant filed two appeals. The first against the order dismissing the suit and the second, with leave of the court, against the order dismissing the application to set aside judgment.

At the hearing of the appeal the appellants counsel conceded that his decision to offer no evidence did not constitute the proceeding *ex parte*. The Court made a finding that the decision to dismiss the suit was not made under **Order IXB Rule 4** and dismissed the appeal against the order dismissing the application to set aside as misconceived.

This Court however allowed the appeal against the order dismissing the suit saying that was the proper course and that no leave was required to file such appeal.

The case of **Magachia** applies in the circumstances this case. It is clear that **Order IXB Rule 4 (1)** (now **Order 12 Rule 3 (1)**) applies in cases of non-attendance – that is where the plaintiff or his counsel does not attend for hearing of the case in contrast to cases where the plaintiff or his advocate has in fact attended the hearing of the suit but for one reason or another fails to prosecute the suit or counter-claim as the case may be as happened in the present case.

It follows that **Order IX Rule 4 (1)** did not apply in the circumstances of the case and the counter-claim was not dismissed under that rule. Indeed the superior court did not say so. Accordingly the order dismissing the counter-claim was appealable as of right.

In the light of the foregoing, the application is misconceived. It is dismissed with costs to the appellant/respondent.

Dated and delivered at Kisumu this 13th day of April, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

