EVELYNE HELEN MWAMBAZI v WEDSON CHISHA MWAMBAZI (1986) Z.R. 132 (S.C.)

SUPREME COURT
CHOMBA, GARDNER AND SAKALA, JJ.S.
6TH NOVEMBER, 1986
(S.C.Z. JUDGMENT NO. 27 OF 1986)

Flynote

Civil Procedure - Non - Attendance of plaintiff/petitioner on hearing date - Striking out of list.
Divorce - Second petition - First petition dismissed without trial on merits - Whether second petition can proceed

Headnote

The respondent had previously filed a petition for divorce. When the petition came for hearing counsel for the respondent applied for an adjournment saying the respondent was out of the jurisdiction and was not expected to return for twelve months. The trial judge dismissed the petition without hearing any evidence. Thereafter, the respondent filed a second petition, alleging the same facts as were alleged in the first petition which the court was ready to hear. The appellant raised a preliminary point that the court had no jurisdiction to hear the petition because the facts alleged were the same facts as alleged in the first petition and were res judicata, and that the allegations in the first petition had been dismissed.

Held:

(1) Where a plaintiff or petitioner fails to appeal on the date set for hearing the proper course, under Order 35. Rule 2, is to strike out the cause front the list. It is not proper to dismiss the action.

(2) Where allegations in a first petition have not been put forward or adjudicated upon on the merits a second petition may proceed.

Legislation referred to:

High Court Rules, Cap. 50 0.35 r 2
Rules of the Supreme Court 0.35 r 1

Works referred to:

Rayden on divorce (12th Edn) Page 324. par. 23

p133

[Note: Report starts here in printed version]

divorce petition on hearing was dismissed because an adjournment was refused, the same facts alleged in the first divorce petition could be raised in a second divorce petition.

The appellant, that is the respondent in the divorce petition, has appealed against that decision by a High Court judge. Mr Sikota on behalf of the appellant has drawn our attention to Order 35 Rule 1 of the English Supreme Court Rules (The White Book) which provides that, if at the trial of an action one party does not appear, the action may be struck out of the list. He also referred us to the note to that rude in the white book where the learned editor has indicated that, if the plaintiff does not appear but the defendant does appear, the defendant is entitled to judgement dismissing the claim, and the effect of that judgement is the same as if it were a judgement dismissing the action on the merits. Mr Sikota has argued that those authorities mean that the original allegations of the respondent in the first petition were dismissed on the merits.

We have consulted the High Court record in respect of the first petition and we note that when the case came on for trial the petitioner's Counsel asked the learned trial judge for an adjournment on the grounds that his client was out of the country and was not expected to return to the country for twelve months. The learned trial judge said that an adjournment of twelve months was quite unreasonable and that the petitioner could have applied to the court for an early hearing so that the petitioner's evidence at least could have been taken and there would have been no need for an adjournment. For those reasons, the learned trial judge said the petition was dismissed.

A further argument put forward by Mr. Sikota in support of his contention that the allegations contained in the first petition should not be heard was based on Rayden on Divorce, 12th Edition Volume 1 at page 324, paragraph 23. This paragraph is headed "Res Judicata: Courts duty to inquire;" and it continues: "allegations which have been unsuccessfully put forward and disposed of in one suit cannot, subject to the statutory duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent, be repeated in a second suit between the same parties."

Mr Sikota further urged that there was evidence that the parties had reconciled and had gone back to live together after the presentation of the first petition. He agreed, however, that reconciliation was not successful and that was the reason for the second petition.

Mr. Sikota further argued that the petitioner should have appealed against the order made by the learned High Court judge in the first hearing. In view of the subsequent reconciliation the question of an appeal against the order of dismissal is irrelevant. In our view failure to appeal does not affect the question of whether the petition was or should be treated as having been dealt with on its merits. Our own High Court Rules provide in Order 35 Rule 2 the following:

p134

> "If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just."

Section 10 of the High Court Act Cap 50 provides that the jurisdiction vested in the court shall, as regards practice and procedure, be exercised in the manner provided by that Act and the Criminal Procedure Code or by any other written law, or by such rules, order or directions of the court as

may be made under this Act, or the said Code, or such written law and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.

There is no default of an appropriate order in our rules and therefore, no justification for considering the relevant rule for the time being observed in England. In any event, the authority of the note to order 35 Rule 1 of the English Rules (the White Book) does not support Mr Sikota's argument. The note, which refers to the former Order 36 Rule 32 refers to the *effect* of such judgment in default as being the same as if it were a judgment dismissing the action on its merits and specifically states "i.e. it will give the whole costs to the defendant." It does not say that the action shall be deemed to have been decided on its merits, which Mr Sikota contends for.

It is our view that the proper course for the learned trial judge when he was presented with the first petition and an application to adjourn was, if he decided that an adjournment was not an appropriate course to take, to order that the petition should be struck out of the list, not that it should be dismissed. In the event the original allegations made by the petitioner against the respondent were never put forward in open court and were never adjudicated upon. Paragraph 23 at page 324 of Rayden therefore, does not apply. The wording of that paragraph specifically states that allegations which have been unsuccessfully put forward and disposed of in one suit may not be raised again. It is patently clear in his case that none of the allegations contained in the first petition were ever put forward and were certainly not disposed of after due hearing of evidence.

The learned trial judge in the second hearing dealing with the case which is at present before this court said that he was quite satisfied that the allegations in the first petition had never been disposed of. We agree with him. The preliminary point taken on behalf of the respondent had no merit whatsoever. This appeal is dismissed and the petition in the second action will proceed. Costs will follow the event. The appellant will pay the respondents costs of this appeal.

Appeal dismissed.

1985