

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MSOFFE, J.A., KILEO, J.A. And ORIYO, J.A.)

CIVIL APPEAL NO. 83 OF 2008

MR. LEMBRICE ISRAEL KIVUYO.....APPELLANT

VERSUS

M/S DHL WORLD WIDE EXPRESS

DHL TANZANIA LIMITED..... RESPONDENTS

**(Appeal from the decision of the High Court of Tanzania
(Commercial Division) at Arusha)**

(Luanda, J.)

dated the 27th day of November, 2006

in

Commercial Case No. 4 of 2005

JUDGMENT OF THE COURT

20 & 25 August, 2010

MSOFFE, J.A.:

A brief background of events leading to this appeal is necessary. As early as 21/3/2006 Commercial Case No. 4 of 2005 of the High Court of Tanzania (Commercial Division) at Arusha was ready for hearing but was adjourned for hearing on 28/6/2006 because the plaintiff (appellant herein) was reported sick. On 28/6/2006 Kimaro, J. (as she then was) granted an adjournment for "mention on 26/7/2006 for purposes of fixing another date for trial". She did so at the request of Mr. Elvaison Maro, learned

advocate for the plaintiff, who had submitted that the plaintiff was then held in custody in connection with Criminal Case No. 1452/2004 of the Kisumu Resident Magistrate's Court in Dar es Salaam. According to the record before us, the case did not come up for mention on 26/7/2006. Instead, it came up on 14/8/2006 before Massati, J. (as he then was) who upon hearing Mr. Maro, and one Mr. Terry for the defendant who had no objection to an adjournment, observed and ordered as follows: -

Court: *Since the plaintiff is now lawfully incarcerated and therefore beyond reach, the application for adjournment is reasonable. Therefore I order: -*

Order: *Mention 27/11/2006.*

On 27/11/006 the matter came up before Luanda, J. (as he then was).

There was yet another prayer for an adjournment because the plaintiff was still in prison and was to be released in December, 2006. One Mr. Boniface for the plaintiff requested for an adjournment till "earlier next year". Mr. Balomi, learned advocate for the defendants (respondents herein), resisted the request for a number of reasons. In response, Luanda, J. composed and delivered a ruling which reads: -

This is another attempt by the advocate for the plaintiff to adjourn the case. On 27/6/2006 (read 28/6/2006) this Court (Kimaro, J.) reluctantly adjourned the matter.

But the reasons adduced are not sufficient. Last time they said the plaintiff will be set free from prison at the end of November, 2006. Today they are saying early December, 2006. Now which is which?

This shows in my view that the advocate for the plaintiff is not serious to prosecute this case.

This Court will not tolerate such laxity of an advocate.

I take it that the plaintiff has failed to prosecute their case.

In the upshot the suit is dismissed for lack of prosecution with costs.

Of course, a look at the proceedings of 28/6/2006 will show that there is no indication that Kimaro, J. "reluctantly adjourned the matter" as

Luanda, J. put it. Anyhow, this is an appeal against the decision of Luanda, J. (*supra*). The appellant has preferred two grounds of appeal, thus: -

- 1. That the High Court clearly erred in law and fact in dismissing the suit for want of prosecution on a mention date.*
- 2. That on account of the facts presented to the High Court, the court clearly erred in refusing to adjourn the suit and or fix it for hearing.*

At the hearing of the appeal Mr. Maro informed the Court that the second ground was in the alternative to the first one. At the centre of his submission in so far as the first ground is concerned is that it was wrong for the judge to dismiss the case on a date set for mention. In his view, the word "mention" is not provided for in the Civil Procedure Code (CAP 33 R.E. 2002) (hereinafter the CPC). That the CPC provides instances when a case can be dismissed. That a dismissal order can only be made when a case has been called on for hearing. In conclusion, Mr. Maro was of the strong view that it was therefore irregular for the judge to dismiss the suit

on a mention date. He cited to us a number of authorities in support of his submission to which we are very grateful.

On the other hand Mr. Alex Balomi, learned advocate for the respondents, supported the judge in making the order of dismissal of the case. The bottom line of his submission was that the case had been adjourned for too long at the request of the plaintiff's counsel. In his view, there was no good reason to adjourn the case again. Hence the judge was justified in dismissing the case, he urged.

In view of the above background of events and the oral submission made before us by learned counsel it occurs to us that the following matters are not in dispute. That on 28/6/2006 the case was coming up for mention; a date which was set down by the court with the consent of both parties. That there is a difference between a "mention" and a "hearing". That the CPC does not provide for a "mention"; it provides for a "hearing" only. That the crucial question is whether or not the judge was justified in dismissing the case on a mention date.

In **Osborn's Concise Law Dictionary**, Eighth Edition, hearing is defined as: -

The trial of a case before a court. It is usually held in public but some hearings are held in camera.

