

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO. 51 OF 2022**

EXIM BANK (TANZANIA) LIMITED..... PLAINTIFF

VERSUS

TSN SUPERMARKET LIMITED.....1ST DEFENDANT
TSN DISTRIBUTION LIMITED2ND DEFENDANT
TSN LOGISTICS LIMITED3RD DEFENDANT
TSN OIL (TANZANIA) LIMITED..... 4TH DEFENDANT
AHMED MOHAMED BAGHOZAH.....5TH DEFENDANT
FAROUGH AHMED ABOOD BAGHOZAH.....6TH DEFENDANT
FAHD MOHAMED BAGHOZAH.....7TH DEFENDANT
RUWAIDAH FAROUGH BAGHOZAH.....8TH DEFENDANT
WARDA SALIM BAFADHIL.....9TH DEFENDANT

Last order: 01st SEPTEMBER 2022

Ruling: 6th OCTOBER 2022

RULING

NANGELA, J:.,

When the Defendants were permitted to file their Written Statement of Defence (WSD) they did so jointly and raised a preliminary objection, to wit, that:

“This suit filed under Order XXV-SUMMARY PROCEDURE, which compelled the Defendants to seek leave to appear and defend

and which denies the Defendants an automatic right to defend is fatally defective as it involves Defendants who are not parties to any mortgage Deed with the Plaintiff contrary to Order XXXV Rules 1(c), (i), (ii) , (iii) and (iv) and Rule 3(1) (c) & (ii) of the Civil Procedure Code, Cap.33 R.E 2019.”

On the basis of the above objection, the Defendants have urged this Court to strike out this suit from the Court with costs. When the parties appeared before me, the Plaintiff enjoyed the services of Mr. Jovinson Kagirwa, learned Advocate, while Mr. Frank Mwalongo, learned Advocate as well, represented all Defendants.

When these learned counsels for the parties herein appeared in Court on the 28th July 2022, it was agreed that, the preliminary legal issue raised by the Defendants be disposed of by way of written submissions. A schedule of filing was issued

and by 1st September 2022 all parties had complied. I will briefly summarise their submissions here below.

Submitting his position in support of the preliminary objection, it was Mr. Mwalongo's contention that, according to the Plaintiff, paragraphs 1 to 22 thereof narrate the loan history between the Defendants and UBL Bank who is not a party to this case. He submitted that, paragraph 23 of the Plaintiff states that, the suit is based on an Asset Purchase Agreement and Deeds of Variation annexed to the Plaintiff as Annex. **Exim-13, Exim -14 and Exim-15.**

He submitted that, annexure 12 contains several Mortgage Deeds between UBL Bank and some of the Defendants which forms part of the narrated history of the suit but with no bases to it. He contended that, the status of this suit by now is a summary suit with leave to defend granted upon an application for leave pursued by the Defendants.

According to Mr. Mwalongo, as it stands, the suit is fatally defective because a suit based on Asset Purchase and Deed of Variation does not deserve to be a summary suit under Order

XXXV of the Civil Procedure Code, Cap.33 R.E 2019. He submitted that, the Asset Purchase Agreement and Deed of Variation are just forming part of contractual documents and claims upon them cannot form or fall under the summary procedure.

To bolster his submission, Mr. Mwalongo relied on the Court of Appeal decision in the case of **Jomo Kenyatta Traders Ltd & 5 Others vs. NBC Limited**, Civil Appeal No.48 of 2016, (unreported), **Prosper Paul Massawe & 2Others vs. Access Bank Tanzania**, Civil Appeal No.39 of 2014 and **Diamond Trust Bank (Kenya) Ltd vs. Prime Catch (Exports) Ltd**, Commercial Case No.62 of 2017.

He submitted that, while in the above cited authorities there were at least one or two Defendants being party to the mortgage deed, in this present matter before me, none of the Defendants is a party to the Mortgage Deed as clearly acknowledged in the Plaintiff, in which case summary suit under Order XXXV of the CPC does not stand against the Defendants.

He surmised that, the nine Defendants herein have been subjected to seeking leave to appear and defend in this matter due to fatal mistake committed by the Plaintiff by defectively filing a summary suit based on Asset Purchase Agreement and Deed of Variation which are not falling under the requirements of Order XXXV of the CPC. He contended that, the suit befits being struck out and with costs.

In reply to the submissions filed by Mr. Mwalongo, the learned counsel for the Plaintiff did file his written submission as well. Mr. Kagirwa submitted that, the preliminary objection filed is misconceived and devoid of merits since, the Plaintiff filed this summary suit on recovery of Mortgage and Promissory Notes which were signed as between UBL Bank and the Defendants, and, as such, the Plaintiff assumed the right and obligation to claim on account of the transfer and assignment clause under the Deed of Novation signed by the UBL Bank, the Defendants and the Plaintiff.

According to Mr. Kagirwa, the position held by the Defendants that the Plaintiff is not entitled to bring the suit as

summary procedure suit is not legally maintainable. He submitted that, summary procedure under the CPC entitles a Plaintiff to file a suit seeking for summary judgement against Defendants provided the suit is premised on the itemized items under the Code.

He contended that, the current suit is about recovery of money secured by mortgage and Promissory Note, hence, fittingly filed under Order XXXV Rule 1 (a) and (c) of the Code. He referred to this Court the contents of paragraphs 7 to 18 of the Plaint, arguing that, these paragraphs indicate that the suit is for recovery of monies under credit facilities which were extended to the Defendants.

Besides, Mr. Kagirwa referred this Court to paragraph 20 of the Plaint and contended that, the credit facilities which were extended to the Defendants were secured by a legal mortgage stated under paragraphs 20.1, 20.2, 20.3 and 20.4 of the Plaint. He maintained that, although the Mortgage Deed marked annexure 12 was executed between UBL Bank and the

Defendants, there was an assignment and transfer which allowed parties to transfer their rights and interest therein.

He contended, therefore, that, acting on that clause, UBL Bank, the Plaintiff and the Defendants signed a Deed of Novation (Annexure 13 to the Plaint) which gave the Plaintiff authority to claim for payment of the outstanding amount under the Overdraft Facility. He submitted that, the novation agreement was signed by the 1st, 2nd, 3rd, and 4th Defendants.

To further strengthen his submission, Mr. Kagirwa relied on section 62 of the Law of Contract Act, Cap.345 R.E 2019 regarding the doctrine of novation. He contended that, by the Deed of Novation, the parties agreed that, the Plaintiff should enter into the shoes of the UBL Bank. He relied on the decision of this Court in the case of **Exim Bank (Tanzania) vs. Riaz G.Ganhji t/a Abbas Emporium**, Commercial Case No. 50 of 2021, to support his contention.

Mr Kagirwa referred to this Court the case of **COFACE South Africa Insurance Ltd vs. Kamal Steel Limited**, Comm. Case No.108 of 2020, arguing that, the same case was

decided on similar grounds as the one at hand and, that, an objection of the similar nature, was overruled by the Court.

In his further submission, Mr. Kagirwa contended that, even if the Court was to find that the suit ought not to have been filed as '**summary procedure**', the remedy is to grant leave to defend and turn the suit into a normal suit and, the Defendant will be allowed to file his defence. He referred to this Court the case of **Turbine Tech vs. CSI Construction**, Misc. Comm. Case No.140 of 2020 (unreported) and **Jomo Kenyatta's case**, (supra).

As regards the **Jomo Kenyatta's case**, (supra), it was the submission of Mr. Kagirwa that, the concern of the Court of Appeal was the fact that summary judgment was entered by the Court against a party who is not required to file application for leave to appear and defend the suit (not a party to the mortgage) and the Court directed that, the suit should proceed as a normal suit and did not strike out the Plaint but the summary proceedings.

He also argued that, the decision of the Court of Appeal in the case of **Prosper Massawe** (supra) followed a similar approach. He contended, however, that, the cited case of **Diamond Trust Bank (Kenya) Limited** (supra) is a far-fetched decision to be relied upon as it was based on whether guarantors can be sued under summary procedure.

He argued that, the **Diamond Trust Bank (Kenya) Limited's** case (supra) is distinguishable because, nowhere in the Plaint is it said the suit is premised on the Deed of Guarantee but on the Promissory Notes and Mortgage, these being well covered under Order XXXV Rule 1 of the CPC. He contended as well that, it cannot be a good law since there are Court of Appeal decisions which have indicated a path to be followed. He maintained a stance, therefore, that, the objection is misconceived and should be overruled.

In a brief rejoinder, the learned counsel for the Defendants maintained his submission in chief and stated that, in essence, the Plaintiff has not rebutted that submission but rather admits the legal facts that the suit was brought as

summary suit under Order XXXV of the CPC, a fact which compels the Defendants to seek leave to defend while it involves Defendants who are not parties to any mortgage Deed with the Plaintiff.

It was a further rejoinder by Mr. Mwalongo that, the Plaintiff has admitted that the novation agreement was signed, entered and approved by the 1st, 2nd, 3rd and the 4th Defendants but not all Defendants are included in the suit involving nine (9) Defendants.

He contended that, summary suit deserves to be called so once it has been instituted against the parties to the agreement who are in breach and not otherwise as per the requirements of Order XXXV Rule 1(c), (i), (ii),(iii) and (iv) and 3(1) (c) (i) & (ii) of the Civil Procedure Code, Cap.333 R.E 2019.

Mr. Mwalongo rejoined further that, the respective procedural rules were enacted with a purpose that they should be followed by a party intending to institute suits under summary procedure but were not meant to be taken blindly.

To back up his point, he drew an analogous position taken in the case of **Mondorosi Village Council and 2 Others vs. Tanzania Breweries Ltd & 4 Others**, Civil Appeal No.66 of 2017 (unreported) regarding the need to adhere to procedural rules. He consequently urged this Court to uphold the objection and cause the suit to be struck out with costs.

I have given a careful consideration to the rivals arguments fronted before me by the learned counsels in their written submissions and the various authorities which they have invited me to consider in my deliberations.

As a matter of principle under Order XXXV Rule 2 (1) of the Civil Procedure Code, Cap.33 R.E 2019, 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**". This is exactly what the Plaintiff did and, as such, the suit was filed as summary suit.

In the case of **CRDB Bank Limited vs. John Kagimbo Lwambagaza** [2002] TLR 117, this Court (Nsekela, J (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 relates to suits stipulated there-under.”

From the above understanding of what “Order XXXV-Summary Procedure” stands for, the question that follows is whether this present suit falls within the kind of suits stipulated there under. Mr. Mwalongo has argued that, the current suit is not one that should have been brought under Order XXXV

Summary Procedure. His reason for that argument is that, there are parties which are not in any manner whatsoever part to the mortgage deed and the Deed of Novation which granted rights to the Plaintiff which were erstwhile held by the UBL Bank.

In his submission as well, the Plaintiff's counsel contended that, the filing of the suit as 'summary suit' was based on recovery of Mortgage and Promissory Notes which were signed as between UBL Bank and the Defendants, and, letter assigned under the Deed of Novation signed by the UBL Bank, the Defendants and the Plaintiff.

However, it is certainly, under paragraph 9 of the Plaintiff's submission that, in his submissions, Mr. Kagirwa, the learned counsel for the Plaintiff, has admitted that the Deed of Novation was not signed by all Defendants. According to him, it was entered and approved by the 1st, 2nd, 3rd and the 4th Defendants. That admission means that, five (5) out of the nine (9) Defendants included in the suit were not party to the Deed.

If that is the case, was it proper to have brought up this matter as Summary Suit?

Unlike Mr. Kagirwa, as I said, Mr. Mwalongo has given a negative answer to the above question because of what Order XXXV Rule 1(c), (i), (ii),(iii) and (iv) and 3(1) (c) (i) & (ii) of the Civil Procedure Code, Cap.333 R.E 2019 provide.

In the **Jomo Kenyatta's case** (supra), the Court of appeal set aside a summary judgement and ordered that, the suit be treated and determined as an ordinary suit. The Court reached that conclusion after an appeal was lodged before it by the appellants arguing, in the first place, that, the suit was not one that should have fallen under the summary procedure.

On page 24 of the Court's judgment it is stated as follows:

"We find ourselves inclined to agree with Mr. Mkali, learned advocate, that the suit did not fall under summary procedure having regard to the pleadings and the fact that it

involved parties who did not
execute any mortgage.”

The case of **Jomo Kenyatta** (supra) was also followed in the case of **Prosper Paul Massawe** (supra) with a similar argument that since some other parties were not party to the mortgage deed, then, they cannot be sued under that procedure. The Court set aside the summary judgment.

In the present suit before me, there is no summary judgment. What was raised before me by Mr. Mwalongo is a preliminary issue of law regarding whether it was appropriate to bring this suit as summary suit because of the reasoning that, some of the Defendants are not parties to any mortgage deed executed by the Plaintiff and some of the other Defendants.

As the above authorities indicate, the response to the issue above is in the negative, i.e., it was improper for the Plaintiff to have brought the suit under the ‘summary procedure’ provisions of Order XXXV of the CPC. What is the fate then?

Mr. Kagirwa has stated that, should I find that the suit does not fall under Order XXXV, then I should proceed to regularise it since, in the above cited authorities, the Plaintiff was not struck out. However, to my understanding, what was before the Court of Appeal was an appeal.

I have posed to ask: had the matters raised there in brought to the attention of the trial court, would it have spared the Plaintiff? I do not think so. It would have struck it out immediately because, "Order XXXV – Summary Procedure" is specific in relation to what kind of suit it applies. If a suit does not fit in it, that suit will definitely be struck out.

Since I have made a finding that this suit does not fit in as a summary suit given that there are Defendants who were not party to the mortgage transactions executed by the UBL Bank and some of the Defendants and later assigned to the Plaintiff, then it ought not, in the first place, be filed before this Court under "Order XXXV- SUMMARY PROCEDURE".

Since "Order XXXV- SUMMARY PROCEDURE" is the very procedural foundation for any summary suit desired to be filed

in Court by a Plaintiff, a suit that is filed in flagrant flouting of such a mandatory or foundational provision which goes to the very heart of the case, cannot be spared or rescued. That has been a settled position of the law as set out in the **Mondorosi Village Council's** case (supra) with regard to mandatory procedural provisions.

In view of the above position, this Court has no other option other than to agree with the submissions by Mr. Mwalongo that, since there are some of the Defendants who did not take part in the mortgage transactions, in the first place, the suit ought not to have been filed under Order XXXV-SUMMARY PROCEDURE.

In the upshot of the above, this Court settles for the following orders, that:

1. The Preliminary Objection is hereby upheld since; in the first place, the present suit ought not to have been filed under 'Order XXXV-Summary Procedure'.

2. That, in view of the above, this suit is hereby struck out with costs. The Plaintiff is at liberty to appropriately file a fresh suit if she so desires.

It is so ordered.

DATED at DAR-ES-SALAAM, THIS 06TH DAY OF
OCTOBER 2022



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HON. DEO JOHN NANGELA
JUDGE