

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

CIVIL REVISION NO. 01 OF 2021

(Originating from Shinyanga District Court in civil case No. 8 of 2020)

KASHEBA'S & SONS CO. LTD.....APPLICANT

VS.

KAL HOLDING CO. LTD.....RESPONDENT

JUDGMENT

A. MATUMA, J.

The Respondent herein instituted a summary suit under summary procedure within the meaning of order XXXV of the Civil Procedure Code, Cap. 33 R.E 2019 against the Applicant in the District Court of Shinyanga in Civil case No. 8 of 2020.

The applicant applied for leave to appear and defend the suit but his application was denied. The Respondent thus obtained judgment and decree to the tune of **Tshs. 10,875,000/=** against the Applicant allegedly a debt owed through the **Hire purchase agreement** of a vehicle namely Excavator no. T. 598 CNB.

According to the affidavit of the Applicant, the impugned Judgment was delivered in her absence and without any notice. She came aware of it when the respondent was pursuing her Bill of Costs, hence this application for Revision.

At the hearing of this application the Respondent did not file counter affidavit. Mr. Audax Costantine learned advocate for the respondent

explained that they did not file counter affidavit because they had formed an opinion to concede to the application.

On his party Mr. Pharles Malengo learned advocate for the Applicant prayed for the application to be granted by nullifying the proceedings and judgment thereof of the trial court for having contravened the mandatory requirements of the law governing Summary suits under summary procedure including service of the notice to the defendant on the day fixed for delivery of the judgment so that the defendant becomes aware of the judgment for his necessary steps.

I have considered the circumstances of this matter as a whole in accordance to the records at hand and the submission by the learned advocates and I am satisfied that this application has been brought with sufficient cause. This is because of several factors.

First of all, the claim upon which the summary suit was instituted against the applicant does not follow within the parameters of Order XXXV Rule 1 of the CPC supra. When I asked the learned advocate for the Respondent whether the suit fitted within the meaning of Order XXXV rule 1 of the CPC, he had an opinion that it fitted because it involved a cheque.

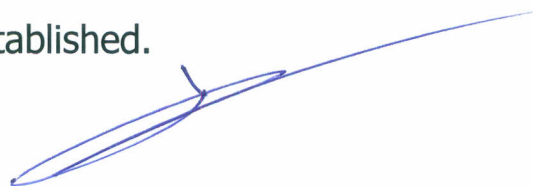
With due respect to the learned advocate, a mere involvement of a cheque in the Civil dispute does not constitute the summary claim. There must be some other evidence linking the cheque to the relevant claim and that the issued cheque by the defendant to the Plaintiff was not paid despite of having been presented to the relevant Bank for payment. The none payment must be by reason that the cheque has been dishonoured because of insufficient fund in the defendant's bank

account. In that respect we expect to see an endorsement by the relevant bank official to that effect.

In the instant matter, the plaint was accompanied by a copy of cheque No. 000353 dated 28/2/2020 as annexure "A". such a cheque is not self-explanatory as to its purpose nor it bears any endorsement by bank officials as to whether it was presented for payment or not, whether it was dishonoured or not. And if dishonoured, for what reason. All these unanswered questions should have put the trial court to an inquiry whether the defendant now the Applicant could not have a probable defence. Therefore, a mere presence of a cheque should have not been used to make the claim fit under the summary procedure.

My thorough scrutiny of the records finds out that the Respondent's claims based on **breach of contract** for the Hire Purchase agreement. The applicant is alleged to have hired the herein above named Excavator for the Hire purchase price of Tshs. 15,875,000/= but paid only Tshs. 5,000,000/=. So she stood owed Tshs. 10,875,000/=. In that respect the cause of action is the breach of the hire purchase agreement which is not covered under order XXXV supra.

But even if we could have determined that such hire purchase agreement is covered under the Summary Procedure, the respondent's plaint should have been accompanied with vivid evidence to put naked the claim. She could have done so by annexing such necessary exhibits establishing the claim by prima facies evidence on the face of it so that the court could determine the same that in the absence of a probable defence the claim is established.



In the case of ***CRDB Bank Limited vs. John Kagimbo Lwambagaza (2002) TRL 117***, it was held that the purpose of Order XXXV "summary procedure" is to enable a plaintiff to obtain judgment expeditiously where the defendant has in effect no **substantial defence** to the suit and to prevent such a defendant from employing delaying tactics to post pone the day of reckoning.

It is my humble finding that the court cannot determine that the defendant has no **substantial defence** to the suit on a mere allegations in the plaint which are not authenticated even by its annexures. The Plaint must be accompanied with such substantial evidence upon which if it is not sufficiently contravened, proves the claim in the plaint.

In the instant matter the alleged hire purchase agreement was not accompanied in the plaint to avail the court opportunity to scrutinize the conditions thereof and its breach. The alleged cheque as I have said is not self-explanatory nor it shows whether it was presented to the Bank for payment and dishonoured.

It is my firm findings that with the deficiencies apparent on the plaint and its annexures, there were triable issue between the parties and thus the suit could not proceed under a summary procedure.

The defendant was entitled for leave to appear and defend a summary suit because on the face of record there were triable issues, apparent. See the case of ***Tanzania Telecommunications Company limited Vs. Timoth Lwoga (2002) TLR 150.***

Summary procedure is not there to be used by the plaintiffs who have no probable cause of actions against defendants, or who have cause of actions but foresees plausible and strong defences by the defendants against the claims to prevent the defendants to enter their respective defences. It should therefore not used to defeat the rights of innocent defendants to be heard fully as per Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. That is why such summary suits are restricted to certain suit only as per Order XXXV rule 1 supra in the meaning that the claims to be pursued under summary procedure are only those which have no triable issues as the claims and evidence are naked on the face of record.

In the circumstances of this case and for the reasons I have stated, I allow this application. The proceedings, judgment and decree of the trial District Court are hereby revised. I quash them all and return the parties to their original status as if there was no suit instituted and decided between them in respect of the claim.

The respondent is at liberty to re-institute a fresh suit in which the defendant shall have the right to enter her defence and the matter be determined accordingly. The application therefore allowed.

Taking the fact that the Respondent's advocate conceded to the application even prior to the submission of the Applicant's advocate, I do not grant costs to either party.

It is so ordered.



A. MATUMA
JUDGE
11/03/2022

COURT; Judgment delivered in Chamber this 11th day of March, 2022 in the presence of Mr. Pharles Malengo learned advocate for the Plaintiff and in the presence of Mr. Audax Costantine learned advocate for the Respondent. Right of Appeal explained.

Sdg. A. MATUMA

JUDGE

11/03/2022