In the **Dictionary of English Law** by Early Jovitt at page 897 it is defined as: -

An investigation of a controversy. See TRIAL

And on page 1780 thereto a trial is defined as: -

The hearing of a cause, civil or criminal... A trial is the finding out by due examination the truth of the point in issue or question between the parties, whereupon judgment may be given... A trial is that step in action, prosecution or other judicial proceeding by which the questions of fact in issue are decided...

In **Webster's New World Law Dictionary** by Susan Ellis Wild, hearing is defined as: -

... any proceeding in which the parties have the opportunity to present evidence or testimony to the Court or fact finder...

In **Black's Law Dictionary**, Abridged Sixth Edition, by Henry Campbell Black, the word is defined as: -

A proceeding of relative formality... generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented...

As for the word "mention", we must confess that through our limited research we could not come across an appropriate definition for it as applied in the legal parlance. At best, the definition supplied to us by Mr. Maro from a computer print out produced from ANSWERS.COM, though in relation to family law, is in our view appropriate in the circumstances, thus;

*This is a date when a case is to have a brief looking over with the new evidence supplied. **He and she will then be possibly given a "Hearing date" or another type of court date.***

(Emphasis supplied.)

From the above definitions it seems obvious to us that there is a distinction between the "mention" and the "hearing" of a case, as used or

applied in the legal parlance. Basically, on a mention date the Court is expected to ascertain the state of the pleadings or the stage reached in the trial and then proceed to make appropriate orders geared or aimed at disposing of the suit or action as the case may be.

On the other hand, a "hearing" is something different. Briefly, in law hearing is an act of listening to evidence. A hearing entails the actual investigation of the controversy in dispute. Normally in a hearing issues of law or fact will be tried whereupon witnesses will be heard and evidence presented with a view to determining the rights of the parties in connection with the suit or action involving them. In a hearing questions of law or fact are determined. In essence therefore, a hearing is by far something more than a mention. In this regard, it will not be fair to say that every appearance in court constitutes a hearing.

Admittedly, though commonly used, there is nothing like a "mention" in the CPC. The CPC provides for a hearing and not a mention. As this Court observed in **The Executive Secretary, Wakf and Trust Commission v Saide Salmin Ambar**, Civil Appeal No. 7 of 1996

(unreported), mentions are not a legal requirement but ones of practice only.

This brings us to the crux of the matter in this appeal, which is this: - Was Luanda, J. justified in dismissing the suit on a mention date? With respect, our answer is in the negative. Since, as already observed, there is a distinction between a "mention" and a "hearing", the judge erred in dismissing the case on a mention date. We are supported in this view by the Kenya Court of Appeal case of **Floriculture International Ltd v Central Kenya Ltd and Others** (1995 – 1998) East Africa Law Reports, citing its earlier decision in **Wanjiku v Esso Kenya Ltd** (1995) LLR 3916 (CAR), that; -

*...where a matter is fixed for mention...**the learned judge had no business determining on that date the substantive issues in the matter...** He can only do so ... if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties...*

(Emphasis supplied.)

Back home, in a more or less similar situation, the decision of the High Court of Tanzania (Bahati, J.) in **National Bank of Commerce v Grace Sengela** (1982) TLR 248 is, in our view, good law for the proposition that a case can only be dismissed on grounds of default of appearance when the case is fixed for hearing and not merely when it is set down for mention.

In our CPC there are instances when a case can be dismissed where there is default of appearance on a hearing date. Examples of such instances are to be found in the provisions of **Order IX Rules 3 and 8** of the CPC. The point which we have to emphasize here is that such dismissal(s) can only be made on a **hearing** date and not on a **mention** date as happened in this case.

Of course in law, in this case there would be no question of dismissing the suit on account of default of appearance because it is on record that all along the respective parties, through their learned advocates, were always attending the court as and when they were ordered to do so. Indeed, as already observed, when the case was dismissed on 27/11/2006, the parties through their advocates Mr. Boniface

and Mr. Balomi, respectively, were actually present. As such, no question of dismissal for lack of prosecution ought to have arisen in that regard.

In fact, if we may digress here a bit, we think it is common knowledge that when a case is set down for mention at the back of a party's mind there will be an expectation that the case will come up for necessary orders only. A party or parties in the circumstances will not expect the case to be dismissed on such a mention date.

In view of the position we have taken on the first ground of appeal there will be no need for us to determine the alternative second ground of appeal.

For the above reasons, we allow the appeal and accordingly set aside the order of dismissal of the suit made by Luanda, J. on 27/11/2006. The High Court of Tanzania (Commercial Division) is directed to reconstitute itself and proceed to determine Commercial Case No. 4 of 2005 from where it ended on 14/8/2006. The appellant shall have the costs of this decision.

DATED at ARUSHA this 24th day of August, 2010.



J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", is written over a horizontal line.

(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL