IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 86 OF 2014

BYTRADE TANZANIA LIMITED ..... PLAINTIFF

VERSUS

BOARD OF TRUSTEES OF TANDAHIMBA

FARMERS AGRICULTURAL INPUT TRUST FUND .... DEFENDANT

11th May & 1st June, 2015

JUDGMENT

MWAMBEGELE, J.:

Before me is this suit filed by the plaintiff Bytrade Tanzania Limited against the defendant Board of Trustees of Tandahimba Farmers Agricultural Input Trust Fund asking for judgment and decree in the following terms:

(a) Summary Judgment and Decree against the defendant for the sum of Tshs. 284,429,500/=;

(b) Judgment and Decree against the defendant for the sum of Tshs. 140,006,000/=;

(c) That the defendants pay the plaintiff interest on the principal amount in paragraph (a) and (b) hereinabove at the commercial rate of 30% from due date till judgment;

(d) That the defendant pays the plaintiff interest on the principal amount in paragraph (a) and (b) herein at court's rate from the date of Judgment till date of decree is satisfied in full;

(e) Costs of this suit be provided for; and

(f) Any other and further relief this court may deem fit.

To have a better understanding of the present suit, the relevant background facts may paint the picture; they go thus: the claim by the plaintiff against the defendant is for Tshs. 284,429,500 and 140,006,000/= being unpaid price for pesticides delivered and interests thereon. The duo had entered into an agreement for the supply of 20,000 litres of Bayfidan 250 EC and 20,000 litres of Defender EC both valued at Tshs. 1,340,000,000/=. Upon delivery of the said pesticides by the plaintiff, the defendant issued a total of 29 postdated cheques totaling Tshs. 284,429,500/=. Upon presentation for encashment, the said cheques were dishonoured by the defendant's banker with an endorsement "refer to the drawer". It is stated that it is this amount that forms the basis of the summary suit. As at the date of filing this suit, the said amount as well as the balance of Tshs. 140, 006,000/= remained undischarged by the defendant.

In my opinion, the above narration tells it all as far as the bone of contention of the matter is concerned. However, to appreciate the position I am going to take in this judgment, I will further narrate what transpired in court since institution of this suit. This is not for embellishment or lack of other matters to spend time on, but rather for the peculiarity of this suit itself. The recital and subsequent analysis will demonstrate.

The Plaint was filed in this court on 2.07.2014. It is titled thus:

"PLAINT
ORDER XXXV: SUMMARY PROCEDURE"

Thereafter, the prayers, particularly (a) and (b) are couched thus:

"1. Summary Judgment and Decree against the defendant for the sum of Tshs. 284,429,500/=
2. Judgment and Decree against the defendant for the sum of Tshs. 140,006,000/=".

On 24.07.2014, this court (Nyangarika, J.) seized with the matter for the first time recorded and ordered thus:

"Upon a Summary suit being filed and appropriate fees being paid, I order as follows:

i) Let the defendant be served under Oder 35 of CPC,
ii) The matter will be called for orders in chambers on 19/08/2014".

On the said date; that is, 19.08.2014, Mr. Ringia and Mr. Mashiku advocates entered appearance for the plaintiff and the defendant respectively. The matter was once again set for orders on 15.9.2014 but come that date, the

defendant was absent and unrepresented. It was then set to come up for orders on 29.09.2014 whereby, upon yet another absence of the defendant, Mr. Benedict Alphonce appearing for the plaintiff had the following to tell the court:

> "The defendant has not appeared and no application to defend the suit has been filed. I pray for summary judgment as prayed under para 9 (a) and (b) and (e) of the plaint. I drop my relief for 9% court interest rate and instead pray for 7% only."

That prayer was rejected by this court for the reason that despite the appearance of Mr. Mashiku on 19.08.2014 and his subsequent prayer to withdraw from representing the defendant through his letter filed in court, there was no proof that the defendants were aware of such withdrawal. As the record reveals, the defendants were unable to strike a deal with any advocate for their representation and ultimately, on 05.11.2014, Mr. Sabasaba's prayer to withdraw from representing them for want of proper instructions was accepted by the court. There and then one Halfan Manzi Matumla, who had, allegedly, been requested by the defendant's chairman to look for an advocate said that he knew the chairman had family problems but otherwise the defendant could be served themselves.

