**Attorney-General v Shavu**

**Division:** Court of Appeal of Tanzania at Dar-Es-Salaam

**Date of judgment:** 26 November 1999

**Case Number:** 1/98

**Before:** Kisanga, Mfalila and Lugakingira JJA

**Sourced by:** L J S Mwandambo

**Summarised by:** H K Mutai

**JUDGMENT**

**LUGAKINGIRA JA:** This appeal arises from the judgment and decree of the High Court sitting at Dar-es-Salaam in civil case number 128 of 1993. The suit was founded on trespass to property and the person of the Respondent/Plaintiff.

The Respondent was a businessman operating a bar, a lodging, a restaurant and a shop in premises situate on plot number 5/A at Kibondo Minor Settlement in Kigoma region. There were three Defendants before the High Court: the Kibondo District Area Commissioner, one TAK Msonge, the Kigoma Regional Trading Co Ltd, which carried on wholesale and retail business in Kigoma region, and the Attorney-General. It was found at the trial that on 27 November 1978 the First Defendant, purporting to act in his official capacity, ordered the Respondent’s arrest and he was duly arrested and detained in police custody overnight. Meanwhile, agents of the First and Second Defendants broke into and entered the Respondent’s business premises, then removed and took away the Respondent’s entire property. It included goods worth TShs 357 253, cash amounting to TShs 90 000 and cheques worth TShs 4 800.

Nothing was to be restored. This outrageous act apparently came in the wake of a breakdown in negotiations whereby the Respondent was to hand over his premises to the Second Defendant in exchange for the Second Defendant’s premises on plot number 7/D. The Second Defendant accordingly took occupation of the Respondent’s premises but the Respondent could not move to Plot Number 7/D because the promises were dilapidated.

Up until November 1992, the Respondent sought compensation from the government, alternatively, the consent of the Minister to sue, but while the government admitted liability substantially, it offered compensation which the Respondent considered inadequate and consent to sue was flatly refused. In August 1993, following a change in the law, the Respondent instituted this suit against the Defendants jointly and severally claiming damages for false imprisonment, compensation for goods and money seized, loss of earnings, and cost of modifications to the business premises, plus interest and costs. The Second Defendant did not enter appearance and did not file a written statement of defence, whereupon judgment was entered against it on 2 March 1995. The Attorney-General and the First Defendant were represented by a State Attorney and filed a joint written statement of defence. On the day fixed for hearing, 28 April 1995, counsel for the Defendants did not appear and the Court proceeded to take evidence from the Respondent. In the end the Court granted all the claims as well as compensation of TShs 878 383 107 for the devaluation of the shilling, along with interest and costs.

The Attorney-General was aggrieved by the decision and brought this appeal on the following four grounds:

“1. The Honourable Judge erred in law in allowing Defendant (*sic*) to prove his case *ex parte* the way he did, contrary to Order IX, Rule 6 of the Civil Procedure Code 1966 as amended by GN 376 of 1968, Government Proceedings (Procedure) Rules 1968.

2. That the Honourable Judge erred in fact when he awarded compensation based on the United States dollar instead of the Tanzanian Shilling.

3. That the Honourable Judge erred in law by taking into consideration devaluation and also awarding interest.

4. That the Honourable Judge erred in law when he granted the whole amount quoted as loss of earnings without considering whether or not the Respondent did mitigate his loss”.

We will start with the first ground, move on to the fourth, and revert to the second and third grounds.

On the first ground, Mr *Mwidunda* who appeared for the Attorney-General submitted that the *ex parte* proof ordered by the trial Judge was fatally irregular as it ignored the provisions of Order 9, Rule 6 as modified by GN 376 of 1968. This Government Notice introduces various modifications in the First Schedule to the Civil Procedure Code to cater for proceedings under the Government Proceedings Act, 1967. In its unmodified form Rule 6(1)(*a*) of Order 9 reads thus:

“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 and it is proved that the summons was duly served, the court may proceed *ex parte*”.

As modified by GN 376 of 1968, paragrah (*a*) reads thus:

“ (*a*)(i) if the Defendant is the Attorney-General and it is proved that the summons was duly served, the Plaintiff may apply for leave to proceed *ex parte* and the court shall thereupon fix a day for the hearing of the application and shall direct that notice of the application and of such day be given to the Attorney-General;

(ii) Where the Attorney-General appears at the hearing of the application under this paragraph and assigns good cause for his previous non-appearance, he may, upon such terms as the court may direct as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for hearing of the suit”. Mr *Mwidunda* argued that in view of this modification, the Respondent should have moved the trial court by a written application as provided under Order 43, Rule 2 to proceed ex parte and the Court should have fixed a day for hearing the application after notification to the Attorney-General. Since this procedure was not complied with, but the court proceeded as if GN 376 of 1968 did not exist, the ex parte proof was incurably irregular. Mr *Lukwaro* appearing for the Respondent disagreed with Mr *Mwidunda*. He stated that GN 376 of 1968 did not apply in this case and gave two reasons. First, he said that the modification applied only “if the defendant is the Attorney-General”, meaning, if the Attorney-General is the sole defendant. In this case, however, the Attorney-General was one of three Defendants but not “the Defendant”. Second, Mr *Lukwaro* submitted that Order 9, Rule 6 applies “when the suit is called for hearing”, meaning, when it is called for the first time for hearing. In this case, Mr *Lukwaro* said, the suit was not first called for hearing on 28 April 1995, but that was an adjourned date.

It seems logical to begin with Mr *Lukwaro*’s second point. Indeed in the opening part of Rule 6(1) the words “when the suit is called for hearing” appear to be operative. In one sense that means the court cannot proceed *ex parte* if, say, the suit is only coming for mention. Mr *Lukwaro* takes the matter further to say that those words refer to the first day of hearing. We have given adequate consideration to the argument and we think learned counsel has a point in the first place, there is support for the argument from learned texts. *Sarkar* (8 ed) page 478, says the words “called on for hearing” mean “on the first day of hearing” so as to distinguish Order 9, Rule 6 from Order 179, Rule 20. Similarly, *Woodroffe* (2 ed) page 756, says the words “when the suit is called on” appear to have been inserted so as to limit Order 9, Rule 6 to the first day of hearing and mark the distinction between these provisions and those of Order 17, Rule 2. Further support for the argument is also found in Order 9 itself read with Order 8, Rule 15. A careful examination of Order 9 establishes that the whole of it refers to a hearing day fixed in accordance with the provisions of Order 8, Rule 15, and that in fact is the first hearing day fixed upon completion of the pleadings. Order 8, Rule 15 says that when the pleadings are complete, “the case shall be deemed to be ready for hearing and a day shall be fixed by the court accordingly . . .”. Order 9, Rule 1 provides for appearance by the *exparties* on the day so fixed and the rest of the Rules under Order 9 provide for the consequences of non-appearance by the parties or any of them on that day. We are therefore in agreement with Mr *Lukwaro* that the words “when the suit is called for hearing” in Order 9, Rule 6(1) refer to the first day fixed for hearing.

However, our agreement ends there; we do not think, with respect that learned counsel is correct in further stating that Order 9, Rule 6 applies only when the suit is called for hearing on the first occasion. It seems that he mistakes *Sarkar* where it is said (on page 1309): “Order 9, Rule 6 by itself is not applicable if the Defendant after having appeared in answer to the summons fails to appear at an adjourned hearing”.

Learned counsel appears to rely on this passage, and similar passages he read from *Mulia*, to argue that Order 9 Rule 6 cannot apply in this case because 28 April 1995 was not the first hearing day but an adjourned hearing day. He overlooks, or so it seems, the significance of the words “by itself” in the passage which imply that Order 9, Rule 6 as such cannot be applied at an adjourned hearing except in conjunction with some other provisions. These provisions are Order 17, Rule 2 which states: “Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit”.

Therefore, Order 9, Rule 6 is applicable even on an adjourned hearing, but it derives that applicability from Order 17, Rule 2. *Sarkar* in fact makes this point by again saying (*ibid*):

“Both under Order 9, Rule 6 and Order 17, Rule 2 the procedure is the same where the Defendant fails to appear at the hearing, whether the hearing takes place on the day fixed in the summons as contemplated by Order 9, Rule 6, or at a later date to which the hearing may be adjourned, which is contemplated by Order 17, Rule 2”.

And *Woodroffe* states (on page 838) that Order 17, Rule 2 “is an application to adjourned hearings of the procedure prescribed for the first hearing”. It is thus evident that Order 9, Rule 6 when read with Order 17, Rule 2 applies to adjourned hearings and was so applicable in the instant case if, as maintained by Mr *Lukware*, 28 April 1995 was an adjourned date.

