



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:TUNOI,BOSIRE & O,KUBASU JJ.A.)

CIVIL APPEAL 139 OF 1999

BETWEEN

JOHNSTONE AGGREY OCHOLA..... APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Justice Ole Keiwua) dated 24th day of February 1999

in

H.C.C.C. No.628 of 1995)

JUDGMENT OF THE COURT

O IXB rule 4(1) of the Civil Procedure Rules (the Rules) provides that:

“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.”

Likewise o XVI rules 3 and 4 of the Rules provides that:

“3. Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose off the suit in one of the modes directed in that behalf by order IXB, or make such other order as it thinks fit.

4. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.”

The appellant, Johnstone Aggrey Ochola, whom we shall hereafter refer to as the appellant, was the defendant in a suit commenced in the superior court by plaint by National Bank of Kenya Limited (the Bank). When that suit came for hearing, on 4th May, 1998, the appellant and his counsel, Mr Amuga

were present but only counsel for the Bank, one Oduge, attended. She applied for the adjournment of the case arguing that she had had difficulties reaching her client, and also that the Bank “is taking time to extract” some documents relevant to the case. Mr Amuga for the appellant did not oppose the application for adjournment. However, the learned trial judge, Ole Keiwua J (as he then was) was disinclined to grant the adjournment and without assigning any reasons made an order in the following terms:

“Order”

Adjournment is refused”.

Counsel for the Bank thereupon announced that she would not be able to proceed with the plaintiff’s case. The trial judge then without further ado ordered the suit to be dismissed with costs.

The record of proceedings shows that after the dismissal neither party took any steps on record until 16th December, 1998, when the Bank filed an application by Chamber Summons expressed to be brought under o IXB rule 8 and o XLIX rule 5 of the Rules and section 3A of the Civil Procedure Act, for an order vacating, varying or reviewing the order dismissing the Bank’s suit. By dint of the provisions of o XLIX rule 5, above, the application was heard by the learned judge who made the dismissal order, and after hearing the parties’ respective counsel he allowed the application and thereby provoked this appeal.

The main legal point raised and argued before the learned trial judge and also before us is whether the learned judge had jurisdiction under o IXB rule 8 above, to grant the order. Mr Amuga, for the appellant, submitted, both in the court below and before us, that the plaintiff’s suit was not dismissed for default of attendance but for failure to adduce evidence. Consequently, he said, the dismissal order was made under o XVI rule 4, aforequoted. In his view because counsel for the Bank was present in Court the Bank’s suit could not properly be dealt with under o IX B rule 4, above, and the only course which was open to the Bank, if it wished to challenge the order, was an appeal against it.

Mr Rachuonyo for the Bank did not think o IX B envisages attendance of counsel but the attendance of the party he represents personally. In his view the said order envisages a situation where the parties themselves do not attend and because of their absence it is impossible to proceed with the case in the normal manner. Consequently, he urged, a decision made in those circumstances is not on the merits and can be recalled and be either reviewed or set aside. In the alternative, Mr Rachuonyo submitted that since the Bank’s application in the superior court had a prayer for review, even though the relevant provision authorizing review was not cited, the Court had the jurisdiction to order review if the Bank’s was a fit case for review. In that regard he cited the case of *Brooke Bond Liebig (1) Limited v Mallya* [1975] EA 266 in support of that proposition.

It cannot be gainsaid that o IXB rule 4 (1) , above may only be resorted to when the suit comes on for a hearing on first instance. Where the hearing of a suit has commenced its persecution is governed by the provisions of orders XVI and XVII of the Rules. Where a party is refused an adjournment either on the first day the suit comes for a hearing or on any day to which the hearing of the suit is adjourned, by dint of the provisions of o XVI rule 3, any party in whose absence an order adverse to him was made is at liberty to move the Court under o IXB rule 8, above, for an order, either setting aside, varying or reviewing such order. The Court’s powers to set aside under that order are not confined only to cases where the orders sought to be vacated are made under that order but also extends to cases which are part-heard but for some reason any of the parties fails to attend at the resumed hearing of the suit.

But, Mr Amuga submitted that the dismissal of the Bank’s suit was neither under o XVI rule (3) nor o IXB rule 4, but under o XVI rule 4, and an application could not, therefore, be validly made under o IXB rule 8, aforestated for the setting aside of the dismissal. With due respect to counsel, o XVI rule 4, above has to be read together with rule (1) of the same order. The latter predicates that a suit be heard on a day to day basis. Where, however, that is not practicable because any party to the suit is unable to produce evidence, the Court has power to grant that party time within which to do so. Rule 4, above, presupposes that such a party has failed for the second or more times to produce evidence in support of his case even after being granted the time to do so. That is not what happened in this matter. Neither party had at his or

its request, been granted an adjournment to get witnesses or to produce evidence. The setting down of a suit for hearing by the plaintiff under o IXB rule 1, of the Rules is not envisaged by that rule because that is a step which has to be taken administratively not judicially. The governing phrase in rule 4 which distinguishes the rule from rule 3 before it, is “where any party to a suit to whom time has been granted...” It must be read to mean time granted in accordance with the provisions of o XVI rule 1. In our judgment, therefore, o XVI rule 4 has no bearing on this matter.

