**Dave v Business Machines Ltd**

[1974] 1 EA 68 (CAN)

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 14 March 1974

**Case Number:** 45/1973 (24/74)

**Before:** Sir William Duffus P, Law Ag V-P and Musoke JA

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*[1] Practice and Procedure – Attendance – Defendant not attending – Plaintiff must prove case.*

**Editor’s Summary**

The appellant did not attend the hearing of the case brought against him by the appellant. The judge gave

judgment relying on letters which were handed to him but not proved.

On appeal

**Held –** where a defence has been filed but the defendant does not attend, the plaintiff must prove his case

by evidence.

Appeal allowed.

**Case referred to Judgment:**

(1) *Eksteen v. Kutosi* (1951), 24 (2) K.L.R. 90.

**Judgment**

The following considered judgments were read. **Law Ag V-P:** The respondent company sold some

shares to the appellant, and sued him for Shs. 60,000/- being the balance allegedly due under the contract

of sale. The appellant entered an appearance and by his defence denied the debt, and pleaded that the

contract was conditional on certain obligations to be fulfilled by the respondent company which had not

been fulfilled. On 26 July 1972, the suit was by consent fixed for hearing on 25 and 26 July 1973. On 25

July 1973, when the hearing was due to begin, Mr. Hira appeared for the appellant. He made it clear that

his instructions were limited to applying for an adjournment, as the appellant had been deported to the

United Kingdom and his evidence might have to be taken on commission. The judge was not impressed

by this belated application in a suit which had been set down for hearing a year earlier, and rejected it out

of hand, in my respectful opinion quite rightly. Mr. Hira then withdrew. The hearing then began, with

only counsel for the respondent company present, and one would have expected him to prove his case *ex*

*parte*, in accordance with O. 9B, r. 3 (*a*) of the Civil Procedure (Revised) Rules, as read with s. 25 of the

Civil Procedure Act, which requires a court to hear a case before pronouncing judgment, even when the

claim is for a liquidated amount, when the defendant has duly entered an appearance and filed a defence

as happened here. Unfortunately this was not done. What did happen, according to the record, is that

counsel for the respondent company addressed the court as follows:

“Claim for liquidated sum of Shs. 60,000/- balance of purchase price of shares transferred by the plaintiff at

agreed price of Shs. 20/- per share. Full amount Shs. 100,000/-. Shs. 40,000/- paid. Balance Shs. 60,000/-.

Agreed bundle of correspondence. Exhibit one. Pray for judgment as prayed. Defendant has not appeared.”

This last statement was not correct, unless counsel meant, as I think he must

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have done, that the defendant had not attended the hearing (within the meaning of O. 9B, r. 3) either in

person or through an advocate. The judge accepted the invitation to give judgment, and did so in the

following terms:

“This being a claim for a liquidated sum representing the balance of agreed purchase price of shares

transferred by the plaintiff to the defendant, I enter judgment as prayed for the plaintiff.”

I agree with Mr. Khanna for the appellant, and with his first four grounds of appeal, that the judge had no

power to proceed as he did, and to dispense with proof of the claim before entering judgment. He appears

to have done so purely because the claim was for a liquidated sum, but the suit was not brought under the

summary procedure laid down by O. 35. Even then there must be affidavit evidence “verifying the cause

of action and any amount claimed”. When, as in this case, the ordinary procedure applies and the

defendant has entered an appearance but failed to attend at the hearing, I would respectfully adopt what

was said by Windham, J. in *Eksteen v. Kutosi* (1951), 24 (2) K.L.R. 90, as to the correct procedure to be

followed:

“Now if an appearance had been entered and a defence filed, and if the only failure on defendant’s part had

been a failure to appear, either personally or through his advocate, on the day when the suit was called on for

hearing, then I think the plaintiff ought properly to have been called upon formally to prove his claim, that is

to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his

claim.”

Mr. Couldrey for the respondent company, who did not represent it in the High Court proceedings the

subject of this appeal, supported the judgment on the ground that the agreed bundle of correspondence

was before the judge, and that the contract relied on by the respondent company was to be found from

perusal of that correspondence. I cannot accept that proposition. So far as I am aware, the agreeing of a

bundle of correspondence amounts to no more than an admission by the parties that the letters and

documents therein contained were written or received by them, or on their behalf, respectively. It does

not amount to an admission as to the truth or evidential value of the contents of those letters and

documents.

There was thus in my considered opinion no evidence before the judge to justify the judgment

delivered by him. I would allow this appeal, with costs; I would set aside the judgment and decree

appealed from, and direct that the suit be remitted to the High Court to be set down for hearing and

determination before another judge. I would order that the costs of the suit, including costs already

incurred, be in the discretion of the judge who hears and determines it.

**Sir William Duffus P:** I have had the advantage of reading the judgment of the Acting Vice-President.

In this case the appellant had entered an appearance and filed his defence but then failed to appear on the

day fixed for hearing.

The judge should have proceeded under O. 9, r. 3 of the Civil Procedure (Revised) Rules 1948 and

proceeded to hear the case *ex parte*. Mr. Couldrey for the respondent concedes this but submits that, in

fact, this is what the trial judge did. The record is not clear but on the face of it does appear that the trial

judge dealt with the matter as a claim for liquidated damages in which no appearance had been entered or

defence filed. I agree, though, that it must be presumed that the judge properly dealt with the matter as an

*ex parte* trial, and that he relied on the correspondence admitted as exhibit 1 to establish the plaintiff’s

case, but it does appear that this correspondence was wrongly admitted.

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Letters can be put in by consent of the advocates for the parties, but in this case it was an *ex parte* trial

and the advocate for the appellant was not present and unable therefore to agree that the letters went in

by consent. It is not sufficient for the advocate who appears for the plaintiff to state from the bar that this

was the agreed correspondence. The danger of this is illustrated here where the advocate for the

appellant, Mr. Khanna also states from the bar that the correspondence was only agreed subject to formal

proof at the hearing.

No evidence was called to prove the plaintiff’s case and the trial judge should have called for such

evidence and not proceeded to judgment as he did.

I agree with the Acting Vice-President that this appeal must be allowed and new trial ordered. I fully

agree with the order set out in his judgment and as Musoke, J.A. also agrees, it is so ordered.

**Musoke J:** I agree.

*Appeal allowed.*

For the appellant:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi)

For the respondent:

*JA Couldrey* (instructed by *Kaplan & Stratton*, Nairobi)