We say if 28 April 1995 was an adjourned date because there is some difficulty in this case in ascertaining which day was the first day of hearing, the proceedings having taken a checkered course.

The written statement of defence for the First and Third Defendants was filed on 16 January 1994 and hearing was fixed for the first time to proceed on 10 June 1994. On that day, however, hearing was adjourned to 9 August 1994 due to the absence of the First and Second Defendants. But on that day neither the Respondent/Plaintiff nor his counsel appeared nor was the suit dismissed for want of prosecution. There followed an application for restoration of the suit and it was restored on 22 September 1994 when hearing was also fixed for 2 March 1995. On that day judgment was entered against the Second Defendant but hearing did not proceed; the Judge made an order staying hearing in order for the case to go through the ADR process. It seems that no mediation took place, or it failed, for the court sat on 11 April 1995 when the Judge ordered: “Hearing adjourned to 28 April 1995”. The word “adjourned” would suggest that 11 April 1995 was a hearing day, but it seems most likely that the Court sat on that day ostensibly to fix a hearing day following the failure of mediation. On 28 April 1995 learned counsel for the Defendants did not appear and the Plaintiff was permitted to proceed.

Now, which was the first day of hearing 10 June 1994, following completion of the pleadings, 2 March 1995, following restoration of the suit, or 28 April 1995, following the failure of mediation? It is tempting to think that 10 June 1994 cannot be that day because the suit was thereafter dismissed and ceased to exist, but the temptation is fraught with difficulty since the restoration of the suit operated to revive all the steps that had been taken before. That being so, 2 March 1995 which followed the restoration cannot be the first hearing day but must rank as an adjourned date. Similarly, 28 April 1995, though coming after the failure of mediation, cannot be the first hearing day. The scheme of Order 8A, B and C which provide for alternative dispute resolution does not remove a suit from the jurisdiction of the court but is a process which, if successful, substitutes for a trial. To that end even the Learned trial Judge was careful to say that he was “staying” the hearing but not disposing of the suit. This analysis leaves 10 June 1994 as the first day of hearing and Mr *Lukwaro* was correct in regarding 28 April 1995 as an adjourned date. It follows from what has been stated earlier that Order 9, Rule 6 was applicable on that day by virtue of the provisions of Order 17, Rule 2. In fact the trial Judge did not cite any provision while deciding to proceed *ex parte* but, as now demonstrated, his decision had the requisite basis in law.

To turn now to Mr *Lukwaro*’s first point, he said that GN 376 of 1968 applies only where the Attorney-General is the sole defendant. Mr *Mwidunda* countered, but we think without heart, that the modification applies whenever the Attorney-General is a defendant, whether alone or with others. The answer, really, turns on the construction of “if the defendant is the Attorney-General”, and these words do not present any ambiguity. Giving them their grammatical meaning, they limit the person of the defendant to the Attorney-General only and any attempt to read any other defendant in that context would be an outrage to the public language. Had the legislature wished to convey a different meaning and to make it appear that GN 376 of 1968 is applicable whenever the Attorney-General is a defendant, and not “the Defendant”, it could have said so. For instance in Order 3, Rule l the same GN 376 of 1968 introduces the words “or, where the Attorney-General is a party . . .” and in that context the modification applies whenever the Attorney-General is a party. We hold, therefore, that the modification to Rule 6(1)(*a*) applies where the Attorney-General is the sole Defendant but not where, as in this case, he is one of several Defendants. In saying so we are also fortified by the modification to Rule 11 of Order 9 which states: “Provided that if the Attorney-General is a defendant who does not appear, the provisions of paragraph (*a*) of subRule (1) of Rule 6 shall apply to such non-appearance”.

This means that where the Attorney-General is one of several Defendants and defaults in appearance, the Court may proceed under Order 9, Rule 6 as if GN 376 of 1968 did not exist. The proviso is a logical clarification; it is otherwise difficult to imagine a situation whereby the other Defendants would have to wait while the Attorney-General was being availed the privileges of the Government Notice. For there is no doubt that the modification to Rule 6 extends to the Attorney-General a privilege not enjoyed by other litigants; the legislature could not be so indulgent and also intend that this privilege should be enjoyed at the expense of co-Defendants. The proviso to Rule 11 puts this beyond doubt.

We are satisfied in the final analysis that GN 376 of 1968 applies to Order 9, Rule 6 only where the Attorney-General is the sole Defendant but does not apply in a case like the present where the Attorney-General was one of three Defendants. The first ground of appeal is therefore rejected.

The fourth ground charges the trial Judge with granting earnings without considering whether or not the Respondent mitigated his loss. This need not detain us long. In fact the trial Judge considered the aspect of mitigation of loss and said:

“It is . . . to be noted when the Plaintiff was forcibly removed from his business premises the building he was supposed to move into, being one formerly occupied by the Regional Trading Co, was not by then fit as business premises. It was in a dilapidated state . . . It is also to be born in mind that by seizing his trading goods, the Plaintiff’s business capacity had thereby been brought to the ground. In the circumstances it is most unreasonable to contend that the Plaintiff had not been stopped from carrying on with his business, when he was practically so battered”. We share in the observations of the Learned Judge. Perhaps it is only necessary to add that a Plaintiff is only expected to take reasonable steps to mitigate his misfortunes and whether he has done so or not is a question of fact rather than law which has to be judged in the peculiar circumstances of each case. In the case before us, the Respondent could mitigate his loss by taking up occupation of the premises on plot number 7/D and continuing his business there, but as the trial Judge remarks in the passage above, neither of this was possible. There were no alternative premises to turn to, there were no goods to restart a business with, and, it should not be forgotten, even his money was seized. In spite of all this, the Respondent in fact did seek to mitigate his loss. He set out early to claim, compensation or, if this failed, to be allowed to sue; but for over 10 years he was not offered reasonable compensation and for the same period he was refused the fiat to sue. Yet he was under no obligation to aggravate his already precarious situation in order to mitigate the compensation payable by the Defendants. This case is testimony to such a flagrant violation of the rule of law, wanton disregard of the individual’s rights, and abuse of power by the officers of state that it is cynical and unbefitting to turn around and say that the Respondent did not mitigate his loss. In the circumstances, we cannot fault the trial Judge in his decision to grant all the items of lost earnings. In fact they were modest and amounted to TShs 3 100 per day, consisting of TShs 500 from the shop, TShs 1 000 from the bar, TShs 450 from the restaurant and TShs 1 150 from the lodgings. We reject the fourth ground as well.

The second ground questions the propriety of using the United States dollar as a yardstick in assessing compensation for the purpose of making good the depreciation of the shilling. Mr *Mwidunda* contended that the practice of the courts in this country is to award reasonable compensation to cater for devaluation and charged that the method used by the trial Judge had resulted in an excessive award. Mr *Lukwaro* saw nothing wrong with the use of the dollar and did not consider the award excessive.

The Respondent’s entitlement to be compensated for devaluation is not in dispute. This Court has on a number of occasions taken the position that in awarding compensation it is proper to take into account the fact of devaluation of our currency in order to put the claimant in the position he was at the time of the wrong complained of: see for example *NBC v Perma Shoe* Co [1988] TLR 224 and *Augustino v Mugabe* [1992] TLR 137. In deciding to award compensation in the instant case the Learned trial Judge actually had that principle in mind for he spoke of putting the Respondent “in as good a position as he would have been had his business not been brought to a stand still”, and that the Respondent deserved to “be offered compensation that would proximately enable him to put up another business of the kind that had been effectively wiped out”. The Respondent’s claims fell under five heads, that is, (i) TShs 357 253 for goods seized, (ii) TShs 94 800 in cash and cheques seized, (iii) TShs 114 400 being cost of modifications to the business premises, (iv) TShs 3 100 in lost earnings, and (v) TShs 13 000 as damages for false imprisonment and inconvenience but which the trial Judge scaled down to TShs 10 000 only. There is no controversy or reasonable controversy over these basic claims which amounted to TShs 579 553 as at 28 November 1978. In assessing the compensation for devaluation, however, the trial Judge adopted a methodology which we think attracts at least two criticisms.

