IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 39 OF 2014

1. **PROSPER PAUL MASSAWE**
2. **HILDA JOHN MUSHI** } **.....APPELLANTS**
3. **WILERICK PAUL MASSAWE**

VERSUS

ACCESS BANK TANZANIA LIMITED.....RESPONDENT

(Appeal from the ruling, order and decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Nchimbi, J.)

dated the 26th day of February, 2014

in

Commercial Case No. 79 of 2013

JUDGMENT OF THE COURT

5th & 22nd July, 2021

KITUSI, J.A.:

Access Bank Tanzania Limited, the respondent, instituted a summary suit, Commercial Case No. 79 of 2013, against Prosper Paul Massawe, Hilda John Mushi and Wilerick Paul Massawe, the appellants, seeking to recover mortgage debts allegedly due to it from them. The appellants' application for leave to appear and defend the suit, vide Miscellaneous Application No. 69 of 2013, was denied. Instead, the High Court, Commercial Division, proceeded to enter judgment as

prayed in that application from which a decree was extracted subsequently.

The appellants have appealed against that decision on five grounds, the first raising a procedural issue, that the impugned judgment was actually entered in the Misc. Application; No. 69 of 2013, instead of Commercial Case No. 79 of 2013 which was left undetermined. The second ground of appeal challenges the trial court's refusal to grant the appellants leave to appear and defend the suit, despite them demonstrating existence of triable issues to warrant grant of their said application. The third and fourth grounds of appeal challenge the trial court's decision for not taking into account that the respondent admitted to have seized and sold properties belonging to the first and second appellants and that it erred in not taking the amount realized in the sale as offsetting the debt. The fifth ground is a complaint on the award of interest. There was an additional ground that sought to challenge the competence of the summary suit.

Before us, the appellants were represented by Messrs. Thomas Eustace Rwebangira and Thomas Brash, both learned advocates, whereas the respondent was represented by Mr. Edward Nelson Mwakingwe, also learned advocate. All counsel adopted the written

submissions as forming part of their respective positions in the appeal, before they addressed us orally.

To begin with, Mr. Rwebangira who argued grounds 1, 2, 3 and 4, submitted that it was an error for the trial court to enter judgment immediately after dismissing the application for leave to defend, and doing so within the same proceedings. He submitted that after the trial Judge had dismissed the application for leave to appear and defend the suit, judgment in the summary suit under Order XXXV rule (2) (a) of the Civil Procedure Code [Cap 33 R.E 2002] hereafter the CPC, was supposed to be entered in the main suit, but the learned trial Judge left it hanging. In addition, the learned counsel wondered what the trial court might have meant by entering judgment 'as prayed', while under paragraph 12 of the plaint, the reliefs prayed by the respondent included general damages, compounded interest and also prayers for alternative reliefs. He suggested that it is inconceivable that a judgment would award unspecified main prayers simultaneously with the alternative prayers.

On the second ground, Mr. Rwebangira submitted that in dismissing the appellants' application for leave to appear and defend, the trial court erred in concluding that the appellants had not

demonstrated existence of triable issues. Citing to us our decision in **Makungu Investment Company Ltd and Petrosol (T) Limited**, Civil Appeal No. 23 of 2013 (unreported), the learned counsel argued that the trial court's main consideration should have been whether the defendants (appellants) had a fair and reasonable defence to make. He linked this ground with grounds 3 and 4.

The complaint in grounds 3 and 4 of appeal is that the fact that there had been seizure and sale of some of the properties belonging to the first and second appellants, and that the realized proceeds had not been ascertained, should have made the trial Judge to either find that there were triable issues, or offset the amount due to the respondent.

Mr. Brash argued the additional ground of appeal, leave of which had earlier been sought and obtained. Briefly the learned advocate attacked the competence of the summary suit in as far as the 2nd and 3rd appellants were concerned. **The learned counsel submitted that a summary suit based on a mortgage could not competently implead persons who were not parties to the mortgage deed.**

Mr. Mwakingwe made an unenthusiastic submission in support of the course that was taken by the learned trial Judge. Therefore,

although he appeared to agree that there was no judgment, he maintained that there is a drawn order in favour of the respondent.

