

THE LEGAL POSITION WHEN COUNSEL IS PRESENT BUT THE CLIENT IS ABSENT AT THE HEARING [1997] 2 MLJ lxxxix

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THE LEGAL POSITION WHEN COUNSEL IS PRESENT BUT THE CLIENT IS ABSENT AT THE HEARING

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Order 28 of the Subordinate Courts Rules 1980 deals with the hearing of an action. This order applies when the action is called up for hearing in the sense that all the pleadings and documents are before the court to enable the court to effectively adjudicate on the dispute. The parties with their witnesses must be present if the action is to be heard. This article deals with the problem when a party or any of the parties does not appear on the date of hearing but counsel is present.

If neither party appears when the action is called on for hearing, the court may strike out the action — without prejudice, however, to the restoration thereof on the direction of the judge.¹ When an action — other than an action to which O 43 (proceedings by and against the government) and O 45 (moneylenders' action) apply — is called on for hearing and the plaintiff appears but not the defendant, the court may:

- (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim;² and
 - (b) if the defendant has a counterclaim, dismiss the counterclaim with costs;³ and
- make any other order as it thinks just.

When the action is called on for hearing and the defendant appears but not the plaintiff, the court may:

- (a) if the defendant has no counterclaim, dismiss the action with costs;⁴
- (b) if the defendant has a counterclaim, give judgment for the defendant on his counterclaim;⁵ and

make any other order as it thinks just.

Any judgment or order obtained when one party does not appear at the hearing may be set aside on the application of the party who is affected by the judgment or order.⁶ It must be observed that the rule speaks of a judgment or order given in the absence of a party that may be set aside and in this regard, the appropriate course would be to make an application to court.

What happens if the party is absent but his counsel is present? Would it make any difference? Apparently, there is a clear difference. If one of the parties is absent when the action is struck out, then, that party may apply to court for the restoration of the action for hearing. All he needs

to do is to explain in his affidavit supporting the application the reason for his absence. When the plaintiff is absent but his counsel is present, different considerations apply. Counsel for the plaintiff may seek an adjournment and if the court is minded to grant one, then, no problem arises. However, should the court refuse an adjournment for good reasons — eg, the matter had been adjourned a number of times or counsel for the defendant objects to the application for adjournment — counsel for the plaintiff would apparently be in a dilemma for he or she cannot adduce evidence and proceed with the trial. Assuming that the plaintiff's counsel is in a quandary, unable to proceed simply because the plaintiff is not present, then what happens? It is open to the defendant to invoke O 28 r 7(a), in which case the action has to be dismissed with costs. The court, too, may dismiss the action with costs without any prompting from the defence. The basic thing to remember is that the case has been fixed for hearing and it is the responsibility of the plaintiff to be present with his counsel to prove his case. If he stays away, he does so at his own peril. The plaintiff would have brought the misfortune on himself and no one else can be faulted.

Order 28 r 8(1) provides that a judgment or order obtained in the absence of a party may be set aside on the application by the affected party. It must be observed that an application to set aside a judgment or order may only be made by a party who was absent when the action was called on for hearing. When a plaintiff is present — whether in person or through his counsel — and is unable to proceed with the case, he cannot claim the benefit of O 28 r 8(1). The rule is clear beyond doubt and that is the plaintiff must be absent on the date of hearing. Having said this, the immediate question which calls for an answer is: what is meant by the word 'party'? A party to an action could either be a plaintiff or a defendant. However, that is not the end of the matter. The word 'party' which refers to a plaintiff or a defendant includes counsel who appears for a party — whoever it may be — in an action. Therefore, if counsel representing a party is present in court when the action is called up for hearing and his client — either the plaintiff or the defendant — is absent, the law assumes that the party is properly before the court.