The record reveals further that ultimately the defendants were served and notified to file a defence and that the case was coming up on 25.02.2015. It

was on this date, before me, when Mr. Ringia learned advocate for the plaintiff had this to say:

> "My Lord, we filed a suit partly under O. XXXV on 02.07.2014. According to the record, we have been serving the defendants but they appeared only once. They have not appeared since then. I pray to invoke rule 68 of GN No. 250 of 2012 for summary judgment for the sum as per prayer (a) in the plaint read together with O. XXXV rule 2 (2) of the CPC. With respect to prayer (b) as per rule 22 (1) of the Rules requires the filing of form 1, which I pray to file tomorrow..."

This court could not be mean. His wish was granted and the purported application form was accordingly filed. On 27.02.2015 the plaintiff's counsel prayed for judgment. I reserved to pronounce the judgment on 13.04.2015. However, in the course of drafting the judgment, I realised that there were two points which ought to have been addressed before writing the judgment. On 10.04.2015, I subpoenaed the plaintiff's counsel to come and address me on two points; namely:

1. Whether or not it was proper to bring a summary suit under Order XXXV of the CPC together with an ordinary suit in the same plaint endorsed "Summary Procedure", if not what should be done in respect of the claims which were not repugnant to Order XXXV; and

2. Whether or not it was proper to file an application default judgment under rule 21 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

The course of action was opted by the court having in mind the legal standpoint that where a court or tribunal discovers an issue of law after the closure of evidence and submissions which might be decisive of the case, the interest of justice demands that parties must be accorded an opportunity to address the court before making a decision on the point - see ***Ibrahim Omary (EX. D 2323 Ibrahim) Vs the Inspector General of Police and 2 others***, Civil Appeal No. 20 of 2009, ***Mire Artan Ismail & Another Vs Sofia Njati***, Civil Appeal No. 75 of 2008, both unreported decisions of the Court of Appeal.

Mr. Ringia, learned counsel for the plaintiff, who appeared on the date to address me on the two issues started with the second point. He conceded that the relevant provision is rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") which makes it mandatory to file Form No. 1 which is a prescribed form. He stated that Form No. 1, has been titled "under rule 21" and it being a prescribed form, it ought to have been followed to the letter as it left no room for invention. Mr. Ringia, confessed that he had no authority for that proposition but that that was the general practice obtaining in this jurisdiction. He was ready, though, to rectify the anomaly and re-file the application for default judgment with proper citation, if so ordered by the court.

On the second point, Mr. Ringia, learned counsel for the plaintiff, submitted that they opted to file a summary suit as well as an ordinary suit in the same plaint titled "summary procedure" to avoid multiplicity of proceedings as they were causes of action arising from the same transaction and between the same parties. He added that in the circumstances, if the defendants appeared they would have unconditional leave to defend themselves against the prayers which did not fall under summary procedure; as for the prayers under summary procedure, the defendants would be obliged to seek leave of this court to defend. Upon being asked if the learned counsel had any authorities to support his proposition he retorted that he was not aware of any in this jurisdiction but he had some emanating from India. However, he had none on his finger tips, so he prayed for a short adjournment of one week within which to research on the point and avail the court with supporting authorities. The matter was therefore fixed for continuation of submission on 04.05.2015.

On the said 04.05.2015, Mr. Ringia learned counsel did not appear. In his stead, there appeared Mr. Benedict Alphonce, learned advocate who intimated to the court that their Mr. Ringia had researched on the point but could not appear because he was attending to a sick wife who has been admitted into Hospital. Mr. Alphonce, learned counsel sought for an adjournment so as to allow Mr. Ringia, who felt should address the court himself, to come and address the court on the point. The court granted the prayer and the matter was adjourned to 11.05.2015.

On 11.05.2015 Mr. Ringia appeared. He addressed the court that having made a research on the issue, he conceded that it was inappropriate to bring

two suits – one under summary suit and another an ordinary suit – in the same plaint endorsed "Summary Procedure". He thus prayed to withdraw the prayers under ordinary procedure with leave to re-file the same.

I have painstakingly undertaken to unearth what transpired throughout the proceedings by way of preview of some relevant episodes mainly for the reasons of the peculiarities of this matter. Let me now explain the peculiarities.

It is true that there have been several attempts to have the defendants defend themselves but the efforts proved futile. I think, the reasons are not hard to comprehend. An inference can be hastily drawn that maybe they had no defense any way. But still, that remains speculative only as no one who appeared on behalf of the defendant said anything in respect of the claim against them. That notwithstanding, the approach taken by the plaintiff, or more precisely their counsel is somewhat strange. I shall demonstrate.

The suit was filed under summary procedure as per Order XXXV of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"). This is what appears on the plaint as shown herein above. It was endorsed as such and confirmed by the order for service made by this court for the first time on 27.07.2014, the prayer for summary Judgment made by Mr. Alphonce on 29.09.2015 (supra) as well as prayers (a) and (e) in the plaint shown hereinabove.

However, the rest of the prayers made in the plaint, as well as those put up by the learned counsel on the 29.09.2014 and 25.02.2015 respectively raise

doubts as to their propriety and procedural regularity. Apparently, Mr. Ringia learned counsel viewed the suit as being partially summary, by stating that they filed this suit "partly" under summary procedure. It implies that the rest part is intended to be, and indeed is, an ordinary suit. This is obviated by the differentiation of his prayers; he is seeking for summary judgment in terms of both rule 68 of the High Court (Commercial Division) Procedure Rules - GN.250 of 2012 (henceforth "the Rules") as well as rule 2 (2) of Order XXXV of the CPC, and yet, he seeks default judgment in terms of rule 22 (1) of the Rules.

Let me, at this juncture, pause to ponder. I ask myself questions what actually was the intention of the plaintiff in this suit? If at all what I perceive is what he wanted, is it regular and legal? Or to be precise, can a suit be preferred partly as a summary suit and partly as ordinary suit in the same plaint endorsed as Summary Suit? The questions do not end there, as regards the prayers, can a default judgment under rule 22 (1) of the Rules be entered where a suit proceeded under summary procedure? Alternatively, can a default judgment be entered where a case proceeded under summary procedure? These questions form the basis of my task in the subsequent part of this judgment.

At the outset, I must observe here that once a judgment always a judgment. It is an end product that is categorised according to the means (process and procedure) by which it was achieved. Hence they are categorised as Default Judgment, Summary Judgment, Judgment on Admission, *ex parte* Judgment, *et cetera*. It follows therefore that every category of judgment and the

resultant decree will be dictated by the nature of the process or procedure as predicated by the law.

Coming to the questions interposed above, particularly on whether a suit can be preferred partly as summary suit and partly as ordinary suit, the Civil Procedure Code and particularly order XXXV is instructive. Under rule 1 thereto, it is provided thus:

> "This order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-
> (a) Suits upon bills of exchange (including cheques) or promissory notes; ..."

Rule 2 of the same order governs institution of the summary suit where a person desires so to proceed under the Order. I will once again quote the relevant part:

> "Suits to which this order apply shall be instituted by presenting a plaint in the usual form endorsed "Order XXXV: Summary Procedure ..."

Apparently, the law presupposes clear procedure where a person wishes to bring a suit under summary procedure. Thus, upon it being endorsed "Order XXXV: Summary Procedure", it means that the plaintiff's claim and the sought reliefs must be those provided for under the order. Under Order XXXV rule 2 of the CPC, the class of suits to which the Order applies is indicated in clear and certain terms. As has been stated in a number of decisions, Order XXXV

is intended to enable the Plaintiff with a liquidated claim to which there appears to be no good defence to obtain a quick and summary judgement – see ***CRDB Bank Limited Vs John Kagimbo Lwambagaza*** [2002] TLR 117, ***Industrial and Commercial Development Corporation Vs Daber Enterprises Ltd*** [2000] 1 EA 75 and ***Zola & Another Vs Ralli Brothers Ltd & Another*** [1969] EA 691 at 694. My reading of the wording of rule 2 of Order XXXV has it that the Order is restrictive as to what claims can be brought under the Order. Claims not otherwise provided for under the Order are excluded; *expressio unius exclusio alterius*.

The predicament one finds himself in when a summary suit contains reliefs envisaged by both summary and ordinary proceedings and questions that linger in such a situation has been explained by B. D. Chipeta, one of the long serving members of this Bench, in his book **Civil Procedure in Tanzania, a Student's Manual** (Law Africa, Revised Edition, 2013) at p. 272 in the following terms:

> "There are times when a plaintiff's suit contains some claims which can correctly be brought under summary procedure and others which cannot. What in such a case should be done? Can the court in such a case proceed with the entire suit under summary procedure, or can it strike out those claims not falling within the categories of suits that may be dealt with under summary procedure?"

The learned author then goes on to refer to the case of ***Uganda Transport Company Ltd Vs Count De la Pasture*** (1954) EACA 163 in which it was held that where a plaint specifically endorsed "Summary Procedure" contains other claims, the court may deal with the claims correctly endorsed as if no other claim had been included therein and allow the suit to proceed with regard to the residue of the claim. In the ***Count De la Pasture*** case, it was also held that the court has no power under the Order to strike out any part of the claims.

