

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CIVIL APPEAL NO. 12 OF 2005

**(Originating from the decision of the District Court of Dodoma at
Dodoma in Civil Case No. 17 of 2005)**

PATRICE BABU MUSHI APPELLANT

Versus

**THE REGISTERED TRUSTEES OF
UMOJA WA MAENDELEO NA
HUDUMA KWA JAMII MKOA
DODOMA (UMHJ)**

..... RESPONDENT

15/9/2006 & 3/10/2006.

J U D G M E N T

MASANCHE, J.:

Sometime in 2003, the appellants, John Kiluda Mola, Phillip Elius, Joel Yohana, and Patrice Babu Mushi, obtained loans from the respondents, The Registered Trustees of Umoja wa Maendeleo na Huduma Kwa Jamii (U.M.H.J.). The loans ranged from 3 million Shillings to Shs. 450,000/=. When time to pay came, the appellants failed to pay the loans. So, the respondents sent them to Court in District Court, of Dodoma, Civil Case No. 17/2005.

There, at the District Court, they were sent before Mr. Kibella, a Resident Magistrate. Mr. Kibella granted the respondents judgment. It was an ex parte judgment. The judgment is a short one and, I reproduce it below. It reads:

“JUDGMENT

KIBELLA, R.M.:

The plaintiff in this case, the Registered Trustees of Umoja wa Maendeleo na Huduma kwa Jamii Mkoa wa Dodoma on 28.2.2005 filed this suit under Order XXXV – Summary procedure of Civil Procedure Code, 1966, against the four defendants namely John Kiluda Mola, Philip Elius, Joel Yohana and Patrice Babu Mushi. The plaintiff prayed for the following reliefs.

- (a) Payment of shs. 1,505,000/= per para 6.*
- (b) Payment of shs. 270,900/= per para 7*
- (c) Payment of shs. 133,192/50 per para 8.*
- (d) Payment of 18% interest of (a) (b) and (c) above till Payment in full.*
- (e) Costs of the suit.*

The defendants were duly served with summons, but none filed an application for leave to file a defence up to this moment. For that reason, therefore, judgment under summary suit procedure is hereby entered in favour of the plaintiff as prayed, with costs. Order accordingly.

Right of Appeal Explained.

Sgd: R.M. Kibella

R.M.

28/4/2005

*Judgment delivered in the presence of Mr.
Nyangarika for the plaintiff, and in presence of 4th
defendant only.*

Sgd: R.M. Kibella

R.M.

02/05/2005”

Now, Mr. Ruhumbika, learned counsel for the appellants, says that, that could not have been a case on summary procedure under order XXXV of the Civil Procedure Code. And, indeed, even if it were, the summonses that his clients got, were summons for orders, which required his clients to file a statement of defence within 21 days. And he said, summons in summary suits are different from summons for orders.

Mr. Ruhumbika is right. But, before I go further to state the law on summonses, or the serving of them, let me say something about summary procedure. It appears the learned Resident Magistrate does not know what summary procedure is.

Summary procedure, to suits, is provided for in Order 35 of the Civil Procedure Code 1966. Under that order, a plaintiff is entitled to judgment unless the defendant obtains leave of the Court to defend the suit. And, he applies for this order, ex-parte, by way of filing a chamber application supported by an affidavit. Cases on Bills of Exchange are the sort of cases that fall under summary procedure (see Hassanali Issa V Jeraj Produce Store [1967] E.A.L.R. 555). R.D Agarwala on The Civil Procedure Code, 3rd

edition, at page 594, says this, of Order 37 r.4 (our order 35) that, sometimes:

