

IN THE HIGH COURT OF TANZANIA

AT MTWARA.

CIVIL APPEAL NO. 3 OF 2013

(From Liwale District Court Civil Case No. 8 of 2012)

BEFORE: HON. E. R. RWEHUMBIZA ESQ – RM

DISTRICT EXECUTIVE DIRECTOR OF LIWALE COUNCIL - APPELLANT

VERSUS

BONIFACE S. MAGANGA ----- RESPONDENT

JUDGMENT

7th August, 2014 and 3rd September, 2014

M. G. MZUNA, J.:

The District Executive Director of Liwale Council has filed this appeal against the decision of the District Court of Liwale (Hon. E. R. Rwehumbiza) who entered the ex parte judgment in favour of the respondent Boniface S. Maganga.

That said judgment was entered after the appellant had failed to file his amended written statement of defence for about (7) months from the date he was ordered to file same. It was for that reason the respondent prayed for ex parte judgment and the District Court granted his prayer.

The appellant has filed six (6) grounds of appeal in his memorandum of appeal. During the hearing of this appeal the appellant was represented by Mr. Manyangu learned Advocate while the respondent appeared in personal.

The first issue is whether or not it was proper for the District Court to pronounce ex parte judgment in favour of the respondent without ex parte proof for his claim?

Mr. Manyangu learned counsel stated that he objects for the judgment of the District Court for the reasons that it has no qualities to be called a judgment. He said under Order XX Rule 1 and 5 of the CPC (sic) the law says the judgment contains points and decisions thereof. That it is mandatory as the word used is "shall". That the judgment does not show the concise statement, points and decision thereof. It only says the judgment is hereby entered against the defendant, and it is proceeded to award the claim plus 70% of G.D as prayed.

He further submitted that there was a prayer for specific damage of T.shs 100 million. Prayer for general damages Tshs. 200 million but there is no proof of specific damages and that it was not a judgment in legal sense. He prayed for the appeal to be allowed.

On his part the respondent stated that the judgment was entered ex parte because the appellant defaulted to appear for a year. He further submitted that he was not invited to prove his claim but if he was allowed to do so he can prove the specific damages and general damages.

The law is clear under Order VIII rule 14 (2) (b) of the CPC Cap 33 R.E. 2002 that;

"In any case in which a defendant who is required under sub rule (2) of rule 1 to present his written statement of defence fails to do so within the period

specified in the summons or, where such period has been extended in accordance with the provision to that sub – rule, within the period of such extension, the court may

(a) not relevant.

(b) In any other case, fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim”.

The record is silent if the respondent did prove his claim before the District Court after the appellant had failed to file his amended written statement of his defence.

The above cited provision of the law does not provide in a situation where the written statement of defence had been filed but only the amended written statement of defence is not filed. Under such circumstances it can not be said that the Written Statement of Defence had not been filed. The court ought to have abandoned the order which require him file the Amended WSD instead proceed with hearing inter parties based on the filed WSD. This is by necessary implication the meaning of Order VI Rule 18 of the Civil Procedure Code Act Cap 33 RE 2002.

Even assuming the Magistrate has the basis for the decision he resorted to, still with due respect, he went wrong to enter ex parte judgment in favour of the respondent without ex parte proof for his claim as required Under Order VIII rule 14 (2) (b) of the CPC.

Mr. Manyangu was also right when he said that the judgment had no qualities to be termed a judgment because it did not show the concise statement, points and decision thereof as provided for under Order XX rule 1 and 4 of the CPC.

The second issue is what course should this court do?

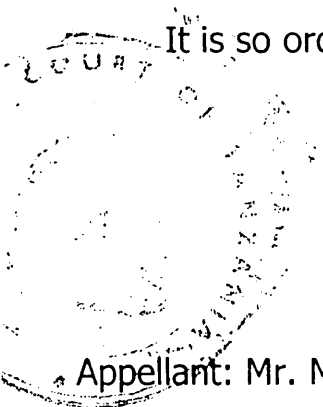
Mr. Manyangu, learned counsel said that there was the preliminary objection which was raised on the point that the court was not seized with jurisdiction as it was a labour matter. It was his argument that such point ought to have been resolved before dealing with the ex parte proof. he referred this court to the case of **Anderson Chale vs. Abubakari Sakapara**, Civil Appeal No. 121 of 2004, High Court of Tanzania at Dar es Salaam, unreported.

I agree. Where a preliminary objection is raised and especially when it relates to the issue of jurisdiction, that point must be resolved first before dealing with the merits of the suit. The Magistrate did not resolve the issue before him and nothing was said as to why he resorted to that course.

Another point which was raised is that the Honourable Magistrate purported to use provisions of the law which are nonexistent. He gave an example of Order IV Rule 180 of the CPC, Cap 20 RE 2002 which is nonexistent. This complaint is well justified as Order IV ends with Rule 33. Magistrates are urged to read the provisions of the law instead of taking the matter for granted.

For the above stated reasons the ex parte judgment is hereby set aside. The matter be remitted before the District Court with direction that it should be dealt with before another Magistrate of competent jurisdiction. It is hereby directed further that the raised preliminary objection be determined first. In case the same is overruled then the matter can proceed for hearing inter parties as the case may be without requiring the appellant to file the amended WSD. No order for costs.

It is so ordered.




M. G. MZUNA,
JUDGE
3/10/2014

Appellant: Mr. Mtama, Solicitor.

Respondent: Present in person.

Court: Judgment delivered.

Right of appeal explained.



M. G. MZUNA,
JUDGE
3/10/2014