Hence, the course adopted by learned counsel for the plaintiff is not common in the law of Civil Procedure currently in practice in our jurisdiction. The practice has all along been to file a summary suit in respect of liquidated damages as envisaged by the provisions of Order XXXV of the CPC and where a plaintiff has both claims; under summary procedure and ordinary procedure and wishes to recover the claims under one suit, the procedure has been to file a suit under ordinary procedure. That is why I say the course taken by the plaintiff is somewhat strange. This is logically obvious because, the attendant procedure where the suit is instituted on summary basis is different from the procedure attendant to ordinary suits. Whereas under summary procedure the defendant's right of defence is not automatic but subject to leave of the court upon satisfaction by the defendant that there are triable issues in the suit, he has an automatic right to defend against an ordinary suit. This is why, this court ordered the defendants to be served in terms of Order XXXV when it was seized with the matter at first instance. This factor only suffices to require separateness and specificity in the institution of the suit.

Thus under Civil Procedure law, a suit cannot ordinarily be filed partly under summary procedure and partly under ordinary procedure. It is simply superfluous and bad calculated to abuse the court process.

In the circumstances, the intention of the plaintiff in respect of its suit can be determined by the nature of their claim. Does it fall in the ambit of Order XXXV? An answer thereto is not difficult to seek. Reading through the plaint and throwing the prayers on the sieve of Order XXXV Rule 1 (a) - (g), I find that the only prayer which can be rightly made and granted under summary procedure is prayer (a) in the plaint and the flanking prayer respecting costs of the suit. I say so because, it relates to the bounced cheques which were allegedly issued by the defendants but ultimately dishonored by the defendant's banker. Hence it is a suit upon bills of exchange which includes the said cheques.

Accordingly, since the plaint bears an endorsement as required under order XXXV, then the plaintiff intended to have this suit dealt with under summary procedure and not "partly under summary procedure" as suggested by the learned counsel; the claims not falling within the realm of Order XXXV must be disregarded. I will revert to this point shortly and see what should be done in respect of it in this case.

Can rules 22 (1) and 68 of the Rules of this court make any difference in the circumstances? I have serious doubts. The former, crystal clearly caters for a situation where the defendant has, by his own laxity or choice, decided not to enter defence either within the time prescribed for filing defense or where it has been extended. For avoidance of doubt, I reproduce it hereunder:

> "(1) Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule (2) of rule 19, within the period of such extension, the Court shall upon proof of service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules enter judgment in favour of the plaintiff."

Under summary procedure, a defendant, as intimated hereinabove, is not required to file a defence as in ordinary suit envisaged in the above quoted rule. Therefore, the question of failure to enter defence does not arise save where leave has been sought and obtained and he defaults in complying with the court order thereafter.

Accordingly the procedure adopted is dictated by the nature of the claim as already intimated. The two claims cannot ordinarily be combined because it will only end in either absurdity or multiplicity of the pleadings and twice punishing the defendant because he will otherwise be necessitated to enter defence in respect of part of the suit and apply for leave in respect of another part of suit. The absurdity becomes apparent in the nature the suit itself is supposed to proceed - disjointed, forth and backward zigzagged movement.

There seems to be yet another absurdity if a default judgment is entered in terms of rule 22 (1). This lies in the conditions for execution of the decree

thereunder. It is not automatic. It is upon advertisement and lapse of about 31 days before it can be executed. This is all different from a summary judgment or decree obtained under Order XXXV of the CPC. It is quite undesirable and an abuse of process to issue two different types of decree issuable under different procedures.

As for rule 68 of the Rules, which the learned counsel read together with rule 2 (2) of the Order XXXV, it does not paint a different picture either. Firstly, the two provisions cannot be read together because, each is sufficient and complete in itself, as they cater for different situations. Whereas Order XXXV rule 2 (2) envisages a situation where leave has not been obtained to defend the suit, rule 68 envisages a situation where there are pleadings from both parties. In the former, the law requires the court to enter a decree in the sum mentioned in the plaint as well as interest. In the latter, regardless of the nature of the claim, the court can enter a judgment and decree summarily upon assessing the substance of the pleadings before it.

