IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

COMMERCIAL CASE NO. 26 OF 2014

BANK OF AFRICA TANZANIA LIMITED .....PLAINTIFF

VERSUS

MALASE SITTA MAKALANGA
MADUHU MONGO } **..... DEFENDANTS**

15th & 16th April, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a prayer fronted by Mr. Kange; learned counsel for the plaintiff to the effect that this court should enter summary judgment against the defendants in respect of this suit filed under summary procedure. The background facts of this case are very short and not difficult to comprehend. They go thus: the plaintiff bank - Bank of Africa Tanzania Limited - is a limited liability company incorporated under the laws of Tanzania and licensed to carry on the business of banking. Malese Sitta Makalanga and Maduhu Mongo; the defendants, as described in the amended plaint, are both natural

persons living and working for gain in Kahama township within Shinyanga Region. By a Facility Letter dated 16.09.2013, the first defendant obtained from the plaintiff bank a loan of Tshs. 400,000,000/= which comprised an overdraft facility of Tshs. 200,000,000/= and a Term Loan of Tshs. 200,000,000/=. Houses standing on Plot No. 942 Block "Q" Nyasubi Kahama held under CT No. 37605, Plot No. 602 Block "Q" Nyasubi Kahama held under CT No. 18704 – LR Mwanza and Plot No. 20 Block "Q" Kahama urban area held under CT No. 22805 – LR Mwanza, were mortgaged as security for the loan. The relevant Mortgage Deeds were appended with the plaint.

As per the Facility Lette,r the overdraft was payable within twelve months and the term loan was payable in twenty four months. It happened that the defendant defaulted to repay the loan as agreed. In consequence whereof, the plaintiff bank, filed this suit under summary procedure as per Order XXXV of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC") claiming against the defendants jointly and severally for the following reliefs:

(i) That the defendants should pay to the plaintiff Tshs. 493,949,419.05 as an amount due as on 17th November, 2014 or else the mortgaged properties be sold to recover the outstanding amount;

(ii) That the defendants should pay to the plaintiff interest that shall accrue on the principal sum at the rate of 24% per

annum from 18th November 2014 up to the date of judgment;

(iii) That the defendant should pay to the plaintiff interest on the decretal sum at the court rate from the date of judgment up to the date of payment in full;

(iv) That the defendant should pay the plaintiff costs of this suit; and

(v) Any other /further order as the court may deem fit under the circumstances of this case.

Since its institution until 15.04.2015 when the matter came before me for necessary orders, there had been no leave sought by the defendants to defend the suit. When the suit was called on for orders on the said 15.04.2015, Mr. Kange; learned counsel for the plaintiff told the court that though the defendant was absent, he was served and there was proof of service. For that reason, he moved this court under Order XXXV rule 2 (2) (a) of the CPC to enter judgment in favour of the plaintiff as prayed. He stated that he made that prayer under the said provisions of the CPC because the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") are silent in matters related to summary procedure.

Mr. Kange, learned counsel for the plaintiff is right. Indeed the Rules do not provide for the summary procedure. That notwithstanding, this court is empowered to issue a summary Judgment in terms of rule 68

upon the circumstances as stipulated therein. Therefore, where the suit has been specifically premised on Order XXXV, judgment thereof will be entered accordingly, subject to the conditions in the Order being satisfied. Among the conditions for the judgment to issue upon a prayer made by counsel for the plaintiff can be reckoned from the provisions of the said Order XXXV Rule 2 (1) and (2) (a) of the CPC. These include, first, service of the summons to the defendant together with a plaint, directing him to file an application for leave to defend the suit and the manner in which such application shall be filed, and secondly, default by the defendant (or defendants as the case may be) to obtain leave after a plaint and summons in the prescribed format have been served onto them.

Clearly the judgment in the circumstances is predicated upon service of a plaint as well as summons to the defendants and their failure to obtain leave to defend. Admittedly, under summary procedure, once a defendant fails to file an application to defend a suit after being properly served, the provisions of Order XXXV rule 2 (2) of the CPC, at once, come into play – see ***CRDB Bank Limited Vs John Kagimbo Lwambagaza*** [2002] TLR 117.

