

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

**CIVIL CASE NO. 23 OF 2023**

**TANZANIA AGRICULTURAL DEVELOPMENT BANK .....1<sup>ST</sup> PLAINTIFF**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NYARUSAI COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ALEX MANYAMA NYARUSAI .....2<sup>ND</sup> DEFENDANT**

**SUMMARY JUDGMENT**

***11<sup>th</sup> & 12<sup>th</sup> March 2024***

**F.H. MAHIMBALI, J**

The plaintiffs herein instituted this suit under summary procedure pursuant to order XXXV of the Civil Procedure Code, [Cap 33, R.E 2022] (the CPC) against the defendants for the judgment and decree on the following orders that:

- (i) Declaration that the first defendant has defaulted repayment of the loan and thus breached the facility agreement.
- (ii) An order for attachment and auctioning of all landed properties pledged as collaterals to recover TZS 1, 556, 631, 057.96 being the total outstanding loan amount as at the time of filing the suit.

- (iii) An order for taking other necessary recovery measures to recover from other pledged collaterals.
- (iv) Payment of interest on the decretal at the rate of 18% from the date of institution of the suit to the date of judgment.
- (v) Interest at the Court's rate from the date of judgment till full liquidation of the outstanding loan.

It appears that the 1<sup>st</sup> defendant company had on 7<sup>th</sup> August 20218 obtained a credit facility amounting to a total of TZS: 858,353,000/= from the 1<sup>st</sup> Plaintiff. The said Credit facility was divided into two categories as follows.

The first facility which was for the short-term loan amounted to 400,000,000/=. This facility was to be repaid in twelve months in equal monthly instalments exclusive of six months' grace period from the date of first utilization at an interest of 15% per annum.

The second facility (medium term loan) amounting to TZS 458,353,000.00/= for purpose of financing final payment of extraction mills, purchase of brand new truck and trailer as well as purchase of a standby generator. This facility was to be repaid in fifty-four (54) equal monthly instalments

exclusive of six months' grace period at an interest of 15% per annum (TADB -2).

That the terms and conditions of the Credit Facility – Offer Letter were accepted by the 1<sup>st</sup> Defendant through 2<sup>nd</sup> Defendant as its Managing Director on 10<sup>th</sup> August 2018. It was the term of the Credit Facility – Offer Letter that whole facility would be secured by the following collaterals:

- a) First Ranking General Debenture over present and future assets of the First Defendant.
- b) First Ranking Legal Mortgage over the landed property located on Plot No. 111 and 112, Block E, Lugela Industrial area within Kahama Township, with Certificate of Title No. 939 and 9991 respectively both in the name of the 2<sup>nd</sup> Defendant.
- c) Specific Charge over the new motor vehicles (Truck and Trailer), sunflower Oil Machineries and Power Generator to be purchased through TADB loan.
- d) Directors' personal Guarantee.
- e) Shareholders' Personal Guarantee.

That despite the agreement as to the expiry of the full repayment of the said loaned money to the defendants, the defendants as at 13<sup>th</sup>



September 2023 failed to repay the loaned money and its interest as per following breakdown:

- For a short term loan and its interest stood at **840,833,441.4**
- For the medium – term loan and its interest stood at **715,797,616.6**

In resisting the claims upon being dully served, the defendants attempted to make an appearance before the court and made an oral application to defend the suit in which they were advised to make a formal application as per law. As they didn't, the court had no other option save to proceed with the suit as filed.

To my further surprise, I came to note the existence of Land Case No. 14 of 2023 in which these defendants are suing the plaintiffs herein for the breach of the loan agreement entered between them and thus asking the first plaintiff to extend the time and restructure the loan repayment schedule.

In digest to the facts in the plaint of this case filed under the summary procedure as provided in the Civil Procedure Code, Cap 33 R. E2019, I am satisfied that the Defendants were dully served by the Court Process server. I say so basing on the probe of the court to Mr. Kalenda

learned state attorney for the plaintiffs on whether the defendants were dully served and with appropriate court's summons. Noting that the defendants were not served with the appropriate court's summons under summary suit/procedure, Mr. Kalenda vehemently submitted to the satisfaction of the court. He submitted that it is true that the summary procedure suit dully filed in Court, was ultimately served to the defendants but mistakenly with ordinary court's summons for ordinary suits. The summons to appear was issued by the Court on 25th October 2023 requiring the defendants to appear before this Court on 29<sup>th</sup> November 2023 at 09.00hrs. The said summons was processed and were dully signed by one Alex Nyarusai on 26<sup>th</sup> October 2023 on his own behalf and the first defendant, he being the Managing Director of the First Defendant. The said summons was processed by Court's process server by name of **Christopher Rutekabenga** t/a Abajaja Company Ltd who filed an affidavit in proof of the said service. The said summons served to the defendants was accompanied with the plaint properly endorsed as "Summary Suit".

It is true that institution of Summary Suit, requires a summons to be sent to the defendants to be a summons on summary suit with words that: *unless he obtains leave from the court to defend the suit, a decision*

*may be given against him and shall also inform him of the manner in which application may be made for leave to defend.* The same **Order XXXV, Rule 2(2)** lists reliefs the plaintiff is entitled in the event the defendant defaults to make such an application to obtain leave of the Court.