Regarding the construction to give to the provisions of o IX B rule 4(1), above, the rule, in our view, should be given an interpretation which avoids absurdities. It is of course true that where a party has appointed counsel to appear for him and that counsel has due instructions to proceed with the hearing of a suit, it should not be dismissed under o 1XB rule 4(1), above. In that regard we would agree with the decision in *Herman Mugachia v Hamisi Mwakibundu & another* [1982-88] 1 KAR 666, which Mr Amuga cited in support of the appellant’s case.

In *Lobo v Saleh S Dhiyebi* [1961] EA 223 at p 229, the Court of Appeal for East Africa had occasion to consider the duty of counsel *vis-à-vis* his client and the Court. Sir Kenneth O’Connor, P delivering the judgment of the Court, said:

“An advocate who appears for a client in a contested case is retained to advance or defend his client’s case and not his own. This he must do strictly upon instructions and with a scrupulous regard to professional ethics. Remembering that he is an officer of the court and owes a duty to the Court as well as his client, he must never knowingly mislead the Court as to the facts or the law.”

The “attendance” or “appearance” of counsel in Court as used in the Rules of practice does not denote merely a literal physical presence. *Sarkar’s Law of Civil Procedure*, 8th Ed Vol 1 at P 723, has a comment on the term “appearance” as used in the Indian Civil Procedure Code. It states as follows:

“Appearance” has a well recognized meaning and means appearance in person or through pleader for conducting the case. When a pleader asks for an adjournment which is refused but has no instructions to present his client, there is no “appearance” though the party was present in person in Court..... Substantially, when a party is ready to do something or other in relation to the progress of the suit, he shall be taken to have appeared.”

But o IXB of the Rules does not use the term “appearance.” Rather it uses the term “attendance.” In our view, and there is ample authority, to wit, *In Re Mahon* [1893] 1 Ch 507, that there is really no distinction between “appearance” and “attendance”. They both connote counsel’s presence in Court ready to do something in relation to the progress of the case to which he has instructions. This Court came to the same conclusion in *Juliane Ulrike Stamon v Tiwi Beach Hotel Ltd* (Civil Appeal No 57 of 1996) (unreported). In that case the plaintiff was not personally in Court but he had counsel who was duly instructed to proceed with the hearing of the case. This Court held that a plaintiff need not personally be present in Court if he has counsel who is duly instructed to proceed with the case.

In Re Mahon, (*supra*), the Court of Appeal in England held that an attendance of a solicitor or his clerk for a merely formal purpose, such as delivering briefs or papers at counsel’s chambers is not an “attendance” which would entitle the solicitor to a fee for such attendance. In *Din Mohamed v Lalaj Visram & Co* (1937) 4 EACA 1 the Court of Appeal for East Africa also emphasized attendance in Court by an advocate duly instructed as sufficient.

In *Shah Kachra Merag v Gandhi & Co* [1975] EA 466, the Court of Appeal for East Africa, held that there are two types of appearances, namely, appearance in fact and appearance in law. Appearance in law means, in our view, being ready to do something or other in relation to the progress of the suit. For instance, in *Finaughty v Prinsloo* [1958] EA 657 counsel for the appellant as plaintiff in the suit was fully instructed by the official receiver, the appellant having been declared insolvent, to continue with the case. He applied for adjournment of the hearing on the ground that the appellant was away and could only possibly attend on the following day. Adjournment was declined and the trial court dismissed the appellant’s case on the ground that he did not appear. On appeal it was held that the appellant had

appeared by his advocate. The Court said:

“In any event there was nothing to show that Mr Todd when the plaintiff appeared by him was not duly instructed and able to answer all material questions relating to that suit. He was not prepared to give evidence in support of the plaintiff’s claim; but that is not the function of an advocate.”

The Court here tended to adopt the view that where counsel, though instructed, but is not ready to continue with the hearing of a suit, not because of his own default but because of absence of his client, the circumstances were such that it could not be said that there was no appearance in law for that party. In effect the Court adopted the view of Indian Courts. It then follows that it is the duty of counsel concerned to lay before the Court material upon which the Court will act to come to a finding that he is not ready to do something or other in relation to the progress of his client’s case for no fault of his part as counsel.