The question which should be answered in the present case remains to be whether the defendants were properly served with the summonses as well as a plaint that they failed to obtain leave to defend so as to

warrant this court to enter judgment in favour of the plaintiff and against the defendants jointly and severally.

Mr. Kange, as intimated above, has stated that there is proof of service to the defendants. I took trouble to scan through the record of this case with a view to unearthing the said proof of service. My in-depth scrutiny led me to the conclusion that what is said to have been proper service of the appearance on 15.04.2015 was in respect of the first defendant only; namely Malase Sitta Makalanga.

As the record reveals, the said summons was served on the said first defendant on 19.03.2015 and accordingly the twenty one days within which he was required, as per the notice, to obtain leave to defend the suit had lapsed on or about 09.04.2015. The signed copy of the summons by the said defendant as well as an affidavit of the process server; one Silas Lucas Isangi appear to be the basis of Mr. Kange's statement that there is proof of service to the defendants.

However, as to the second defendant, there is an endorsement on the said summons by the process server which connotes that he was not served. The endorsement reads:

> "SAMASI HII HAIKUSAINIWA KUTOKANA NA MADUHU MONGO HAPATIKANI KATIKA MJI WA KAHAMA - 19/MARCH -2005".

And an affidavit thereof partly reads:

> "On the 17th day of MARCH - 2015 I received a Summons/Notice/ Issued by COMMERCIAL DIVISION AT MWANZA in Commercial Case No. 26 of 2015 in the said court, dated 10TH day of MARCH-2015 for service on ... ("SAMASI HII HAIKUSAINIWA KUTOKANA NA MADUHU MONGO HAPATIKANI KATIKA MJI WA KAHAMA).

The gist of the endorsement on the summons to the second defendant and its flanking affidavit is, certainly, that the relevant summons was not signed by the intended recipient because he was not available in Kahama Township. He was therefore not served.

The immediate question that interposes here is whether service on only one of the defendants can be deemed sufficient and regarded as proper service on a co-defendant who was not served so as to warrant judgment entered jointly and severally against both defendants. I have serious doubts. An answer to this question is not hard to seek. It can be found in the provisions of rule 11 of Order V of the CPC. This rule provides:

> "Save as otherwise prescribed, where there are more defendants than one, **service of the summons shall be made on each defendant**".
> (Emphasis supplied).

My reading of the foregoing provision of the law, in its plain meaning, has it that where there are more than one defendant, as is the case in the present instance, service must be effected on each of the defendants. This was not the case in the present matter; service was successfully effected in respect of the first defendant only. It is my well considered view that in a suit where there are more than one defendants and the plaintiff claims reliefs from them jointly and severally, the court, in order to enter a summary judgment against the defendants jointly and severally, must be satisfied that each of the defendants was properly served. On this premise, the answer to the above interposed question is answered in the negative. That is to say; in view of the fact that only one defendant was served, there was no proper service to the defendants as to warrant this court to enter judgment against them jointly and severally.

I am alive, as guided by the records of this court, to attempts at service which had been effected upon the defendants previously before the plaint was amended by the plaintiff. However, in the words of Mr. Kange, learned counsel for the plaintiff, that service was deemed

defective upon his attention being drawn to the fact that the summons which was issued was requiring the defendants to file a defence instead of appearance. Supposing there was proof of service of the same, they are nevertheless of no effect whatsoever, for what is relevant at this stage is the amended plaint. Therefore, the latter being the correct summons, was supposed to be served to both defendants in terms of Order V Rule 11 of the CPC quoted above.

In the upshot, and for the foregoing reasons, I hereby reject the prayer to enter summary judgment against the defendants jointly and severally made by the learned counsel for the plaintiff until and unless the stipulated conditions of the law are complied with to the letter. In view of the fact that the defendants did not appear, the prayer is refused without any order as to costs.

Order accordingly.

DATED at MWANZA this 16th day of April, 2015.

J. C. M. MWAMBEGELE
JUDGE