

TANZANIA / JUDGMENT

19981203 TZCA Dar es Salaam2

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM /i-117V/I · .. CIVIL APPEAL NO 38 OF 1997 · BETWEEN FAIZEN ENTERPRISES LIMITED APPELLANT AND AFRICARRIERS LIMITED RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam) (Mwaika~.~:) dated the 10th day of July, 1995 in RULING OF THE COURT™. _ILA_, J .A.: ' In the High Court of Tanzania at Dar es Salaam, the appellant Company Faizen Enterprises.Limited, sued .the respondent Company Africarriers Limited for among other things, a declaratory order that it is the lawful owner of.Plot No. 106C Chang'ombe Industrial area and for a further order of permanent injunction against the respondent company a..>id its agents or employees to stop any unlawful acts of physical trespass onto the plot or chaJ.lehging the appellant's- lawful title. It was not clear to us why throughout the record, Plot No. 109C and 106C Chang'ombe Industrial area are used inter- changeably. But since the offers refer to plot No. 109C, we shall stick to that number in this ruling. In their written statement of defence, the respondent company made an equally spirited claim to the plo't , · stating that the offer to the appellant was null and void because at the time it was made, the plot was already on offer to som~ other party and such offer ...• /2

- 2 - was still subsisting. When the-pleadings were completed, the endless / saga of mentions and adjournments started, more often than not in complete disregard of the provisions in the Civil Procedure Code. The result of this non-compliance with the provisions of the Civil Procedure Code was the unnecessary delay in the completion of the case. It took seven years (1988 - 1995) to complete this simple case. Just to illustrate our point that the trial court unnecessarily delayed the completion of this case, it took two years to complete the case from the time the court ordered ,the case to proceed ex-parte for the non appearance of the defendant (1/4/93 - 10/7/93). We did not make any effort to try to comprehend how this could possibly happen. Be that a,s it may, on 10/11/92 the hearing date was finally set for 15/4/93. On this date, when the case wae called for hearing 1 Counsel for the plaintiff was present, but no representative of the defendant compar;_y was present in court. Learned counsel for the plaintiff made the following application: I pray for leave to proceed ex-pa.rte. by affidavit as the defendant is absent • Order: .Application granted. Affidavit by 27/4/93. Mention on 28/4/93. '• Then a fresh round of a·djournment's and mentions started all over again a~ if the Civil Procedure Code did not exist. The result was that it took h√o more years to proceed ex-part'~! 'When finally· the· ex~parte judgment was delivered on 10/7/95, the suit \vas

dismissed with costs, the plaintiff had failed to prove its case. It lodged this appeal, pointing out a number of factual and legal errors in the judgment. These were not relevant in view of the attitude we took at the hearing of this appeal. (...) At the hearing of this appeal, we took the view that the trial was beset with a lot of procedural problems which needed our attention before proceeding with the appeal on merit. The question we posed to Counsel was whether the trial judge was correct to proceed the way he did. How did the judge proceed? First, in the absence of the defendant on the day fixed for hearing, the judge directed on the application of Counsel for plaintiff that the plaintiff should proceed to prove its case ex-parte. Counsel for the plaintiff made a further application that he should prove his case by affidavit. This application was also granted by the trial judge and set a date for filing the affidavit by 27/4/93 and that the case should come up for mention the following day on 28/4/93. Were these orders and all those that followed in the next two years correct? Mr. Ndyababo learned counsel for the appellant argued that the learned trial judge acted correctly under Order 9 r 6 (1) and that if there was non-compliance with Rule 7, this was cured by subsequent events. On the other hand Mr. Matte learned counsel for the respondent, argued that the subsequent applications made by the appellant could not cure the initial non-compliance with Order 9 r. 6 (1) as well as Rule 7 and he cited commentaries by Sarkar on Civil Procedure 8th Edition at page 717. As indicated earlier, on the day set for hearing (actually one of numerous such dates) the plaintiff's counsel appeared but the defendant failed to appear, thereupon the plaintiff's counsel applied or prayed to proceed ex-parte. Fair enough, this is what the law says, see O. 9

- r. 60 But what is beyond our comprehension is the plaintiff's counsel other prayer or application that he be allowed to prove his case
- 4 - ex-parte and affidavit. How can anyone prove his entire case by affidavits and whose affidavits anyway? And most important, under what provision can this be done? But the court easily, perhaps automatically, allowed this application and ordered that the affidavit(s) should be filed by 27/4/93 and the case mentioned the following day 28/4/93. On the first part of the order, this must have been done under Order 9 rule 6 which provides as follows:
- O. 9 r. 6 (1) (a) (i) - Where the plaintiff appears and the defendant does not appear when the suit is called for hearing then - (a)-(i) .If the suit is before the High Court and it is proved that the summons was duly served, the court may proceed ex-parte; What was the effect of the court order - granting the prayer to proceed ex-parte and at the same time postponing the filing of the affidavit(s) in proof to another date? We think the effect of this was that the hearing was adjourned to the new returnable date of 27/4/93, but then the court complicated matters by setting down a mention date. After this adjournment, the provisions of Rule 7 came into force, this rule provides as follows: Rule 7: "Where the court has adjourned the hearing of the suit ex-parte and the defendant", at or before such hearing, appears and assigns good cause for his previous non-appearance he may upon such terms

- 5 - e.s the court may direct as to ?Osts or otherwise, ,be heard in answer to the suit as if he had,,. appeaTed oh the day fixed for his appearance.;; But what happened after 15/4/93 when the order to proceed ex-parte and the filing of affidavits by the plaintiff was made, was in total disregard of the provisions of the above rule. When the-case came up for mention on 28/4/93 as ordered on_ 15/4.98, Counsel for both sides appeared, the Registrar by c9nsent of the parties ordered the filing of counter affidavits apparently in a new application to set aside the order to proceed ex-parte and no order was made in respect of .the ;brder of 15/4/93. It took the court two years to untangle the mess but only to dismiss the application to set aside the order to proceed ex-parte made more than a year earlier. iWhen the suit is 1 called for hearing 11 (see Sarkar commentaries p. 478),_ the'q~estion then is: What was the first day of hearing in this case; Was it 15/4/93 ;r 27/4/93 the latest date for the plaintiff to file his· affid2,vit? Since on all subsequent dates the defendant dutifully appeared and so many hearing dates were set, the legitimacy for proceeding ex-parte was lost. All that the court needed to do was to comply with Rule 7 and ask counsel for the defendant to assign good cause why he did not appea.r on 15/4/93. The case would have ended sooner than the 2 years it.took. We shall next consider the order by the Court allowing counsel for the plaintiff to prove his case by affidavit. Several questions came to our minds in cor;mection with this order. First, 15/4/93 was the date set for the hearing of the suit, presumably therefore counsel for the pl2..intiff had come to court with all his witnesses and exhibits ready to proceed with the hearing. If this is ·so, why .
- • 0 ./6 ,, • 6 then or. what prevented him from proceeding with the hearing? Was counsel's application to proceed ex-parte by affidavit meant to hide the fact that even the plaintiff was in no position to proceed with the hearing? If the'Court had not as it were automatically granted thi~ strange application, it would have seen through the deception and disc'overed that even the plaintiff had no witnesses to proceed with the case. Secondly, under what provision did the court allow counsel for the pla.intiff to prove his case by affidavit? . In the Civil Procedure ·Code, affi,davits are provided under orders 11 and 190 Affidavits in Order 11 are those filed in 8.1\"Swer to interrogatories thus irrelev2.nt here. Order 19 provides as follows: Order 19 r. 1: tsAny Court may at any time for - sufficient reason order that any particu+ar fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks . reasonable. Provided that where it appears to the court that _either party.bona fide desires · the production of a witness for cross-examination, and that . I such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit. Affidavits shall be confined to such facts as the defendant is able of his own knowledge to prove, except on interlocutory · applications, on which statements of his belief may be admitted.\" . •.. /7
- 7 - Even assuming that the provisions of this order allow a plaintiff to prove his case by affidavit, what sufficient reason did counsel give to bring his case within the ambit of 0.19 r. 1 and that he was not disqualified, µnder the proviso to that rule? But we think , · more important is the consideration that in this case the plaintiff would be required to prove its entire case not isolated or ind.ividual facts by affidavits. In the circumstances we think that

this Order should not be used to allow absent plaintiffs to proceed ex-parte. For these reasons, we are satisfied that the court was not . . . correct in proceeding the way it did, this non-compliance with the provisions of the Civil Procedure Code resulted not only in very confused proceedings but worse in an unwanted seven years delay before the case could be completed. We think the fair thing to do in such circumstances is to quash the proceedings in the High Court, set aside the judgement and other ancillary orders with an order that the case be retried before another judge who we trust will adhere strictly to the provisions of the Civil Procedure Code. We order accordingly. I ' DATED AT DAR ES SALAAM THIS 3RD DAY OF DECEMBER, 1998. L. M. MFALILA JUDGE OF APPEAL B. A. SAT, A TTA JUSTICE OF APPEAL K.S.K. LUGAKINGIRA JUSTICE OF APPEAL that this is a true copy of the original. ,n,i \ 11 . 4jfi /1J: (!.G, "r,MARIJA) DEPUTY REGISTRAR

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