IN THE SUPREME COURT OF NIGERIA

Suit No: FSC428/1963

Petitioner: Eko Odume & Ors (For themselves and the people of Amorie Ozzizza Akpo)
And
Respondent: Ume Nnachi & Ors (For themselves and the people of Amata Ozzizza)

Date Delivered: 1964-11-06

Judge(s): Lionel Brett, George Baptist Ayodola Coker, Chukweike Idigbe

Judgment Delivered

The point in this appeal is whether the High Court, Eastern Nigeria can give judgement on a statement of claim filed in an
action without receiving any evidence on the claim set out in the relief paragraph thereon. The claim of the respondents was
for '300 damages for trespass on a parcel of land and injunction. Pursuant to an order for pleadings made in July, 1961,
respondents filed a statement of claim, but appellants failed to file a statement of defence. When on the 18th of February, 1963,
the case was mentioned, Counsel for respondents referred to the failure by appellants to file a statement of defence and further
observed that no application for extension of time to file a statement of defence had been made by them. Counsel for appellants
acknowledged their failure to file a statement of defence, and after observing that an appeal against a judgement of the High
Court in another case relating to the same land, and between the same parties, was then pending in the Federal Supreme Court,
contended that in those circumstances, a statement of defence would serve no useful purpose. As defence Counsel neither
applied for an adjournment, nor for extension of time within which to file a statement of defence, Counsel for respondents
asked for judgement. Whereupon the learned Judge (Phil-Ebosie J.) entered judgement for respondents in terms of their writ but
without receiving evidence on the claim.

The only ground of appeal argued before us by Counsel for appellants reads as follows:

\"The learned trial Judge erred in law by entering judgement for plaintiffs without hearing them.\"

This ground of appeal has not been happily worded, but it was clear from the argument of counsel that the gravamen of
appellants\' complaint was that the learned Judge erred in law in proceeding to give judgement for the respondents without first
receiving any evidence on the claims for '300 damages for trespass and injunction. In further support of his contention, learned
Counsel for appellants referred us to the provisions of Order 41, rule 3, High Court Rules (Eastern Nigeria) 1955 (hereafter
referred to as H.C.R.), and Section 15 High Court Law (Eastern Nigeria) 1955 (hereafter referred to as H.C.L.). Section 15
H.C.L. reads

\"The jurisdiction vested in the Court shall be exercised (as far as regards practice and procedure) in the manner provided
by this Law and in any other written law or by such rules and orders of Court as may be made pursuant to this Law or
any other written law, and, in default thereof in substantial conformity with the law and practice for the time being

observed in England in the High Court of Justice.\"
Rule 3 of Order 41 H.C.R. reads
\"If the plaintiff appears (i.e., at the trial) and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of the summons, proceed to hear the cause and give judgement on the evidence adduced by plaintiff\" (bracket is by this Court).
In the case in hand, parties were present in the Court below, when the learned Judge dealt with the case, and that being so, it is
clear that the provisions of rule 3 of Order 41 H.C.R. are inapplicable.
The High Court Rules (Eastern Nigeria) 1955 do not contain any specific provisions for a situation where, as in the instant case,
following a defendant\'s default on a previous order for pleadings, a plaintiff proceeds to ask for judgement; and it is our view
that in those circumstances the relevant provisions of the Rules of the Supreme Court, England (hereafter referred to as R.S.C.
England) will, by virtue of section 15 H.C.L, apply. In a similar situation arising in the High Court of Western Nigeria, the Federal Supreme Court held that relevant provisions of the R.S.C. (England), applied. See Aderide Ogunleye v Gabriel Arewa
decided on 3rd September, 1959, and reported in [1960] W.R.N.L.R. p. 9. In that case, the Federal Supreme Court upheld a
judgement given by the High Court, without receiving any evidence on a claim for declaration of title, following an application
for judgement made on notice of a motion filed by plaintiff who had previously delivered a statement of claim; and Quashie
Idun Ag. FJ. (as he then was), in delivering the Judgement of the Court, made the following observation:
As the defendant failed to deny these allegations of the plaintiff, we think that the provisions of the Western Region High Court Rules would be rendered ineffective if order 27, rule 11 of the Rules of the Supreme Court, England were not applied, for it would mean that even though no defence has been filed in answer to material averments by the plaintiff, the Court would still be bound to hear evidence as if no statement of claim has been filed. This would also reduce the Rules and practice of pleadings to absurdity.
See [1960] WRNL.R. at p.. 11.
With the above observations we are in complete agreement, and we would again remind Counsel of their duty, in the conduct of
cases for their clients, to adhere strictly to the provisions of the Rules of Court. The claim in Ogunleye v Arewa was, however,
for a declaration of title merely and the claim in the case in hand is for '300 damages for trespass and injunction; and we think
it proper to draw a distinction between the two cases; since in our view different considerations apply to the case now under
appeal.
Learned Counsel for respondents, in his endeavour to support the procedure by which the award of, '300 damages for trespass
was made, referred us to rule 2 of the former Order 27 R.S.C. (England) and contended that as the claim for '300 for damages
for trespass was a claim for \'liquidated damages\' the respondents (i.e., plaintiffs) were entitled to final judgement for the amount
claimed on a summary application. We think, however, that the description by learned Counsel of a claim for '300 damages for
trespass, as one for \'liquidated damages\' is erroneous. A claim for damages does not become one for \'liquidated damages\'
merely because a specific amount of money is claimed.
Whenever the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale or other positive data it is said to be liquidated or \'made clear\'. But when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate, the damages are

said to be unliquidated.
See Odgers on The Common Law (1927) 3rd Ed. Vol. 2, p. 654.
In our view, the provisions of rule 2, of the former Order 27 RS.C. (England), do not apply in the present claim.
As already observed, the claims before the lower Court are for damages for trespass and injunction and not, as in the case of
Ogunleye (above cited), merely for a declaration of title.
The relevant rules in the High Court (England) are rules 3 and 7 of Order 19 of the Rules of the Supreme Court (Revision 1962)
which came into force on January 1, 1964; and they are the same rules 4 and 11 of Order 27 R.S.C. (England) in force in 1963,
when the order which is the subject of this appeal, was made. Under rule 4, Order 27, a plaintiff whose claim is for
\'unliquidated damages\' (as in the case now on appeal), may enter interlocutory (not final) judgement against a defendant; and
thereafter (in England) a writ of inquiry will issue for assessment of damages. An application for judgement made under this
rule need not be by a motion. Under rule 11 of Order 27, a plaintiff who claims an order of injunction may obtain final
judgement against a defendant, but the application for judgement under this rule must be by motion or summons. It is not
necessary in either case (i.e., under rules 4 or 11 of the order) for the Court to receive evidence before judgement is entered for
the plaintiff, provided always that a statement of claim, but no statement of defence, has been filed; in a few cases (not relevant
to the case in hand, e.g., claims against infants and persons under disability and claims under order 55, Rule 5a R.S.C. England)
evidence has to be received before judgement is entered for the plaintiff. Dealing with rule 11 of Order 27, Bowen LJ. made the
following observation:
There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked
to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant;
and, as has been decided by Lord Justice Kay in Smith v Buchan (1888) 36 W.R 631, no evidence can be admitted as to
those facts\"
(underline, is by this Court) See Young v Thomas [1892] 2 Ch. 134 at 137.
No specific provision is made in the Rules of Supreme Court (England) for combination of applications under rules 4 and 11
aforesaid (i.e., of Order 27 R.S.C. England); we, however, see no reason why those applications cannot be combined. In Dykes
& others v Thompson [1909] W.N. 104, two applications - viz for damages and injunction- were combined but at the hearing,.
the applicant withdrew his application for damages and judgement was entered on his application for injunction and the
propriety of the joinder of the two applications was not questioned by Hamilton J. In the case now on appeal, the learned Judge
entered final judgement for respondents in respect of the claim for damages for trespass without receiving evidence on that
claim and we think he was clearly in error; but it is, however, our view that the order for injunction is supported by rule 11 of
order 27 RS.C. (England). We however wish to make it clear that the learned Judge was clearly wrong in proceeding to enter
judgement for respondents on the claim for injunction when the application for judgement was made neither by motion, nor by
summons. Counsel for appellants has not, however, attacked the decision on this ground, or suggested that the absence of a
formal application for judgement prejudiced his clients; and it being an error on a point of procedure, we do not consider,

having regard to the attitude adopted by the appellants in the High Court, that it is a point which should be taken by this Court
ex proprio motu.
In the final result, the appeal against the award of injunction fails. In regard to the award of damages for trespass, we think,
however, that the proper course is to remit the case to the learned trial Judge (Phil-Ebosie. J.), to receive evidence on that claim,
and to make such award as the evidence may support, after due assessment.
For clearness sake, it is proposed to replace the judgement of the Court below in suit E/17/6l, the subject of this appeal, which
is hereby set aside, as follows
(a) No defence having been delivered by defendants, it is adjudged that the plaintiffs do recover against the defendants and
their people of Amorie Ozzizza Afikpo, the value of damages to be assessed by the High Court; and
(b) the defendants and their people of Amorie Ozzizza, their servants and or agents are hereby restrained from trespassing
on the land \"Ozarra Nkogho, Ugwu Ezeanyi, Eboro Ukwu and Ebo Otu\", shown on plan No L/D71 filed in Court by plaintiffs.
As, in the main, the appellants have failed in this appeal, the respondents will have their costs which are fixed at twenty-two
guineas; and it is further ordered that costs of the original hearing should abide the assessment of damages by the High Court.