

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 36 OF 1992

LAURENT WEREMA & ANOTHER APPELLANTS
VERSUS
DANIEL KIORA RESPONDENT

J U D G M E N T

MSUMI, J.:

The original suit in this appeal was filed by the respondent against the appellant. On the day when the suit was fixed for hearing, neither the appellant nor his advocate appeared in court though they were duly served. At the request of Mr. Maira, counsel for the respondent, the court entered ex parte judgment for the respondent under Order 9 Rule 6 (1) (a) (ii) B of the Civil Procedure Code. This appeal is against the said judgment.

The memorandum of appeal contains three grounds. However, the gist of the argument in all grounds is that it was wrong for the learned Magistrate to enter the ex parte judgment without first making a finding whether the respondent had established a prima facie case. In support of this argument, Mr. Mkatte, learned counsel for the appellants referred the court to Mulla on the Code of Indian Civil Procedure, 12th Ed. at page 639.

On behalf of the respondent, Mr. Maira controverted this argument. He contended that Order 9 Rule 6(1) (a) (ii) B under which the judgment was pronounced does not require the court to satisfy itself that plaintiff has established a prima facie case before ex parte judgment is entered.

I respectfully agree with Mr. Maira. May be a reproduction of the said provision will magnify the validity of this view. This is what the provision says:

- 6-(1) 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 it is proved that the summons was duly served, the court may proceed ex parte;
 - (ii) if the suit is before any court other than the High Court -
 - (A) where summons issued was summons to file defence and it is proved that the summons was duly served, the court may proceed ex parte;
 - (B) the summons issued was a summons to appear and it is proved that the summons was duly served, the court may enter judgment for the plaintiff.


It is quite apparent that Mr. Mkatte is seriously, with respect, confusing the provisions of Order 9 Rule 6 (1) (a) (ii) B with those of Order 9 Rule 6(1) (a)(ii) A. Indeed this misapprehension is made vivid when the learned counsel referred the court to the commentary on Indian Civil Procedure Code by Mulla. The learned author's comment that plaintiff must establish a prima facie case before ex parte judgment is entered is in respect of section 100(1)(a) of the Indian Civil Procedure Code, which says:

- 100(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then -
 - (a) if it is proved that the summons was duly served, the court may make an order that the suit be heard ex parte.

It is notable that this provision is materially similar to our Order 9 Rule 6 (1) (9)(ii) A. Hence the argument of Mr. Mkatte would be relevant, in my respectful opinion, if the ex parte judgment in dispute was entered under Order 9 Rule 6(1) (a) (ii) A of the Civil Procedure Code. The position is that in a case before a subordinate court,

where a duly served defendant fails to appear when his case is called for hearing one of the following two steps leading to ex parte judgment against him may be taken by the Court. First where the summons issued and served on the defendant is for requiring him to file his defence, the court may allow the plaintiff to prove his case ex parte. And in order to be entitled to an ex parte judgment plaintiff is required to establish a prima facie case against the defendant. Failure to do so the court is bound to dismiss the suit notwithstanding that no defence has been filed against it. The second step which a court may take arises where the summons issued and served on the defendant is for requiring him to appear. Under this situation the court may proceed to enter ex parte judgment in favour of the plaintiff without requiring him to prove his case ex parte. In other words, one may say that under the second step the court is empowered to enter ex parte judgment summarily. The requirement that plaintiff must establish a prima facie does not apply where judgment has been entered, as in this case, without plaintiff adducing evidence ex parte.

In so far as the learned Resident Magistrate acted under the provisions of Order 9 Rule 6(1) (a) (ii) B, the ex parte judgment was properly entered. This appeal is accordingly dismissed with costs.


H. A. NSUMI

JUDGE

5/12/96

For the Appellant: Mkatte.

For the Respondent: Cpt. Sanze.