Before we refer to the response of counsel for the respondent on the second ground of appeal, we shall address the first ground of appeal that raises a procedural issue; whether it was correct for the learned Judge to proceed to enter judgment for the respondent within the very order dismissing the application for leave to appear and defend. Mr. Rwebangira submitted that the learned Judge violated the procedure under O. XXXV rule (2) (a) of the CPC. That provision stipulates: -

> *"(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from the judge or magistrate as hereinafter provided to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in plaint shall be deemed to be admitted, and the plaintiff shall be entitled".*
>
> *(a) Where the suit is a suit, referred to in paragraph (a), (b) or (d) of rule 1 or a suit for the recovery of money under a mortgage and no other relief in respect of*

such mortgage is claimed, to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained".

In an ideal situation, a suit is concluded by a judgment and a decree, and we think that is the import of Order XX rule (1) of the CPC. Rule 4 of Order XX of the CPC provides: -

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision".*

Then, rule 6 thereof provides the following about a decree: -

> *"The decree shall agree with the judgment;* ***it shall contain the number of the suit****, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.* (emphasis ours)".

Our reading of sub rule (2) of rule 2 of Order XXXV of the CPC that the plaintiff in a summary suit 'shall be entitled to a decree', together

with rule 6 of Order XX of the CPC as to what a decree shall contain, leads us to a conclusion that a Magistrate or Judge sitting in a summary suit is expected to prepare a judgment in that summary suit which is distinct from the ruling in the application for leave to appear and defend. Only then, in our view, will the decree reflect the judgment. This is not all too new, after all. In **Mulla Code of Civil Procedure**, 19th Edition at page 3310, the learned author writes the following in relation to summary suits and judgment: -

> *"Therefore, the court or the judge dealing with summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if (i) the defendant has not applied for leave to defend or if such application has been made and refused or, if (ii) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted".*

It is increasingly clear that Order XXXV of the CPC contemplates a judgment from which a decree may be extracted. Given that position, we are unable to go along with Mr. Mwakingwe that there is in the record, a drawn order capable of being executed. Instead, we take note that there is a copy of the decree at page 406 of the record purporting

to bear Commercial Case No. 79 of 2013, but given the fact that there was no judgment, however brief, in that case, the purported decree cannot be valid under rule 6 of Order XX of the CPC reproduced above. If what we have demonstrated above is not enough, rule 7 of Order xx of the CPC requires a Judge to ascertain that the decree reflects the judgment. It provides: -

> *"The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or Magistrate has satisfied himself that* ***the decree has been drawn up in accordance with the judgment,*** *he shall sign the decree"* (emphasis supplied).

We have sufficiently demonstrated the irregularities in the proceedings in Misc. Application No. 69 of 2013, and as a result, we find merit in the first ground of appeal.

The next point for our determination is whether the trial court rightly dismissed the appellants' application for leave to appear and defend the suit. It is common ground that the underlying factor for grant of that leave is existence of triable issues, a matter of fact which has to be demonstrated by the applicant. The court's determination on whether or not there are triable issues has to be based on the affidavit,

obviously because as of that stage, there is yet a statement of defence from the defendant. This is a settled position from our previous decisions, such as; **Makungu Investment Company Ltd** (supra). We also endorse the first holding of the High Court in **Mohamed Enterprises (T) Ltd v. Biashara Consumer Services Ltd** [2002] T.L.R 149, which the learned counsel for the appellants cited to us. The holding states: -

> *"(I) In deciding whether a defendant should be granted leave to appear and defend a summary suit the role of the court is limited to looking at the affidavits filed by the defendant in order to decide whether there is any triable issue fit to go to trial".*

The appellants' counsel has submitted that there were triable issues, and he cited paragraph 11 of the affidavits of the first appellant in which the issue of seizure of their goods by the respondent and that the total value of the same was Tshs 1,091,465,000.00 in excess of the debt, was raised. Submitting further, he referred us to paragraph 11 of the plaint where the respondent acknowledged the fact that they seized and sold the goods belonging to the appellants, but maintained that they fetched a total of only Tshs 100,000,000.00

The respondent argued against the second ground of appeal in relation to the value of the seized goods. It was the respondent's argument that the appellants were not telling the truth about the actual proceeds from the sale. It was submitted that in paragraph 13 of the same affidavit of the first appellant he stated that the total proceeds came up to Tshs. 743,000,000.00, an amount lower than Tshs 1,091,465,000.00 which they had averred in paragraphs 11. In his oral address to the Court, Mr. Mwakingwe submitted that the respondent was exercising its right of sale under the mortgage.

We have resolved to discuss the second ground of appeal simultaneously with grounds 3 and 4, within the context of triable issues. We have already said that in grounds 3 and 4 the appellants' major complaint is against the trial judge's decision not to take into account the fact that some money had been realized from the sale of the appellants' goods.

