

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 98 OF 2020**

CRDB BANK PLC.....PLAINTIFF

Versus

**ELIFADHILI EZEKIEL NSANGU T/A SHINGANI
SUNFLOWER OIL MILLER.....DEFENDANT**

Last order: 6th April, 2021
Judgment: 27th May, 2021

SUMMARY JUDGMENT

NANGELA, J.:

This judgment is in respect of a Plaint filed on 12th October, 2020 under **Order XXXV of the Civil Procedure Act, Ca.33 R.E 2019 ("Summary Procedure")**. The Plaintiff prays for a summary judgment and decree against the Defendant as follows:

- (a) Payment of the principle sum of **TZS 616,796,185.25;**
- (b) Payment of Commercial interest on the amount at 21% per annum, on the

above sum as from 30th August 2020 to the date of full payment.

- (c) Payment of general damages to the tune of TZS 100,000,000/=.
- (d) Payment of interest on the decretal sum, at a rate of 12%
- (e) Costs of this suit.
- (f) Any other relief(s) (sic) as the Court may deem fit and just.

Before I delve further into the nitty-gritty of this case, let me set out its facts, briefly as set out in the Plaint. The Plaintiff alleges that, sometimes in 2014, the Defendant applied, and the Plaintiff approved two overdraft facilities amounting to **TZS 291,000,000.00** and **TZS 145,000,000.00**.

The said overdraft was secured by the Defendant's by an equitable legal mortgage over the landed properties located at Ulemo area in Singida municipality, and chattel mortgage. A Deed of Security Arrangement over the said landed properties and the registered chattel transfer instrument were attached to the Plaint.

Unfortunately, it is alleged that, the Defendant failed to repay the aforesaid facilities as per the

agreed terms and conditions. Upon such failure, the Defendant applied for restructuring of the two facilities. The Plaintiff approved the request for restructuring and the repayment period was extended from 36 months to 120 months.

Even with such a restructured repayment plan, yet again the Defendant failed to repay the loan. With such a failure, the Plaintiff made and issued several demands notice to the Defendant who either ignored them, failed, neglected and, or refused to repay the loan, hence, the present case.

Having filed the present suit under the summary procedure stipulated in the CPC, Cap.33 R.E 2019, the Defendant was dully served with summons on 09th March 2020. However, despite being notified of the pendency of this suit, the Defendant did not enter appearance or make any application to the Court to be allowed to offer a defence to the suit.

On 6th April 2021, the Plaintiff, through its advocate, Ms Ruqaiya Alharh, fronted a prayer for summary judgment under **Order XXXV Rule 2 (2)**

of the CPC Cap.33 R.E 2021. She prayed further to be allowed to furnish this Court with proof of the Plaintiff's case.

This Court granted the prayer and set the 23rd of April 2021, a day when the Plaintiff shall furnish such proof of its case to the Court. On 23rd April 2021 the learned Counsel for the Plaintiff appeared in Court and submitted the original documents annexed to the Plaintiff and which form the basis of the claim. I have in the first place examined the Plaintiff, and its annexure, to find out if it is in compliance with the requirements of the law.

It is trite, under Order XXXV Rule 2(1) of the the Civil Procedure Code, Cap.33 R.E 2019 that, when a Plaintiff wants to file a suit as a summary suit he has to institute the suit by presenting a plaintiff in the normal way but endorse it which the words "**Order XXXV: Summary Procedure**". This is exactly what the Plaintiff did and, as such, the Plaintiff is compliant with the law.

I have also looked at the summons served upon the defendant on 9th March 2021 and I find that, the summons was very clear that the Defendant was informed that, unless he obtains leave from the court to defend the suit, a decision may be given against him. Besides, the summons further informed the Defendant the manner in which an application may be made for leave to defend. There was, therefore, a full compliance with Rule 2(1) of Order XXXV of the CPC.

For clarity purposes, that Order provides as follows:

"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."

Essentially, once a suit is filed under Order XXXV, appearance to defend the suit is not automatic. The law is very clear that, if the Defendant intends to appear and defend the suit against him, he must lodge an application to the Court. No such application

was filed by the Defendant. The summons served upon the Defendant on 9th March 2021, informed the Defendant what he was supposed to do. Unfortunately, the Defendant failed to take the requisite steps.

According to Order XXXV Rule 2(2) of the CPC, Cap. 33 R.E, 2019, failure on the part of the Defendant to obtain leave to defend, makes it possible for the allegations contained in the plaint to be deemed as having been admitted by the Defendant. In view of that fact, the Plaintiff is entitled to an appropriate decree as specified under Order XXXV Rule 2 (a) (b)(c) of the Civil Procedure Code, Cap 33 R.E 2019.

In our case, the appropriate provision is rule 2(2) (a) of the CPC, Cap.33 R.E 2019, which provides as follows:

“(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 defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled-

(a) where the suit is 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 any sum not exceeding the sum mentioned in the summons,** together with **interest** 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 question that follows is whether the defendant failed to obtain leave. As I stated earlier, the Defendant neither entered appearance nor made an application for leave to appear and defend the summary suit filed in this Court by the Plaintiff, despite being dully served with the summons to do so and appear, even on 09th March 2021.

In the case of **CRDB Bank Limited v 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."

The above position as stated by this Court equally applies to this case. Since the Defendant has not been able to give heed to the summons served upon him on 09th March 2021, this Court deems it that, the claims contained in the plaint filed in this Court has been admitted, and the Plaintiff is entitled to Judgment.

As stated in **CRDB Bank Limited v John Kagimbo Lwambagaza (supra)**, the Bank will not be obliged to prove the suit to the standards required by the law. It does suffice to show that the Defendant took a loan and has not been able to repay the amount as required under the Facility letters.

In the upshot, this Court grants Judgment to the Plaintiff and makes the following orders that:

- (a) the Defendant is hereby ordered to pay the Plaintiff a sum of **TZS 616,796,185.25**, being the principal sum claimed by the Plaintiff.

- (b) the Defendant is further ordered to Pay interest on the amount stated in (a) above, at a rate of 12% *per annum* as from 30th August 2020 to the date of full payment.
- (c) the Defendant is also obliged to Pay interest on the decretal sum, at a rate of 7% from the date of this Judgment till satisfaction of the Decree of this Court.
- (d) Costs of this suit shall be borne by the Defendant.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this **27th May 2021**



HON. DEO JOHN NANGELA
Judge

High Court of the United Republic of Tanzania
(Commercial Division)