The first criticism is that raised by Mr *Mwidunda*: the Learned Judge purported to determine the Respondent’s exact entitlement by employing a multiplier derived from the exchange rates between the shilling and the dollar over the period 1979 to May 1995, the date of the judgment. As a result item (i) in the above paragraph yielded TShs 185 414 304, item (ii) yielded TShs 49 201 200, item (iii) yielded

TShs 59 373 600, item (iv) yielded TShs 579 203 000, and item (v) yielded TShs 5 190 900. The combined total came to TShs 878,383,107 to which was added interest from the date of judgment to full payment. The ridiculous nature of the result is self-evident. From a humble TShs 579 553 the element of compensation for devaluation came to over TShs 878 million. The result was ridiculous because by no stretch of imagination could the Respondent have made that amount in the 15 years considered by the Learned Judge. It is obvious, therefore, that the methodology was wrong. Indeed we are not aware of any authority or precedent where the dollar was used to calculate judicial compensation for the purpose of offsetting devaluation, although we are aware that our shilling is pegged to the dollar for the purpose of financial transactions. But as Mr *Mwidunda* argued, this Court and the High Court have on divers occasions awarded what was considered a reasonable amount in the circumstances of each case. In *Perma Shoe Co* (above) a Judge of the High Court awarded TShs 50 000 and this Court upheld that sum as “not excessive so as to warrant interference”, although the Judge did not show how he arrived at the figure. In *Augustino* (also above) this Court considered too high an award of 200% on the compensation of TShs 500 000 for non-use of a motor vehicle. The Court said: “We think a 50% rate is reasonable in the circumstances of this case. Thus we allow TShs 250 000 for the devaluation”. In the instant case, therefore, the trial Judge misdirected himself in departing from the principle of reasonableness and purporting to be scientific in a context which required a judicious decision only. The second criticism is that even if the formula employed by the Judge were available in practice, but we stress it is not, there was no evidence in this case to enable him to exploit that formula. No evidence whatsoever was adduced regarding the exchange rates between 1979 and 1995. During the trial an attempt was made to introduce a document showing rates of exchange for foreign transactions on 22 November 1978 but the document was not admitted in evidence because it was not certified by the originating bank. Thereafter no other attempt was made either to reintroduce this document or to adduce other evidence on the whole of the period up to May 1995. It therefore remains a mystery where, when and how the Learned Judge came by the exchange rates upon which he purported to rely. He states in his judgment that “it has been possible to obtain exchange rates for the month of November 1978, December 1984, December 1989 and December 1994”, but since none of this is in the record of evidence, it is reasonable to assume that he obtained that information otherwise than in the course of the trial. We think that was improper. The decision of the Court can be founded only upon evidence adduced in court but not on information privately obtained in the absence of the parties. It follows, therefore, that the award by the Learned Judge based, as it was, on information from unknown sources, was a complete nullity and deserves no further attention. We uphold the second ground of appeal.

Lastly, the third ground. It is contended here that the trial Judge erred in law by taking into consideration devaluation and also awarding interest. It seems there is a misunderstanding. The award of interest on the compensation for devaluation did not amount to double compensation for the same element, rather the compensation, being the decretal sum, attracted interest for so long as it remained unpaid. It is normal practice for the decretal amount to attract interest and the cure for it, indeed the cure for any interest, is to pay up at once. Apart, perhaps, from the proliferation of interest in the judgment generally, we are otherwise not persuased that the Judge went wrong as such. The third ground is therefore rejected.

We now set out what we consider the appropriate award in the case and in doing so we propose to rationalise the aspect of interest. Firstly, we uphold the principal sum of TShs 576 453 awarded by the trial Judge. Second, we add to this sum compensation of TShs 2 500 000 for devaluation over a period ofsixteen and half years at the rate of 25% pa rounded off to the nearest half a millionth. We wish to emphasize that this approach to catering for devaluation is not intended to be general but serves the peculiar circumstances of this case. In each case, therefore, the concerned court should be guided by the factors obtaining in determining the appropriate award.

Third, we grant lost earnings of TShs 18 414 000 at the rate of TShs 3 100 per day to the date of judgment. The three amounts add up to TShs 21 490 453 and this will carry interest at the current bank rate from the date of judgment, 18 May 1995, to full payment.

In sum, the appeal partly succeeds and partly fails; each party will bear its costs before this Court. (Kisanga and Mfalila JJA concurred in the judgment of Lugakingira JA.)

For the Appellant:

*Mr Mwidunda*

For the Respondent:

*Mr Lukwaro*