

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY
AT MWANZA

CIVIL CASE NO. 26 OF 2021

HAMISI MAGANA KILONGOZI PLAINTIFF
VERSUS
NDONO FILING STATIONDEFENDANT

RULING

15th March, 2022
Kahyoza, J.

Hamisi Magana Kilongozi (Hamisi) instituted a suit under summary procedure provided by Order XXXV of the **Civil Procedure Code**, [Cap. 33 R.E. 2019] (the **CPC**). **Ndono filing Station**, the Defendant, claims among other things, for payment of Tzs. 388,428,931/= . Ndono Filing Station filed the Written Statement of Defence (the **WSD**) without first applying for leave to defend. Hamisi raised a preliminary objection that the **WSD** is incompetent for want of leave of the court and therefore unmaintainable in law. He prayed the **WSD** to be dismissed.

The issue is whether the **WSD** is incompetent for having been filed without first obtaining leave.

Mr. Kilenzi learned friend submitted on behalf of Mr. Hamisi that the **WSD** was incompetent as it was filed without leave. He contended that law was clear, particularly Order XXXV of the **CPC** which governs summary suit.

He was emphatic that the Defendant was required to apply for leave to defend the suit. The Defendant filed the **WSD** without first obtaining leave of this court asserting that he was served a summons to file the **WSD**. The Plaintiff attached to the summons was clear. It indicated that the Plaintiff filed the case under Order XXXV of the **CPC** and it was titled accordingly. The Defendant ought to have complied with the law based on the Plaintiff. He prayed the defence to be struck out.

In his reply, Mr. Kaswahili, the Defendant's learned advocate, submitted that the preliminary objection was unmaintainable for the reason that Order XXXV rule (1) of the **CPC** is very clear on the mode of presentation of a suit under summary procedure and service. He contended that the Defendant was served within the summons to the **WSD** within 21 days. The Defendant did not seek leave. He had to comply with the summons. He added that the summons was part and parcel of the process. The defendant could not have ignored it. He added that rule 2(2) of Order XXXV of the **CPC** implies that issuing of proper summons stating the amount claimed and specifying that the Defendant should obtain leave was mandatory. Failure to issue and serve the defendant with a summons informing him to obtain leave rendered the preliminary objection unmaintainable. He prayed the preliminary objection to be dismissed.

Mr. Kilenzi advocate, rejoined briefly that the error committed by the court of issuing wrong summons did not change the law. He contended that the counsel ought to have complied with the law as provided by Order XXX of the **CPC**. He insisted that the Plaintiff indicated clearly that the Plaintiff was

filed under the summary procedure provided under Order XXXV of the **CPC**. He prayed the **WSD** to be struck out.

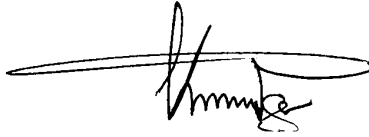
It is beyond dispute that Hamisi instituted a suit under a Summary Procedure as provided under Order XXXV of the **CPC**. The Plaintiff was titled in black and white "*Plaint – Order XXXV, Rule 1(a) Summary Procedure*". Any lawyer, like the Defendant's advocate, knows legal implications of filing a suit under summary procedure. Even if the Defendant's advocate had forgotten what it implies since the provisions of the law was mention he ought to have refreshed his mind by reading the provision of the cited law. The fact that the Defendant was served with the summons to file the **WSD** within 21 days instead of the summons to apply for leave did not change the law. I totally concur with the submission of the Plaintiff's advocate that the Defendant's advocate was bound to observe the law. The law is clear that the defendant has no automatic right to defend a suit filed under Order XXXV. The defendant has first to apply and obtain leave to defend.

The Defendant's advocate submission to the effect that he fled the **WSD** in compliance with the summons served upon his client, which required to his client to file the **WSD**, did not convince me. There is no disagreement that it was wrong for the court to serve the Defendant with the summons to file the WSD that was not a licence not to comply with the clear provisions of the law.

The Defendant therefore, misdirected herself to file the **WSD** instead of applying for leave to defend. Consequently, I up hold the preliminary objection and strike out the Written Statement of Defence for being filed prematurely without first obtaining leave to defend.

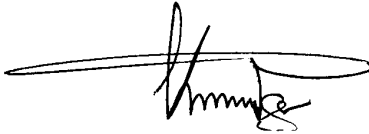
A summons of a court is an order to be comply with. Since the defendant was misled by this court's order, I grant him twenty-one (21) days to apply for leave to defend if he so wishes. The costs shall be in due course.

It is so ordered.



J.R. Kahyoza
Judge
18/03/2022

Court: Ruling delivered in the presence of Mr. Kaswahili advocate for the Plaintiff and Mr. Egbert Mujungu advocate for the Defendant. B/C Ms. Jackline (RMA).



J.R. Kahyoza
JUDGE
18/03/2022