



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 83 OF 2001

J.S.K. (CARGO) LIMITED APPELLANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial

Courts (Ransley, Commissioner of Assize) dated 20th June, 2000

in

H.C.C.C. NO. 1904 OF 1999)

JUDGMENT OF THE COURT

The appellant, ***J.S.K. (Cargo) Limited*** (the appellant) was the plaintiff in a suit it commenced by plaint in which it claimed damages and a liquidated sum of ***Kshs.27,123,583.20***, interest thereon at court rates from the date of the suit until payment in full and costs. The claim arose from an alleged lease of an aircraft from it by ***Kenya Airways Limited***, the respondent in this appeal, which was named the defendant in that suit.

The respondent entered appearance and later filed a written statement of defence in which it denied liability. Pleadings closed and the suit was later set down for a hearing. All parties had notice of the place, date and time the matter would be heard, but when the matter was called on ***9th May, 2000***, an advocate by the name Wachira appeared for the plaintiff and Mr. Deverell for the defendant. Mr. Wachira applied for adjournment on the ground that he wrote to the plaintiff on ***20th January, 2000*** informing it of the hearing date and seeking further instructions but received no response. His letter of reminder dated ***13th March, 2000*** went unanswered. The application was opposed by Mr. Deverell and the court agreed with him whereupon Mr. Wachira sought the leave of the court to cease acting for the appellant. Mr. Deverell did not oppose withdrawal. Immediately thereafter, Mr. Wachira announced that the appellant's representative had come. By consent the hearing of the case was stood over to ***2.15 p.m.*** At that time Mr. Wachira informed the Court that his client wanted to address the court. He was granted the opportunity to do so.

In his statement to the court, ***James Samuel Kinyanjui*** who described himself as the Managing Director of the plaintiff company, said that he had some time back been involved in a car jacking incident in which he was injured, was hospitalized, saw various medical specialists for treatment, and was as a result not

able to get in touch with his company's advocates. He sought adjournment to enable him engage other counsel to represent the company. The court declined an adjournment. Mr. Kinyanjui refused to testify on being asked to do so, whereupon the court on the informal application by Mr. Deverell for the respondent, dismissed the appellant's suit. A formal application to set aside the dismissal was, too, dismissed and thus this appeal was provoked. That application was brought pursuant to the provisions of **Order 9B rule 8** of the Civil Procedure Rules and the court's view was that an application under that rule could not lie as the plaintiff had appeared in court for the hearing of its suit.

In the appeal before us the memorandum of appeal filed on behalf of the appellant by Musalia Mwenesi, advocate, **sixteen grounds** have been proffered. However, those grounds were not argued. The appeal was scheduled to come on **22nd October, 2008** for hearing. It had earlier come for hearing on two or more occasions but was adjourned for various reasons which are not material in the determination of the appeal. On the **22nd October, 2008**, there was in effect a replay of what happened at the High Court when the appellant's suit was dismissed. Musalia Mwenesi did not appear. Mr. Kinyanjui was however present. He addressed the court and said that he was the chairman of the appellant company; the company had an advocate representing it but the said advocate had not appeared and he needed an adjournment to check on him, which adjournment was granted at **10.10 a.m.** At **11.00 a.m.** an advocate by the name Mr. Thangei appeared for the appellant, but merely for the purpose of informing the court that Mr. Mwenesi was unable to attend court because of unforeseen but undisclosed circumstances. He requested for an adjournment of the appeal to an early date. As expected, Mr. Gachuhi, counsel on record for the respondent, opposed the application and expressed the view that because no reasons were disclosed for seeking the adjournment the appeal should be dismissed under **rule 99 (1)** of the Court's Rules. That rule donates the power to the Court to dismiss an appeal where the appellant or his advocate does not appear. The informal application did not find favour with the Court which accordingly directed that Mr. Kinyanjui as an officer of the appellant, proceed to urge the appeal on behalf of the appellant. Mr. Thangei excused himself saying that his instructions were limited to applying for an adjournment.

We wish to observe that the practice where advocates appear on behalf of other advocates merely for limited purposes appears to be gaining currency. In our view it is a practice which should stop. If an advocate agrees to hold another's brief, he should be prepared to go the full mile. Otherwise it is likely to create the unfortunate impression that the Court is expected to agree with him. In matters relating to adjournments, the court exercises judicial discretion. The court may or may not agree to an adjournment and if it declines an adjournment, it should not be made to feel that injustice would be worked if counsel withdraws from the matter on account of his instructions being limited.

Mr. Kinyanjui addressed the Court on the appeal as follows. The facts of the appeal are in the Court record. The case had destroyed a youngman who otherwise had a bright future. A lot of money had been spent pursuing the case. He had pursued the case keenly but there were certain strange forces operating against the company. It was his view that the superior court improperly proceeded with the hearing of the appellant's case because there was an interlocutory application pending at the time which should have been disposed of first before the hearing.

In answer, Mr. Gachuhi took us through the background facts of the case and urged the view that as the appellant's suit had not been dismissed for non-appearance, its application under **Order IXB rule 8** of the Civil Procedure Rules was incompetent. Consequently, he said, it was properly dismissed. He therefore urged us to dismiss the appeal with costs.

Order IXB rule 8, of the Civil Procedure Rules provides as follows:-

“Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

A casual reading of that rule would suggest that the appellant was entitled under **Order IXB rule 8** to bring its application to set aside the dismissal of its suit. The heading of the Order, however, makes it clear that the rule actually refers to setting aside a judgment or dismissal order, made for non-attendance of a party. Mr. Kinyanjui was present in court when the appellant's suit was called. He described himself

then as the Managing Director of the appellant company. A managing director of a company is a senior officer of the company. **Order V rule 2** of the **Civil Procedure Rules** makes provision for service of processes on a corporation. It provides as follows:-

“2. Subject to any other written law, where the suit is against a corporation the summons may be served –

(a) on the secretary, director or other Principal Officer of the corporation;”

From this rule, it is clear that a Managing Director or a Chairman of a Corporation is a principal officer of the corporation who, may therefore speak for the company and who, under the law, is permitted to act for the company in legal proceedings. Consequently, as Mr. Kinyanjui was in court on the date the appellant’s suit was dismissed, the dismissal was not for non-attendance but for failure to adduce evidence in support of the appellant’s case. Consequently, as it was stated by this Court in **DOVER INSURANCE AGENCY LTD. V. UAP PROVINCIAL INSURANCE COMPANY LIMITED**, **Civil Appeal No. 240 of 1999 (unreported)**, a dismissal which does not fall within the purview of **Order 1X B rule 1**, will not be the subject matter of an application under **Order 1XB rule 8**. We reiterate the words of this Court in **JOHNSTONE AGGREY OCHOLA V. NATIONAL BANK OF KENYA LTD.** **Civil Appeal No. 139 of 1999 (unreported)**, in which the Court categorically stated that a Corporation acts through its officers. Mr. Kinyanjui was acting on behalf of the appellant both here and in the court below. That being our view of the matter, it is our view and we so hold that the appellant’s application pursuant to the provisions of **Order IXB rule 8**, Civil Procedure Rules, did not lie and accordingly it was properly dismissed. Accordingly this appeal lacks merit and it is therefore dismissed with costs.

Dated and delivered at Nairobi this 21st day of November, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR