



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller JJA & Simpson Ag JA)

CIVIL APPEAL NO. 45 OF 1980

BETWEEN

NGUA.....APPELLANT

AND

AGIP (KENYA) LTD.....RESPONDENT

JUDGMENT

Simpson Ag JA The plaintiff company (the respondent in this appeal) by agreement in writing granted to the defendant (the present appellant) an exclusive licence to operate a service station. Alleging breaches of this agreement the plaintiff sued the defendant inter alia for eviction from the station and for damages.

The defendant entered an appearance but filed no defence within time. Formal proof was fixed for January 6, 1980. Neither the defendant nor his advocate appeared and judgment was given for the plaintiff upon proof ex parte. Mr Nowrojee conceded that the defendant was not served with a notice of hearing for January 6.

The defendant successfully applied by chamber summons dated May 8, 1980 under order IXA rule 10 of the Civil Procedure Rules for the ex parte judgment to be set aside. He was given leave to defend and execution was stayed. He was also given permission to continue to operate the service station. This order was made ex parte on May 12, 1980.

The following day the plaintiff's advocate satisfied the judge that his failure to appear was due to a registry error and the judge requested the Deputy Registrar to list the matter before him for mention on May 14, and to notify the parties' advocates.

There is no record of any proceedings on May 14 - we were told that the relevant pages of the original record are missing – but there is an order of that date vacating the order of May 12, and dismissing the defendant's chamber summons with costs. It is from this order that the defendant now appeals. He admitted to us that contrary to what is stated in the second ground of appeal, he was present in court on May 14.

The only reason given by the learned judge for dismissing the defendant's summons dated May 8, is

that considerable damage would result to the plaintiff if the service station were returned to the defendant. This is hardly sufficient reason for depriving the defendant of the opportunity to file a defence. However although it was not one of the appellant's grounds of appeal, we are more concerned about and consider that we cannot disregard the failure of the plaintiff/respondent to serve the appellant with notice of the hearing on January 6, 1980, of the formal proof.

"8. Subject to rule 3, in all suits not otherwise specifically provided for by this order, where any party served does not appear the plaintiff may set down the suit for hearing under Order IXB, rule 1.

9. The provisions of rules 3 to 8 inclusive shall apply with any necessary modification where
any defendant has failed to file a defence."

Order IXA rule 1(1) provides —

"1(1) At any time after the close of pleadings, the plaintiff may, upon giving reasonable notice to every defendant who has appeared, set the suit down for hearing."

Mr Nowrojee who appeared for the respondent submitted that this provision could have no application to a formal proof since pleadings have not been closed when a suit is listed for formal proof. If he is correct the words "under Order IXB rule 1" at the end of rule 8 are meaningless. The plaintiff is at liberty to set down the suit for hearing where any party served does not appear or where any defendant has failed to file a defence. He is not required to wait for the close of pleadings which at the earliest occurs fourteen days after service of the defence (see Order VI rule 11). The words "at any time after the close of pleadings" in Order IXB rule 1(1) must be disregarded as inapplicable when that rule is read with Order IXA rules 8 and 9. The circumstances wherein a suit may be set down for hearing under these rules are stated in these rules. Thus in compliance with Order IXB rule 1(1) where a defendant has appeared he must be given reasonable notice of the hearing of formal proof in order that he may have an opportunity if he so desires either to defend or seek leave to file a defence out of time. The appellant was given no notice. This entitles him to have the ex parte judgment set aside and in consequence all subsequent orders including the order appealed against are nullified. The appeal must be allowed.

Mr Nowrojee, reminding us that he had no notice of this ground of appeal, requested us in the event of the appeal being allowed on this ground to consider making an order which will not disturb the status quo, the respondent having now granted a licence to a third party to run the service station. We take the view however that not only is this a matter between the parties but also the respondent having obtained judgment against the appellant by non-compliance with the rules of procedure; no such order by this court could be justified.

In the face of the express provisions of Order IXB rule 1(1) we must allow the appeal and set aside the ex parte judgment and all subsequent orders. The appellant seeks unconditional leave to defend. We think the appropriate order is to grant leave to file a defence out of time within fourteen days from the date hereof failing which the respondent shall be at liberty to resist the matter for formal proof. We make no order as to costs.

As **Madan** and **Miller JJA** agree, it is so ordered.

Dated and Delivered at Nairobi this 4th day of February 1981.

C.B.MADAN

.....
JUDGE OF APPEAL

C.H.E.MILLER

.....
JUDGE OF APPEAL

A.H.SIMPSON

.....
AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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