This problem arose in the case of *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd*.⁷ In that case, when the action was called on for hearing, the plaintiff's representative and counsel were present. The defendant was absent but his counsel was present. The learned magistrate invoked O 28 r 6(1)(a) and gave judgment in default of the defendant's presence. On appeal, Ajaib Singh J (as he then was) took the correct view that it was wrong for the learned magistrate to give judgment against the defendant by default as his counsel was present. The learned magistrate was not empowered, in the circumstances, to invoke r 6(1)(a) of O 28.

The learned appellate judge pointed out that both the old (the Subordinate Courts Rules 1950) and new rules provide for the parties to be represented by counsel. At the hearing of an action, the defendant is thus allowed to either appear in person or by an advocate and solicitor. Only if both the defendant and his counsel are absent that a judgment may be entered against the defendant.⁸ The learned appellate judge went on to warn that the plaintiff or the defendant who stays away when an action is called on for hearing does so at his own peril.

The next case is *Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan*,⁹ where the plaintiff and his counsel were absent, but the defendant and his counsel were present. The plaintiff's claim was struck out. An application for reinstatement of the hearing was made and it was granted.

The defendant appealed. Peh Swee Chin J (as he then was) had no difficulty in pointing out that:

¹⁰ ... a litigant can always be represented by his solicitor who is a duly authorized agent for a plaintiff or a defendant. Such being the case, that when a civil case, it follows, comes up for hearing as fixed, the solicitor can be present without his client.

These two authorities clearly illustrate that a party need not be physically present so long he is represented by his counsel.

So, when an action is called on for hearing and the party is absent but his counsel is present, what would be the position? Can the party apply for reinstatement of the action for hearing as of right? The answer is obvious. Rule 8(1) speaks of a party being absent; it does not touch on the point when a party is present and is unable to conduct his case. Therefore, if a plaintiff is absent although his counsel is present and if the court refuses to grant an adjournment or counsel is unable to proceed, it follows that the action should be dismissed with costs pursuant to O 28 r 7(a). And in that case, the proper remedy available to the plaintiff is to appeal against the decision.

A party who is present and is unable to proceed with his case is in a different position from a party who has absented himself altogether. When a party is present and the court has taken steps to dismiss the claim, the presiding officer becomes functus officio in so far as that action is concerned. The only remedy available to the party is to appeal. When a party does not appear when the case is called on for hearing, the court may strike it out if the plaintiff was absent or enter judgment in default against the defendant if he was absent. This is a clear case of default and the presiding officer is not functus officio. The rules, too, give effect to this position. It is suggested that there is a distinction between the phrases 'struck out' and 'dismiss'. When an action is struck out, it may be reinstated; but when it is dismissed, except when the plaintiff was absent, reinstatement is not the proper course. The effect of such a dismissal is the same as if the action had been dismissed on the merits.¹¹

Ajaib Singh J (as he then was), in the case of *Shaharuddin*, seemed to suggest that the defendant in that case was entitled to bring the appeal without first applying to the magistrate to set aside the default judgment. ¹² It is submitted that the only course open to a party in a situation such as *Shaharuddin's* case is to appeal. There is no provision for the application to be set aside under the rules.

Similarly, that part of the decision of Peh Swee Chin J (as he then was) in *Gan Kim Kiat Realty* where the learned appellate judge said that if the solicitor is present, then no judgment in default or dismissal of the claim can be made must be viewed in the particular circumstances of the case. The principle enunciated in *Gan Kim Kiat Realty's* case is that if counsel is excused, it follows that his client is also excused from being present in court.

¹ Order 28 r 5(1).

² Order 28 r 6(1)(a).

³ Order 28 r 6(1)(b).

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- ⁴ Order 28 r 7(a).
⁵ Order 28 r 7(b).
⁶ Order 28 r 8(1).
⁷ [1982] 2 MLJ 79 at p 80.
⁸ Ibid.
⁹ [1983] 1 MLJ 351.
¹⁰ Ibid at p 352.
¹¹ *Armour v Bates* [1891] 2 QB 233 at p 235 per Lord Esher MR.
¹² *Supra* n 8 at p 80.

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