Apart from decided cases it seems to us that it could be contrary to the policy of the law in circumstances as in the present case to hold that the Bank, in law, appeared by its counsel. We say so advisedly. Assuming for a moment that the Bank, instead of bringing an application under o IX B rule 8 above, appealed. There would be no material upon which the learned judge’s decision to dismiss its suit would be based as the only material on record would be with regard to the application for adjournment. The Bank would not properly appeal against refusal of an adjournment because the suit would have been finally dealt with. It is a situation as the foregoing which, we think, this Court had in mind in the *Herman Mugachia* case (*supra*), when it said (per Hancox JA), thus:

“...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 nonetheless 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 *EL Amira* [1981] 2 Lloyd’s Rep 539), 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] 7 *Uganda Law Reports* 11, should be the last resort of any Court.”

The Court was there emphasizing the issue of the policy of the law. An advocate may have general instructions to represent a party in a suit, but he cannot be supplanted in his place. Whereas here counsel could not possibly do anything without his client to ensure the further progress of the case, moreso where he had done all that he was required to do as counsel, it cannot, properly, be said, in our view, that his client appeared. The wording of o III rule (1) does suggest that there are instances and circumstances when counsel, although instructed, may not be duly instructed. An extract from the judgment of Gillard J, in the Australian case of *Mobbs v Powell* [1965] V R 222, dealing with the meaning of the term “duly” is instructive. It reads thus:

“Now, it should be noticed that the relevant words in the exclusion are ‘duly authorized.’ Each word is deserving of consideration. ‘Duly’ implies that the requisite authority is that required by the circumstances of the occasion. To ‘authorise’ is to give formal approval to, to sanction, approve, countenance... It would appear, therefore, that in order to rely upon the terms of the exclusion as a defence in the third party proceedings it would be necessary for the insurer to prove that the driver did not have the requisite formal authority to be driving the vehicle in the circumstances and for the purpose for which it was then being used...” (See *Words and Phrases Legally Defined* Vol 2 D-H P 123)”

In that case an exclusion on a policy for a motor car insurance provided, *inter alia*, that the policy did not cover liability if the driver was not “duly” authorized under all relevant law. A vehicle covered under the policy was damaged and the insurance company as third party in an ensuing suit pleaded the exclusion clause.

Likewise in our case the Bank’s counsel had general instructions to act for it in the suit but in the circumstances as they obtained on the date its suit was fixed to come for a hearing, she could not possibly perform her role as counsel in absence of her client. Her role as counsel was thus frustrated. In those

circumstances we think that it would be wrong to deem that counsel had instructions and was ready to proceed with the further progress of the case for the Bank.

Having come to the foregoing conclusion on the question of attendance, we need now to look at the facts of this case in greater detail to ascertain the nature of the “attendance” which led to the dismissal order. On 4th May 1998, the suit came for hearing for the first time. Counsel for the Bank was present but was not ready to proceed with the hearing of the case. She gave the reason that she had experienced difficulties reaching her client. By that she meant that she had not been instructed as to the hearing of the case by that day, and she accordingly applied for the adjournment of the case, which application was refused even though the appellant’s counsel did not object to the adjournment. Whereupon the Bank’s counsel indicated to the Court “I will not be able to proceed with our case”. From the sequence of events it is clear that counsel was not able to proceed for lack of instructions rather than inability on her part to proceed because she was unprepared. Clearly, therefore, it cannot be said that she was present in Court, ready to proceed with the hearing of the case. This case is clearly distinguishable from the *Herman Mugachia* case (*supra*) in which counsel for the plaintiff had specifically asked his client not to attend Court. That was clearly default as it would appear that the plaintiff and his counsel, contumaciously did not prepare for the hearing of their case.

Then there is the issue which Mr Amuga also raised with regard to the Bank’s delay in applying to set aside the dismissal order. We agree the delay was not fully explained. That notwithstanding, it was not such delay as would prejudice the applicant beyond monetary compensation by an award of costs. The learned trial judge must have appreciated this because he ordered the Bank to pay the applicant’s thrown away costs.

Finally, we wish to observe here that the learned trial judge in his ruling appealed against repeatedly talked about the non attendance of the plaintiff’s witness. It was not strictly the plaintiff’s witness who failed to attend Court, but an officer of the Bank. The Bank is a legal person which acts through its officers. The officers would be the ones to instruct counsel to represent it and non-attendance of the officer designated to handle a particular case on behalf of the Bank is, in law, non-attendance of the Bank.

In the result, we dismiss the appeal but make no order as to costs. -

Dated and delivered at Nairobi this 10th day of March, 2000.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O.O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR