

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT TANGA

LAND CASE NO.11 OF 2011

RWEGASIRA ALBIN EVARIST.....PLAINTIFF

VERSUS

SINOHYDRO CORPORATION LIMITED.....DEFENDANT

Date of last order: 23/01/2012

Date of Judgment: 08/02/2012

RULING

Mussa J;

This matter arises from Land case No. 11 of 2011 instituted in this Court. Unto it, the plaintiff a natural person, is suing the defendant, a limited liability company, for trespass with respect to mining properties situate at Kwekona-Suwa Village, Handeni District. His prayers are, inter alia, for the eviction of the defendant, recovery of the properties and a permanent injunction to restrain the latter from interfering thereat. It is common ground that the suit having being filed and, in the absence of the parties, the District Registrar made the following order:-

Mention on 9/11/2011. Summons to file written statement of defence to be issue.

That was on the 10th day of October 2011 and; on that same date, a summons addressed to the plaintiff was taken out. I deem it opportune to quote its heading:-

SUMMON FOR APPEARANCE AND FILING WRITTEN OF DEFENCE

(UNDER O. VIII. R.2 OF CPC 1996)

To express at once, quite apart from the heading being engulfed in grammatical shoddiness; the summons, seemingly, seeks to command the defendant to both appear and file a written statement of defence. I shall later assign a word or two on this juxtapositioning. In the meantime, it will suffice to apprise that, in effect, the content of the summons required the defendant to present a written statement of defence within a period of twenty one days. Upon a signature appended on the 11th day of October 2011; there is little doubt that an officer of the defendant was duly served with the summons. Nonetheless, there was no moment when the court specifically required the defendant to file a defence. A good deal later, more precisely, on the 10th November 2011; by letter addressed to the District Registrar, Mr. Sangawe for the defendant requested an extension to file a written statement of defence. That was after he realized that the prescribed period had actually expired. The letter was cordially brought to my attention by the Registrar but; I was disinclined on the premises that the request should rather be deferred so as to be raised in the presence of the adversary party. Thus, at the hearing before me, with leave of the court, counsel for the defendant orally reiterated his quest. Mr. Rwehumbiza, for the plaintiff, vigorously opposed the venture on account that the application should have been formal and that, after all, the period allotted to the plaintiff is long past. Accordingly counsel prayed for an order to proceed exparte.

Addressing the rival contentions, I need not detain myself on the submission that the application should have been formal much as I blessed the oral mode of application. It should be noted that it is purely upon the discretion of the court to allow or refuse an oral application taking into account the set of circumstances laid down in the proviso to Rule 2 of Order XLIII. Furthermore, I need not enter the arena

to resolve the remainder of learned rival contentions. Rather, to me, this matter turns on the applicability of a summons to file a written statement of defence in trials instituted in the High Court. To begin with Order V Rule 1 of the Civil Procedure Code under which a summons to file a defence avails; is very specific in terms and provides that:-

When a suit has been duly instituted a summons may be issued to the defendant at the time when the suit is assigned to a specific judge or magistrate pursuant to the provisions of rule 3 of Order IV-

(a) *To appear and answer the claim on a day to be specified therein (hereinafter referred to as a summons to appear); or*

(b) *if the suit is instituted in a court other than the High Court and the court so determines, to file, in accordance with sub rule (2) of rule 1 of Order VIII, a written statement of defence to the claim (hereinafter referred to as a summons to file a defence)*

There are riders at the foot of the Rule; not quite relevant to the situation at hand. Nonetheless, it may be opportune to just as well extract the referred provisions of Order VIII Rule 1:-

(1) *Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.*

(2) *Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him present to the court a written statement of his defence.*

again, there is proviso underneath the rule, of which is similarly, not quite of moment to the present setting. The point I am rather, anxious about is comprised in the bolded expression; **"if the suit is instituted in the court other than the High Court"**, appearing at the commencement of Rule 1(b) of Order V. To me, the phrase is not empty verbiage; rather, it was intended by it to exclude a summons to file a written statement of defence in suits instituted in the High Court. Thus when required, a District Registrar may only issue a summons to appear with respect to a suit instituted in the High Court. If it happens, as here, that the Registrar inappropriately issues a summons to file a defence; then the summons issued depreciates to the level of a summons to appear. As already hinted, the provisions of Order VIII Rule 1(1) as well as those of Rule 14(1) had not been triggered. To this end, nothing stands across learned counsel's prayer to file the written statement of defence. Even if I am faulted in my construction, I would still come by the same conclusion. More so, as the summons itself seems to me a confusing lot. As I have intimated, by its heading, the document is, supposedly, both a summons to appear and a summons to file a defence which imports sort of an inexactitude. As is beyond question, the two are different creatures and; for that matter, self exclusive. From where I am standing, if, as here, there is some confusion with regard to the nature and type of the summons issued; again, the same depreciates to the status of a summons to appear. All said, the plaintiff's objection is overruled with an order that the defendant files its defence within a period of 21 days. Accordingly ordered.


K.M. MUSSA, J.

27/01/2012

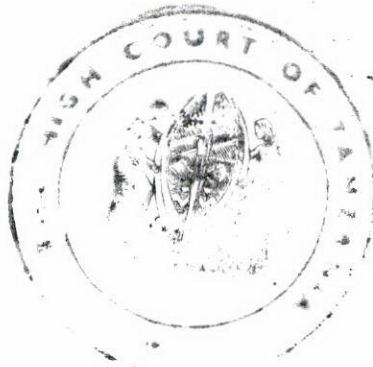
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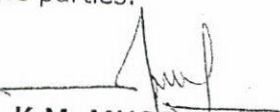
Coram: Mussa, J;

For the Applicant: Mr. Rwehumbiza

For the Respondent: Mr. Sangawe

Ruling delivered in the presence of the parties.




K.M. MUSSA, J.
8/02/2012

* Again there is proviso underneath the Rule, or which
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