

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 124 OF 2014

TANZANIA BREWERIES LIMITED.....APPLICANT

VERSUS

JOSAKA INVESTMENTS LIMITEDRESPONDENT

RULING

Mansoor, J:

Date of Hearing – 1ST APRIL 2015

Date of Ruling- 17 APRIL 2015

This is an application on behalf of the Applicant, a limited liability company, under Order XXXV Rule 8 of the Code of Civil Procedure, Cap 33 R: E 2002 (as amended) for setting aside a



decree passed as an undefended summary suit on 16th May, 2014.

Admittedly, this suit was instituted as a summary suit under Order XXXV of the Civil Procedure Code, Cap 33 R: E 2002 for recovery of rents due to the Local Government. The defendants having failed and neglected to pay the amounts of the said rents due, the present suit was instituted against the defendant for recovery of the rent due.

On 11th March 2014, the defendant made an application in the said suit, for leave to enter appearance and to defend the suit. On 22nd April 2014, the said application came up for hearing before Hon. Nchimbi, J., , and the Plaintiff's Counsel raised an objection that the application was wrongly brought before the Court for wrong citation of the provisions of the law, and Hon. Nchimbi J, was pleased to uphold the preliminary objections, and held that since there was no leave to defend the suit, he entered the decree in favor of the plaintiff as prayed, he held at page 3, last paragraph of the Ruling dated 16th May 2014, as follows:



“Consequently, since there is no leave sought and obtained for the defendant to appear and defend the suit filed by the plaintiff, the allegations in the plaint are deemed to be admitted. It follows that judgment is to be entered against the defendant as prayed for in the plaint.”

Against the said decision of Hon. Nchimbi J, thereafter, on 23rd May 2014, the present application was filed by Law Associates Advocates on behalf of the Defendant.

The short point to be decided in this application is whether there are "exceptional circumstances" within the meaning of Order XXXV Rule 8 of the Code which would enable this Court to exercise its discretion to set aside the decree passed by Hon Nchimbi J on 16th May 2014; Order XXXV, Rule 8 reads as follows:

"8. -- After the decree the Court may, in exceptional circumstances, set aside the execution, and may give leave to the defendant to appear to the summons and to defend the suit,

if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

Order XXXV, Rule 2 of the Civil Procedure Code provides:

2 (1).—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..

(2). -- In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtains leave from the Judge or Magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defense in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled-

(a) where a suit, referred to in paragraph (a), (b) or (d) of Rule 1 or a suit for the recovery of money under a mortgage and no other relief in respect of such mortgage is claimed, to a decree for a sum not exceeding the sum mentioned in the summons, together with interests at the rate specified (if any) and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith;"

The summons was served in accordance with Order XXXV Rule 2 (1) of the Civil Procedure Code. The Defendant, however applied for leave to defend under Order XXXV, Rule 2 (2) of the Civil Procedure Code, as stated earlier. The decree was entered in favor of the plaintiff after the application to defend filed by the defendant was being disregarded for failure to cite the correct provision of the law. The defendant ought to have moved the Court under Order XXXV Rule 3 of the Civil Procedure Code, Cap 33 R: E 2002, consequently, leave to defend was deemed to have been refused and the statements in the plaint admitted by



the defendants, and the decree was entered as prayed in the plaintiff.

Ms. Tausi Abdallah, Counsel for the defendant, has contended that since the plaintiff had prayed for costs in its plaintiff, and since under Order XXXV (2) (a), costs are to be ascertained in the ordinary way, no decree could have been passed against the defendant and, as such, this Court should exercise its discretion under Order XXXV, Rule 8 in setting aside the decree. According to her, this amounts to special or exceptional circumstances warranting this Court to exercise its discretion given under Rule 8 of Order XXXV to set aside the decree.

Secondly, another exceptional circumstances on this matter is that since the plaintiff is an agent of the Municipal Council, a different person who is unknown to the defendant, is not entitled to file a suit for recovery of rent on behalf of its principal, she said the plaintiff's authority was to collect the rents only, and not to file a suit for recovery of the said rents, then that makes this application an exceptional one entitling the defendant leave to defend the suit.

Thirdly. Ms Tausi has argued that, the Court was wrong to enter judgment in favor of the plaintiff, she said, the court ought to have struck out the application, if at all it was satisfied that the application was defective for wrong citation of the provision of the law, to give room to the defendant to file a fresh application.

She said, since there are triable issues such as an issue of whether or not the plaintiff had capacity to sue on behalf of Bukoba Municipal Council, the Court did not have power to treat the matter as a summary suit, and ought to have given leave to the defendant to defend the suit. She submitted further that courts must be able to meet substantial justice as provided by Article 107 of the Constitution of the United Republic of Tanzania and avoid entertaining unnecessary technicalities.

The facts and circumstances of this case is that an application for leave to defend have been decided and the learned Judge passed the order under Order XXXV, Rule 2. The appeal against such order was not pursued and a decree has been passed. I don't agree with the arguments fronted by Mr. Muganyizi, the

Counsel for the plaintiff that the plaintiff ought to have appealed against the decision of the learned Judge or file a Review or Revision. I agree with Ms. Tausi's contention that the defendant is to exhaust the remedies available under Order XXXV Rule 8 of the Civil Procedure Code and make an application under Order XXXV, Rule 8. The Court has got ample jurisdiction under Order XXXV, Rule 8 to set aside a decree passed in a suit under Order XXXV. This is a special jurisdiction vested in the Court. It is, therefore, necessary for the Court to follow in strict accordance with the procedure mentioned in the said order.

Order XXXV, Rule 8 refers to a decree and this decree is the decree passed under Order XXXV, Rule 2. Order XXXV, Rule 2 provides that the defendant has no right to appear or defend the plaintiff's suit unless he first obtains leave from a Judge or Magistrate to appear and defend. It is only when the defendant does not obtain the leave or where the defendant after obtaining such leave does not appear and make out a case for good defense, the plaintiff is entitled to a decree.

Where the defendant has entered appearance within 10 days from the service of summons, as in the present case, it may be logically argued that the decree passed is not a decree within the meaning of Order XXXV, Rule 2.

The procedure as to the defendant obtaining leave is set out in Order XXXV, Rule 3, where the Court has been given power to grant leave unconditionally or upon any terms as the Court thinks fit. The defendant entered appearance, and filed for an application to defend the suit, the application was disregarded for having cited the wrong provision of the law, but it was not struck out, and the Court was of the view that since there was no leave sought and granted the claims were deemed to have been admitted and therefore the decree was passed. This was a decree passed under Order XXXV Rule 2, and the defendant can make an application under Order XXXV, Rule 8 to set aside the decree. Thus, this Court cannot accept the contention of the Counsel for the plaintiff that the application is not maintainable and that the defendant ought to have filed a Review, Revision or Appeal.

The next point to be decided is whether there were "special or exceptional circumstances" for which this Court should exercise its judicial discretion in setting aside the decree.

In this case, the defendant took out the chamber summons for leave to enter appearance and to defend the suit. Admitted that the application was filed under the wrong provision of the law. The application was neither dismissed nor struck out so as to give room to the defendant to file a fresh application. The defendant was not given a chance to enter appearance and to show the court whether or not it has a good defense. The Court can only enter decree in summary suit if it is satisfied that the defendant has no good defense and or wherever the defense put forth by the applicant/defendant is not bonafide, it does not raise triable issues and is not a moonshine.

Rule XXXV of the CPC vests pervasive judicial discretion in the Court to grant, refuse or grant conditional leave to defend, the suit, by the defendant, and the law requires that the defendant should be given a chance to show to the court that there is a good and bonafide defence or triable issue. In the present case,

the Court did not hear the application on merits, and the application was disregarded on technicalities, and thus the Court could not either refuse or grant leave to defend, and thus the Court is unaware of whether or not the defense of the defendant is bonafide and raises triable issues. This makes the present application an exceptional one warranting the Court to exercise the discretion provided under Order XXXV Rule 8 of the Civil Procedure Code, and set aside the decree and execution, and grant leave to the defendant to appear to the summons and defend the suit.

I also do not agree with the Counsel for the Plaintiff that Order XXXV Rule 8 could only be applied where the defendant fails to enter appearance and defend the suit. This order gave a discretion to court to consider any exceptional circumstances, the Order did not specify the circumstances of nonappearance only as argued by the Counsel for the plaintiff relying on the Book by Sarkar on Civil Procedure Code, Vol II page 1986 that powers under the provisions of O 32 Rule 4 of the Indian Procedure Code could only be exercised where the defendant

fails to appear and unable to apply for leave to defend the suit. This is no so, special or exceptional circumstances shall depend on the merits of each application, and on this present application, and as I stated hereinabove, and since there was no negligence on the part of the defendant, and since there were demonstrated exceptional circumstances by the defendant/applicant, this application is allowed, and the defendant is granted leave to appear to the summons and defend the suit.

For all these reasons the application is allowed with costs.

DATED at DAR ES SALAAM this 17th day of April, 2015




MANSOOR
JUDGE
17th April 2015