This issue was raised and discussed by the trial court in Commercial Case No. 79 of 2013 in the course of which however, the learned Judge concluded that the appellants did not raise it bona fide

since they did not dispute receiving the loan, and that they did not represent the truth.

With respect, we think the learned Judge went overboard, because instead of determining whether there were triable issues fit to go to trial or not as stated in the cases of **Makungu Investment Company** and **Mohamed Enterprises (T) Ltd** (supra), he went on to determine the merit. In our view, that was to be determined subsequently by the learned Judge when presiding over Commercial Case No. 79 of 2013, which was not before him at the time. That, in our view, was an error for, even if the appellants did not dispute receiving the loan, the issue of seizure and sale of their goods, whether true or not, was only meant to suggest that the loan had been offset, be it partly or fully, which would constitute a triable issue. Incidentally, that is what is being raised by the appellants in grounds 3 and 4 of appeal. There is, therefore, merit in the second ground of appeal as well as in grounds 3 and 4, within the context of existence of triable issues.

In the additional ground of appeal, Mr. Brash interrogated the competence of the summary suit impleading persons who were not parties to the mortgage deed, the subject of the suit. The learned counsel cited to us the case of **Jomo Kenyatta Traders Limited and**

5 Others v. National Bank of Commerce Limited, Civil Appeal No. 48 of 2016 (unreported). The learned counsel drew our attention to the relevant provisions of Order XXXV of the CPC, that is, rule 1 (c) (i) which governs suits for payment of monies secured by mortgage. He underlined the contention that the second and third appellants, not being parties to the mortgage deed, could not be sued under that procedure.

In response to that, Mr. Mwakingwe submitted that it was in keeping with the law to sue the first appellant jointly with the second and third appellants because the latter two were beneficiaries to the loan. Besides, he submitted, the third appellant was a guarantor of the loan. Rejoining to the above submission, Mr. Rwebangira submitted that there was only one mortgagor, irrespective of who benefitted from it.

Indeed, irrespective of who and how many benefitted from the mortgage deed, they do not, by that fact alone, qualify to be impleaded in a summary suit. Therefore, we commence our deliberation on the additional ground of appeal, by instantly agreeing with counsel for the appellants and declining to accept Mr. Mwakingwe's suggestion because, not only is it against Order XXXV rule 1 (c) (i) of the CPC, but also it requires evidence to establish that someone is a beneficiary.

Earlier, we had referred to Mr. Rwebangira's submissions pointing to the difficult in deciphering what could have been the meaning of the trial Judge in entering judgement 'as prayed' when there were several prayers, including alternative ones. We are bringing up this aspect to show that there was a cocktail of reliefs that would not be maintainable in a summary suit. The learned author of **Mulla, Code of Civil Procedure** (supra) shows instances where a summary suit would be maintainable and where it would not. At page 3311, the learned author writes: -

> *"The reliefs prayed for in a summary suit must be reliefs available under the summary procedure, that is based on a written agreement or a negotiable instrument or as otherwise provided under O. 37 of the Code of Civil Procedure (equivalent of our Order XXXV)".*

In our case, the reliefs claimed under paragraph 12 of the plaint include those that do not fall under Order XXXV of the CPC, which renders the summary suit unmaintainable.

In the end, grounds 1,2,3 and 4 as well as the additional ground of appeal have merit, on which basis we allow the appeal. We nullify the

proceedings and orders in Misc. Application No. 69 of 2013 that wrongly ended in a summary judgment, which we set aside. We order hearing of Commercial Case No. 79 of 2013 to procced as an ordinary suit, for the reason that it has impleaded persons who were not parties to the mortgage deed.

The counsel for the appellants prayed for costs for two counsel. We do not find the matter complex to justify appearance of two counsel, therefore we decline the invitation. We order costs to the appellant for one counsel.

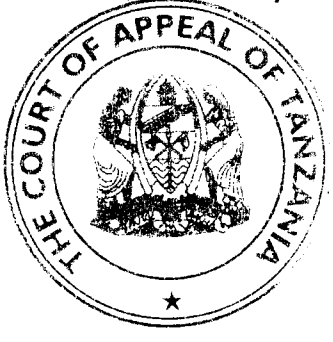
DATED at **DAR ES SALAAM** this 16th day of July, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of July, 2021 in the presence of Ms. Ida Rugakingira, learned counsel for the appellants, who also holding brief for Mr. Edward Nelson Mwakingwe, learned counsel for the respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL