

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MISC. CIVIL APPLICATION No. 8 OF 2021

**(Arising from the decision of the Shinyanga District Court in Civil Case
No. 06 of 2020)**

MS CASCO TECHNOLOGIES CO LTDAPPLICANT

VERSUS

1. KAL HOLDING CO LTD.....RESPONDENT

JUDGMENT

27th March & 6th May 1, 2022

MKWIZU J.

Applicant's application is for revision against the decision and proceedings of the Shinyanga District Court in civil Case No 6 of 2020 in which summary proceedings were successful levelled by the Respondent against the Applicant claiming for payment 11,625,000/= arising out of a hire purchase agreement where applicant is said to have hired An excavator No. 598 CBN, general damages, interest at commercial rate and costs of the suit.

It is on the applicant's counsel affidavit in support of the Application that Applicant's application for leave to defend was refused on 23rd July 2020 and the court proceeded into delivering the judgement in favour of the respondent without notice to the applicant or her advocate and that they only became aware of the decision after service on them the bill of costs application by the respondent.

When this matter came for hearing on 27/4/2022, Mr Audax Constantine for the respondent, without hesitation arose to inform the court that they

are not opposing the application. Apart from supporting the applicants lamentation that they were not notified of the judgement date, he added that, the suit that was before the trial court was not fitting the summary suit envisaged under Order XXXV of the Civil Procedure Code, (Cap 33 RE 2019) and that applicant application for leave was deserving. He cited to the court the decision of this Court (Matuma J) in **Kasheba's Sons Co LTD and KAL Holding Co Ltd**, Civil Revision No 01/2021 urging the court to revise the whole proceedings with no order as to costs.

The response by the applicant counsel were as such a repletion of his application and secondment of the respondent's counsel submissions. He said the decision by the trial court was given in contraventions of Order XX Rule 1 of the CPC, (Cap 33 R:E 2019). He insisted on the nullification of the entire trial courts proceedings and that parties be directed to re institute a fresh suit is so wishes. He left the issue of costs to the court to determine.

I have carefully considered the matter. The main complaint here is the appropriateness of the trial courts proceedings and its decision. The partie's counsels are all at one that the facts of the case presented at the trial court fell outside the ambit of XXXV of the CPC.

I will start by examining the provisions of the referred Order XXXV Rule 1 of the CPC which provides:

(1) This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-

(a) suits upon bills of exchange (including cheques) or promissory notes;

(b) suits for the recovery of income tax; and

(c) suits arising out of mortgages, whether legal or equitable, for-

(i) payment of monies secured by mortgage;

(ii) delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property.

(iii) redemption; or

(iv) retransfer or discharge;

(d) suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer.

(e) suits for the recovery of rent, interest or other debts due to the Republic, the Government or any local government authority;

(f) suits for the recovery of possession of any immovable property including any building or other premises where the right of the person seeking to recover such possession is not restricted by the provisions of the Land Act, and suit for the recovery of rent, mesne profits, or damages for unlawful occupation in respect of such immovable property, building or premises; and

(g) suits for the recovery of possession of any immovable property from a lessee under a financial lease agreement where under a financial lease agreement where under such agreement the lessee has no right of ownership over the property leased to him.

Rule 1 of order XXXV above specifies the situations under which a "summary suit" can be filed. As state earlier, the suit that was filed at the trial court was based on a breach of contract of a hire purchase agreement

which is not one of the claims falling under the above order. The Trial court therefore went astray for determining the matter under that category and as rightly submitted by the parties' counsel, the entire proceedings and the resultant decision are a nullity.

Before penning off, I find it pertinent to say a word on the issue raised in both the application and the parties' submissions in respect of the delivery of the judgement without notifying the parties. It is apparent from the records that after the refusal of the applicant's leave to defend, the trial court went ahead to decide the matter under Order XXXV and the decision therefrom was delivered in the absence of the applicant and his advocate and without notice whatsoever. It was parties' counsel contention that this was contrary to the provisions of Order XX Rule 1 of the CPC and they invited the court to find the judgement invalid. I agree. Order XX Rule 1 of the CPC reads:

*1) The court, after the case has been heard, **shall pronounce judgment** in open court, either at once, or on some future day, **of which due notice shall be given to the parties or their advocates.**" (Emphasis added)*

The provision above is couched in a mandatory term. It requires parties to the case to be notified of the judgement date failure of which renders the judgement inoperative. See **Awadhi Idd Kajass V Mayfair Investment Limited**, Civil Application No, 281/17 of 2017 CAT (unreported). It goes without saying therefore that the judgement by the trial court was invalid for being delivery without notice to the applicant.

Given the circumstances explained above, I allow the application, quash the proceedings, and set aside the decision emanating there from. Parties are returned to their position just before the filing of the suit at the trial court. Interested party may, if so wishes, re- institute a fresh suit in accordance with the law, of course, subject to the law of limitation Act. Each party is also ordered to bear owns costs.

Order Accordingly.

Dated at Shinyanga this 6th day of MAY 2022



E.Y. MKWIZU

JUDGE

6/5/2022