In the case at hand, there is ample evidence on record that the defendants were served. This is evidenced by an affidavit sworn by one Brown Gabriel Nyoni; an officer of the plaintiff. However, for reasons best known to the defendant they chose to absent themselves. No leave to defend the suit has been sought and obtained by the defendant. This circumstance can only be catered for by Order XXXV rule 2 (2) (a) of the CPC and not rules 22(1) or 68 of the Rules.

The plaintiff has prayed for interest at 30% on, *inter alia*, prayer (a) above. It is a cardinal principle of the law of summary procedure that interest is grantable only in situations where the parties had agreed upon such interest.

In the instant case, the Sale Agreement executed by the plaintiff and defendant which was annexed to the Plaint, does not feature any interest in eventualities as happened. The court is not therefore enjoined to grant such interest. I consequently reject the prayer respecting interest at commercial interest on the summary proceedings.

What then should I do in respect of the claim not correctly brought under summary procedure? On the authority of the ***Count De la Pasture*** case (supra), I have no authority to strike it out. The plaintiff's counsel urges me to enter default judgment in terms of rule 21 of the Rules and has filed the relevant application to that effect. As can be seen, the plaintiff has filed the application for default judgment under a wrong provision. The proper provision should have been rule 22 (1) of the Rules. To this Mr. Ringia has conceded but that he ought to have endorsed as such because Form No. 1, it being a prescribed form, left not room for any invention. With due respect to Mr. Ringia, I find myself unable to swim his current. Admittedly, the endorsement "under rule 21" as appearing in Form No. 1 in the First Schedule of the Rules was a drafting inadvertence. The proper provision ought to have been rule 22 (1).

However, that is not an excuse to the plaintiff's counsel. In my considered opinion, despite the drafting ailment, it was still incumbent upon the learned counsel to cite the proper provision. This being the case, the learned

counsel will not exculpate himself from being blamed for citing a wrong provision of the law. It is now settled law that wrong citation or non-citationof an enabling provision of the law renders an application incompetent – see: ***National Bank of Commerce Vs Sadrudin Meghji*** [1998] TLR 503, ***NBC (1997) Ltd Vs Thomas K. Chacha t/a Ibora Timber Supply (T) Ltd*** Civil Application No. 3 of 2000 (unreported), ***Almas Iddie Mwinyi Vs NBC & Another*** [2001] TLR 83, ***Antony J. Tesha Vs Anita Tesha*** Civil Application No. 10 of 2003 (unreported), ***Citibank Tanzania Vs TTCL & 4 Others***, Civil Application No. 64 of 2003 (unreported), ***China Henan International Co-operation Group Vs Salvand K. A. Rwegasira*** [2006] TLR 220, ***Edward Bachwa & 3 Others Vs the Attorney General & Another*** Civil Application No. 128 of 2006, ***Fabian Akoonay Vs Mathias Dawite***, civil Application No. 11 of 2003 (unreported), ***Chamma cha Walimu Tanzania Vs the Atttorney General*** Civil Applciation No. 151 of 2008 (unreported) and ***Harish Jina By His Attorney Ajay Patel Vs Abdulrazak Jussa Suleiman***, ZNZ Civil Application No. 2 of 2003 (unreported) to mention but a few.

In view of what I have endeavoured to state above and in the light of the foregoing authorities, I have no speck of doubt that wrong citation of the enabling provision of the Rules renders the application for default judgment incompetent. It makes no difference even in situations where the wrong citation has been caused by a drafting inadvertence in a prescribed from appearing in the First Schedule to the Rules. The application for default judgment is therefore struck out for wrong citation of an enabling provision.

That apart, assuming for the sake of arguments that the correct provisions were cited, in view of the foregoing analysis of rules 22 (1) and 68 in relation to the nature of this claim and in the light of the ***Count De la Pasture*** case (supra) as well as the procedural absurdity discussed, the application could not stand.

In fine, therefore, and for the foregoing reasons, and furthermore, since the defendant had been served but chose not to take necessary steps to defend the suit, I will enter a summary judgment in terms of Order XXXV rule 2 (2) (a) of the CPC and order as follows:

1. The defendant shall pay the plaintiff a total of shillings two hundred eighty four million four hundred twenty nine thousand five hundred only (Tshs. 284,429,500/=) being the total sum of monies for the cheques issued and dishonored in respect of the pesticides delivered;
2. The defendant shall pay interest on the decretal amount at court rates of 7% from the date of judgment till full and final satisfaction; and
3. The defendant shall pay the plaintiff costs of this suit.

It is so ordered.

DATED at DAR ES SALAAM this 1st day of June, 2015.

J. C. M. MWAMBEGELE
JUDGE