

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 98 OF 2015

COMMERCIAL BANK OF AFRICA (T) LIMITED PLAINTIFF

VERSUS

NAM ENTERPRISES LIMITED

ELIAS LUKUMAY

STEPHEN KORDUNI LUKUMAY

}

..... DEFENDANTS

1st & 2nd October, 2015

RULING

MWAMBEGELE, J.:

The plaintiff Commercial Bank of Africa filed this summary suit against the Defendants NAM Enterprises Limited, Elias Lukumay and Stephen Korduni Lukumay jointly and severally. The prayers in the plaint are as follows:

- (a) Payment by the Defendants jointly and severally of the sum of Tanzania Shillings Eighty Nine Million Nine Hundred Eighty Seven Thousand Three Hundred Seventeen Cents Thirty Four (Tshs. 89,987,313.34) and United States Dollars Three Hundred Seventy Three Thousand Five Hundred Ninety Four Cents Ninety Nine (USD 373,594.99) only being the outstanding amount as of April 24th 2015;

- (b) Interest on the sum at (a) above at the rate of 23% on the TZS account and 9% on the USD account per annum from April 24th 2015 to be date of judgment; and
- (c) Interest on the decretal amount at the court's rate of 7% from the date of judgment up to the date of payment.

In the event of failure by the Defendants to pay the amount at (a) and (b) above,

- (d) Appointment of Mr. Gaspar Nyika Advocate as a Receiver Manager with powers to sell the mortgaged property located on Plot No. 14 Block 17, Mlimwa West Area Dodoma;
- (e) An order for sale of property located on Plot No. 2 and 4 Block "D" Rufiji Road, Chinangali East, Dodoma Municipality with CT No. 8008 DLR LO No. 51471 registered in the name of Stephen Korduni Lukumay;
- (f) An order against the 2nd and 3rd Defendants to provide vacant possession over the properties located on Plot No. 14 Block 17, Mlimwa West Dodoma Municipality with CT No. 2110 DLR LO No. 57041 in the name of Elias Lukumay and on Plot No. 2 and 4 Block "D" Rufiji Road, Chinangali East, Dodoma Municipality with CT No. 8008 DLR LO No. 51471 registered in the name of Stephen Korduni Lukumay;
- (g) Costs of the suit; and

- (h) Any other relief which this Honourable Court may deem just to grant in favour of the Plaintiff.

The records show that the Defendants were served with the plaint on 04.09.2015 instructing them to file their "WRITTEN STATEMENT OF DEFENCE in Duplicate within twenty one days of service" of the Notice.

When the case was called on for orders yesterday 01.10.2015, the defendants did not appear and had not filed any document in court. Mr. Nyika, the learned counsel who appeared for the plaintiff snatched the opportunity to pray for summary judgment under the provisions of Order XXXV rule 2 (2) of the CPC.

In the course of composing a summary judgment I realized that the defendants were served with a notice as if it were an ordinary suit. They were not served as a summary suit. The notice served to the defendants on 04.09.2015 reads thus:

"(SUMMONS FOR APPEARANCE AND FILING WRITTEN STATEMENT OF DEFENCE)

THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NOOF

..... Plaintiff

versus

.....Defendant

To:

WHEREAS the above-named Plaintiff(s) has/have .instituted a suit against you upon the claim, the particulars of which are set out in the annexed copy of the plaint.

YOU ARE HEREBY NOTIFIED that you must file your WRITTEN STATEMENT OF DEFENCE in duplicate within twenty one days of service of this notice upon you. If there are more than one Plaintiffs, additional copies of your Written Statement of Defence must be filed sufficient for service on each of the Plaintiff If there are more

Defendants than one and the defence is not a joint defence, there must be filled sufficient copies for service on each of the other Defendants.

TAKE NOTICE that the case also has been fixed for mention/hearing on the day of 20_ __, at 8.30 o'clock in the forenoon.

AND TAKE FURTHER NOTICE that your attention is specifically drawn to para 3 of the INITIAL NOTICE attached, and that if you default in filing of the written statement of Defence within the time specified the court may pronounce judgement against you.

GIVEN UNDER MY HAND AND THE SEAL OF THE COURT this day..... of 20_ __.

.....

REGISTRAR"

It seems to me that the defendants ought to have been served in terms of the provisions of Order XXXV rule 2 (1) of the CPC. For easy reference, the sub-rule reads:

"Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and **the summons shall inform the defendant 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."**

[Emphasis supplied].

The details in the bold part of the sub-rule are wanting in the notice of hearing sent to the defendants. It is no gainsaying that the provision is couched in mandatory terms. Thus the notice, mandatorily, ought to have informed the defendants first, that unless they obtained leave from the court to defend the suit filed against them, a decision may be given against them and, secondly the manner in which the application for leave to defend the suit against them could be made. This was not done and, I think, justice cannot be done and seen to be so done if this court proceeds to issue a summary judgment against the defendants in the circumstances.

The sample of the notice of hearing normally served upon the defendant under Order XXXV rule 2 (1) of the CPC reads thus:

"Summons in Summary Suit on Negotiable instruments (0.35)

IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT

COMMERCIAL CASE No: OF

.....Plaintiff

versus

.....Defendant

To:

WHEREAS

.....

The above named plaintiff has/have instituted a suit against you under Order XXXV of the Code of Civil Procedure, 1966 (Act No. 49 of 1966) for Shillings being the principal due to as per Promissory Notes/Cheques of which ... together with a plaint are hereto annexed, shillings for noting charges, interest and costs of this suit, **you are hereby summoned to obtain leave from the court within twenty one days from the service hereof, to appear and defend the suit**, and with in such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such twenty one days to obtain a decree of any sum not exceeding the sum of shillings with interest and costs of the suit.

Leave to appear may be obtained on an application to the Court supported by affidavit of declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

Given under my hand and the seal of the Court, this
..... day of

.....

REGISTRAR

Copy to

Civil Court 39"

[Emphasis added]

In the circumstances, I find myself loathe to grant a summary judgment against the defendants when they were not served with a proper notice of hearing. In the premises, I direct that the defendants should be served with a proper notice in terms of Order XXXV rule 2 (1) of the CPC. I think justice will triumph this way.

The circumstances and facts leading to this ruling are such that no order should be made as to costs. I make no order as to costs.

DATED at DAR ES SALAAM this 2nd day of October, 2015.

J. C. M. MWAMBEGELE
JUDGE