“--- It is indeed not easy to say in many cases whether the defence is a genuine one or not, and therefore it should be left to the discretion of the trial judge who has experience of such matters to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the judge is of the opinion that the case raises a triable issue, then, leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous or false, or sham, he should refuse leave to defend altogether. The majority of cases, however, cannot be dealt with in a clear cut way. The judge may entertain a genuine doubt whether the defence is genuine or sham or in other words whether it raises a triable issue or not. To meet such cases, by the amendment made by cases where an apparently triable issue is raised, the judge may impose conditions in granting leave to defend. The matter is in the discretion of the trial judge, which discretion has to be exercised judiciously. Care has, however, to be taken that the object of the rule to assist the

expeditious disposal of commercial causes is not defeated and the same time real and genuine triable issues are not shut out by unduly severe orders as to deposit. It would be undesirable and inexpedient to lay down any rule of general application. Whether the defence raises a triable issue or not, has to be ascertained by the Court, from the pleadings before it, and the affidavits of parties, and it is not open to the Court to call for evidence at that stage. If upon consideration of material placed before the Court, it comes to the conclusion that the defence is a sham one or is fantastic or highly improbable, an order putting the defendant upon terms before granting leave to defend would be justified. Even in cases where a defence is plausible but is improbable, the Court would be justified in concluding that the issue is not a triable issue and put the defendant on terms while granting leave to defend.”

In short, therefore, whether to grant leave to defend, or, not to defend, is in the discretion of the court. Mwesiumo Ag. J. however advises, in Gulamhussein Fazal V. Muzafar Hussein Gulamali [1976] LRT 35, that:

“Where, in an application for unconditional leave to defend under order 35 Civil Procedure Code 1966, there appears to be an issue or issues

capable of being contested and tried, the defendant should be afforded an opportunity to contest such issues to the end.”

and that.

“Whether in the end, the defendant will succeed or not, should not be a concern of the Court at this stage.”

And Mwakasendo J. said, in David Samson and Co Ltd. V. Navichandra Patel and others [1972] H.C.D. No. 148, 156, when an application for leave to defend the suit was brought before him: He said:

“My role in these proceedings is fairly limited. It is simply to decide upon the affidavits filed by the applicant, whether there is disclosed any issue fit to go for trial and no more.”

And, indeed, the case of Thssen Stahlunion Ex part GMBH V. Kibo Wire Industries (1973) LRT No4, (Onyiah, J.) has held, among other things that:

“Where an application for leave to appear and defend a suit brought under Order 35 raises “triable issues” affecting the liability of the defendant vis – a vis the plaintiff, it constitutes a defence to the suit.”

And also it has held, that:

“Order 35 was designed to enable the plaintiff to obtain summary judgment on a liquidated sum where the defendant has clearly no good defence.”

That, actually, is the law on summary suits.

To come to the instant case, Mr. Ruhumbika complain, that the summons given out to his client were summons for orders, which, actually, required 21 days in which to file a defence. Mr. Nyangarika agreed.

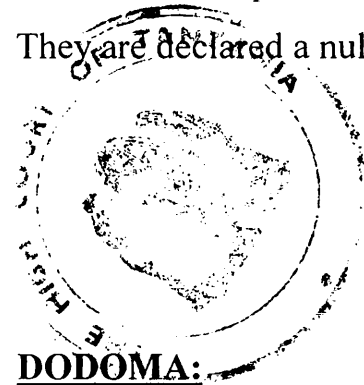
Actually, the difference between summons to file a defence and summons to appear were aptly and succinctly explained by our late brother, Lugakingira, J (as he then was), in the case of Alphonse Nyangero V Samson Kondoro H.C. Civil Case No. 37/92 – Mwanza: Lugakingira, J. said this:

“--- in proceedings before subordinate courts, the court may, where the defendant, duly summoned, does not appear “proceed ex parte” if the summons issued was a summons to file a defence, or may “ enter judgment for the plaintiff” if the summons issued was a summons to appear. The difference between a summons to appear and a summons to file a defence will be found in Order 8 rule I (1) and (2) and the same indicate why the Court may proceed ex parte where the summons

issued was a summons to file a defence, but enter judgment for the plaintiff where the summons issued was summons to appear.”

But, as for Mr. Ruhumbika’s client, none of these would apply to him. The case for the appellant was one on summary suits, as I have said before.

The proceedings in the District Court are, therefore, declared a nullity. It is for the respondent to know exactly, what he is going to do hereafter. They are declared a nullity with costs.




(J.E.C. MASANCHE)
JUDGE

DODOMA:

3rd October, 2006.

Mr. Ruhumbika for appellant

Mr. Ruhumbika/Nyangarika for Respondent.