FAIZEN ENTERPRISES LTD *v.* AFRICARRIERS LTD.

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Mfalila, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No.38 OF 1997

(From the decision of the High Court of Tanzania at Dar es Salaam, Mwaikasu, J., dated 10 July 1995, in Civil Case No. 307 of 1998)

Civil Practice and Procedure – Ex parte hearing – Effect of postponing hearing ex parte – Whether provision to postpone hearing may be used to allow absent plaintiff to proceed ex-parte – Order 9, rule 6(1) of the Civil Procedure Code 1966.

Civil Practice and Procedure – Whether plaintiff may prove entire case by affidavit – Order 9, rule 6 and Order 19, rule 1 of the Civil Procedure Code 1966.

Hearing of the suit was set for 15 April 1993, but the defendant did not appear when the suit was called for hearing on that day. The High Court then ordered that the plaintiff should proceed *ex-parte* by affidavit, the affidavit to be filed by 27 April 1993. The court also directed that the case should come for mention on 28 April 1993. Counsel for both parties appeared when the case came for mention before the Registrar on that day and the Registrar, by consent of both parties, ordered the filing of counter – affidavit, apparently on the defendant's application to set aside the order to proceed *ex parte*. Eventually the defendants application to set aside that order was dismissed and, accordingly, the plaintiff proceeded *ex-parte*. In an *ex parte* judgment delivered seven years after the institution of the suit, the suit was dismissed, the judge finding that the plaintiff had failed to prove its case. On appeal to the Court of Appeal by the plaintiff, there were rival arguments by counsel over the question raised by the court, namely, whether the High Court was correct to proceed the way it did.

Held: (i) Where the High Court applies Order 9, rule 6(1)(a) and proceeds *ex parte*, the court should do so straight away and hear the evidence of the plaintiff and his witnesses, if any;

(ii) Where a prayer to proceed *ex parte* under Ordinance 9, rule 6(1)(a) is granted and the court then postpones the reception of the plaintiff's evidence, that tantamounts to adjourning the hearing of the suit *ex-parte*, and rule 7 of Order 9 comes into force if the defendant appears at or before such hearing and assigns good cause for his previous non-appearance;

(iii) Order 9, rule 6 should not be used to allow absent plaintiffs to proceed *ex parte;*

(iv) Order 19, rule 1 does not permit a plaintiff to prove his entire case by affidavit.

Order accordingly

Statutory provision referred to:

(1) Civil Procedure Code 1966, Order 9, rule 6 and Order 19, rule 1

Mr Ndyanabo, for the Appellant

Mr Mkattte, for the Respondent

JUDGMENT

(Dated0 3 December 1998)

MFALILA, 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 Number 106C Chang'ombe Industrial area and for a further order of permanent injunction against the respondent company and its agents or employees to stop any unlawful acts of physical trespass onto the plot or challenging the appellant's lawful title. It was not clear to us why throughout the record, Plot Numbers 109C and 106C Chang'ombe Industrial area are used interchangeably. But since the offers refer to plot Number 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 plot, 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 some other party and such offer 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 April 1993 – 10 July 1995). We did not make any effort to try to comprehend how this could possibly happen.

Be that as it may, on 10 November 1992, the hearing date was finally set for 15 April 1993. On this date, when the case was called for hearing, Counsel for the plaintiff was present, but no representative of the defendant company was present in court. Learned counsel for the plaintiff made the following application:

> Mwajasho: I pray for leave to proceed *ex parte* by affidavit as the defendant is absent.
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> Order: Application granted. Affidavit by 27 Apirl 1993. Mention on 28 April 1993.

Then a fresh round of adjournments and mentions started all over again as if the Civil Procedure Code did not exist. The result was that it took two more years to proceed *ex parte*! When finally the *ex parte* judgment was delivered on 10 July 1995, the suit was 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 are 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 August 1993 and that the case should come up for mention the following day on 28 April 1993. Were these orders and all those that followed in the next two years correct?

Mr Ndyanabo learned counsel for the appellant argued that the learned trial judge acted correctly under Order 9, rule 6(1) and that if there was non-compliance with rule 7, this was cured by subsequent events.

On the other hand, Mr Mkatte learned counsel for the respondent, argued that the subsequent applications made by the appellant could not cure the initial non-compliance with Order 9, rule 6(1) as well as rule 7 and he cited commentaries by **Sarkar on Civil Procedure** 8 ed 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's failed to appear, thereupon the plaintiff's counsel applied or prayed to proceed *ex-parte*. Fair enough, this is what the law says, see Order 9, rule 6. But what is beyond our comprehension is the plaintiff's counsel other prayer or application that he be allowed to prove his case *ex parte* and by 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 April 1993 and the case mentioned the following day 28 April 1993.

A On the first part of the order, this must have been done under Order 9, rule 6 which provides as follows:

> Order 9, rule 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 the summons was duly served, the court may proceed ex-parte;

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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 April 1993, 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:

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> 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 as the court may direct as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

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F But what happened after 15 April 1993 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 April 1993 as ordered on 15 April 1998, Counsel for both sides appeared, the Registrar by consent of the parties ordered the filing of counter affidavits apparently in a new application to set aside the order to proceed ex-part and no order was made in respect of the order of 15 April 1993. 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 "When the suit is called for hearing" (see **Sarker Commentaries** p. 478), the question then is: What was the first day of hearing in this case? Was it 15 April 1993 or 27 April 1993 the latest date for the plaintiff to file his affidavit? Since on all subsequent dates the

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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 appear on 15 April 1993. 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 connection with this order. First, 15 April 1993 was the date set for the hearing of the suit, presumably therefore counsel for the plaintiff had come to court with all his witnesses and exhibits ready to proceed with the hearing. If this is so, why 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 this strange application, it would have seen through the deception and discovered that even the plaintiff had no witnesses to proceed with the case. Secondly, under what provision did the court allow counsel for the plaintiff to prove his case by affidavit? In the Civil Procedure Code, affidavits are provided under Orders 11 and 19. Affidavits in Order 11 are those filed in answer to interrogatories thus irrelevant here. Order 19 provides as follows:

> Order 19, rule: Any court may at any time for sufficient reason order that any particular 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.
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> Provided that where it appears to the court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.
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> Rule 3: 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.

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 Order 19, rule 1 and that he was not disqualified under 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 individual facts by affidavit section 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 judgment 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.

INTERTEC EAST AFRICA A. S *v.* B AND S INTERNATIONAL

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Lubuva, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 46 OF 1997

Civil Practice and Procedure – Issues – Issues of law – and Issues of facts – Where issues of law may dispose of the case or part of it – Court must