It is clear as per Mr. Kalenda's submission backing up the grant of the reliefs sought in the case, that on 29<sup>th</sup> November, 2023, the defendants' counsel by name of Pastory Biengo, had entered appearance before this Court as directed by the Court. The said counsel admitted before this Court that his clients were dully served with the summary procedure suit and that they are aware of the law that they don't have an audience to defend the case, unless they obtained leave of the Court to do so. He also admitted that since service of the said summary suit to them, it had passed a total of 31 days without them processing the said leave to defend submitting that the reason for failure to do so, was late instructions given to him.

On that respect, the plaintiffs pressed that, that was not the requirement of the law. As they failed to do so, such a prayer cannot be orally made as it is always supposed to be in formal application. This Court



ultimately, denied the defendant's concern for further leave to defend the case.

Now the question to ask is whether the processed summons met the legal requirement. I reluctantly agree with Mr. Kalenda on the appropriate summons to the defendants in the circumstances where the suit filed is summary procedure, as by law, the corresponding summons must stipulate so. That notwithstanding, the service of the ordinary summons accompanying the "Summary Procedure Suit" in this case didn't prejudice the defendants and accordingly made an appearance before this court vide their lawyer namely Pastory Biengo. In my considered view, as per facts of this case, I am of the settled mind that the defendants knew the filing and existence of the Summary Suit against them by the plaintiff. I say so on the basis that as per law, the rationale behind the said summons is to inform the defendants of the existence of the said claims before the court of law and the possible legal remedies to take if so concerned.

Otherwise, in our case, I agree with Mr. Kalenda that in the circumstances of this case, the summons served to the defendants which was accompanied with the plaint endorsed "summary suit", though not appropriate summons, but squarely made the defendants aware of the

existence of the summary procedure suit before this Court. Thus, the defendants are very aware of that fact and that decision would be given against them. That, they are very aware of. For these reasons, despite being served with the appropriate court's summons, the defendants were not in way prejudiced with it.

This is evidenced by the returned court's processed summons dated 27<sup>th</sup> October, 2023 in which the Manager of the said defendant dully signed it. Further, the defendant attempted to file an application to file defense, but didn't process it. Despite all this, the Defendant did not appear and instead later filed Land Case No. 14 of 2023 in which the defendants are suing the plaintiffs herein for the breach of the loan agreement entered between them and thus asking the first plaintiff to extend the time and restructure the loan repayment schedule.

Having determined the legal issue on the appropriateness of the court's summons didn't prejudice the defendants, I now proceed to the merit of the case.

It being a summary suit based on Summary Procedure, Mr. Kalenda submitted that this Court be pleased to grant the reliefs sought in the plaint as they are pursuant to Order XXXV, Rule 1 (c)(i) and Rule 2(1) of the Civil Procedure Code.



It is trite law that where a suit is filed under the summary procedure provisions, the Defendant ought to obtain leave of the Court if he or she is to defend the suit. Failure to obtain such leave of the Court means that, the allegation contained in the Plaintiff is deemed to be admitted by the Defendant and the Plaintiff shall be entitled to a decree as specified under Order XXXV Rule2(1) of the Civil Procedure Code, Cap 33 R.E 2019.

According to Order XXXV of the CPC, it is provided that, when a Plaintiff wants to file a suit as a summary suit, he has to institute the suit by presenting a plaint in the normal way but endorse it with the words "order XXXV: Summary Procedure,". Since the Defendant did not obtain leave to appear and defend this summary suit, despite being dully served, nothing should stop the Plaintiff from getting his judgment as expeditiously as it has been sought. As well stated in the case of **Maendeleo Bank PLC vs Yusuph Hamisi Kitundo**, commercial case no 15 of 20211, High Court Commercial Division in Dar es Salaam where Nangela, J quoted the case of **CRDB Bank Limited vs. John Kagimbo Lwambagaza** [2002] TLR 117, this Court (NsekelaJ (as he then was) stated 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 prevent the Defendant from employing delaying tactics and, in the process, postpone the day of reckoning. I am of the settled view that order XXXV is self-contained in so far as it relate to suits stipulated there-under."*

See also **Hamisi Maganga Kilongozi V. Bahati Moshi Masabile t/a Ndono Filling Station**, Civil Case No. 26 of 2021, HC Mwanza at page two, in which it was insisted that as a matter of law, a summary suit is not necessarily established by adducing evidence in court.

In consideration of the facts of the current case, I have waived the plaintiffs from adducing evidence in the matter filed as per dictate of the law. I have thus digested the plaintiffs' claims vide their plaint and annexures thereof, as per law and this being a suit based on summary suit and procedure, in default of the defendants' obtaining such leave to defend or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted as I hereby endorse so, and the plaintiff shall be entitled to the reliefs sought in their plaint as follows pursuant to Order XXXV, Rule 1 (c)(i) and Rule 2(1) of the Civil Procedure Code and I hereby order as follows:

- (i) That the first defendant has defaulted repayment of the loan and thus breached the facility agreement.

- (ii) An attachment and auctioning of all the landed properties pledged as collaterals to recover TZS 1, 556, 631, 057.96 being the total outstanding loan amount as at the time of filing the suit is hereby issued.
- (iii) Taking other necessary recovery measures to recover from other pledged collaterals.
- (iv) Payment of interest on the decretal at the rate of 18% from the date of institution of the suit to the date of judgment.
- (v) Interest at the Court's rate from the date of judgment till full liquidation of the outstanding loan.
- (vi) Costs of this suit

It is so ordered.

DATED at SHINYANGA this 12<sup>th</sup> day of March, 2024.



F.H. MAHIMBALI  
JUDGE