

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 327 OF 2019

M/S ROKO INVESTMENT CO. LTD.....APPELLANT

VERSUS

TANZANIA ELECTRIC SUPPLY CO. LTD.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 22nd day of May, 2018

in

Civil Appeal No. 18 of 2017

RULING OF THE COURT

0th & 9th November, 2022

MWAMPASHI, J.A.:

On 20.10.2016, in the Resident Magistrate's Court of Tabora at Tabora (the trial court), there was filed a summary suit (Civil Case No. 29 of 2016) under Order XXXV of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC), by the respondent, Tanzania Electric Supply Co. Ltd against the appellant M/S Roko Investment Co. Ltd. According to the plaint, the respondent's claim against the appellant was for a total of Tshs. 84,160,612.93 being the principal claim plus interest, arising from unpaid charges of electricity supplied by the respondent to the appellant's ginnery. In its judgment dated 07.06.2017, the trial court entered judgment for the respondent against the appellant in the claimed sum of

Tshs. 84,160,612.93, plus Tshs. 20,000,000.00 as general damages, interest and costs.

Aggrieved by the judgment of the trial court, the appellant filed Civil Appeal No. 18 of 2017 in the High Court of Tanzania at Tabora. Unfortunate to the appellant, the appeal was dismissed with costs on 22.03.2018. Still aggrieved, the appellant lodged the instant appeal on 21.08.2019. According to the memorandum of appeal, the appeal is premised on two grounds of appeal which will, however, for reasons that will become apparent shortly, not be recited herein.

When the appeal came before us for hearing on 04.11.2019, the appellant was represented by Mr. Kelvin Kayaga, learned advocate, whereas the respondent had the services of Mr. Ponziano Lukosi, learned Principal State Attorney, assisted by Mr. Lameck Merumba, learned Senior State Attorney, Mr. George Kalenda and Ms. Juliana Kipeja, both learned State Attorneys.

In the course of the hearing, Mr. Lukosi raised a pertinent legal issue on the propriety or otherwise of the proceedings and the conduct of the suit before the trial court, which, as we have alluded to above, was by way of summary procedure. He contended that the trial of the suit was vitiated by a fatal procedural flaw in that the mandatory provisions of Order XXXV rules 1 and 2 were not complied with. Mr. Lukosi referred us to the proceedings of the trial court, particularly at page 188 of the record

of appeal, where it is on record that by 09.11.2016, the appellant had already filed the written statement of defence, while no leave to appear and defend the suit under Order XXXV rule 2 (2) of the CPC, had been sought and granted. He argued that since the trial of the suit proceeded without the appellant having first applied for and granted leave to appear and defend the suit, the whole trial was unprocedurally conducted and thus a nullity. He thus urged the Court to nullify the proceedings of the trial court as well as that of the High Court together with the resultant orders and judgments. He finally prayed for an order that the suit be retried.

Mr. Kayaga agreed with Mr. Lukosi that the hearing of the suit was tried in contravention of the law. He also argued that after the institution of the suit, the defendant was not issued with the special summons under Order XXXV rule 2 (1) of the CPC, but with an ordinary summons which led to the filing of the ordinary written statement of defence on 08.11.2016. Mr. Kayaga did therefore join hands with Mr. Lukosi that retrial of suit was the appropriate remedy.

In confronting the issue raised, we propose to begin by revisiting the relevant provisions of the law applicable to the instant matter, which are rules 1 (d) and 2 (1) & (2) of Order XXXV of the CPC, under which it is stated that:

"1. *This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-*

(a) *N/A*

(b) *N/A*

(c) *N/A*

(d) *Suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer.*

(e) *N/A*

(f) *N/A*

(g) *N/A"*

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 inform him the manner in which application may be made for leave to defend.

(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.."

[Emphasis added]

First and foremost, it is our observation that, the suit by the respondent which is for the recovery of electricity charges amounting to Tshs. 84,160,612.93, was properly brought under summary procedure. Under Order XXXV rule 1 (d) of the CPC, the respondent is specifically mentioned as an amenable plaintiff who can institute suits under the summary procedure.

It is also clear from the above reproduced provisions of law that where a suit is filed under summary procedure, a special summons has to be issued to the defendant to inform him that unless he applies and obtains leave to appear and defend, the allegations in the plaint would be deemed to be admitted. It is also imperative that the defendant has to be informed, by that summons, the manner in which the application for leave to appear and defend has to be made. It should be emphasized that, in suits filed under summary procedure, the defendant has no automatic right to enter appearance and file his written statement of defence. It is a mandatory requirement of the law that before the defendant appears and

files his defence, he must first apply for leave to do so under Order XXXV rule 2 (2) of the CPC.

In the instant case, the record is clear that no summons issued under rule 2 (1) of Order XXXV of the CPC was served upon the appellant. It is also undisputed that the appellant did not apply for leave to appear and defend as the law requires and no such leave was therefore granted to the appellant. According to the proceedings before the trial court appearing at page 183 of the record of appeal, the appellant's first appearance before the court without leave to do so through its advocate one Mr. Mwangazambili, was on 06.09.2016. After a number of adjournments, it was on 02.11.2016 when Mr. Mwangazambili orally prayed to file a written statement of defence which was then filed on 08.11.2016. From there the trial of the suit was normally conducted to its conclusion but without the appellant having been granted the required leave.

It is therefore our settled finding, as also correctly submitted by the learned counsel for the parties, that the trial of the suit was conducted in contravention of mandatory provisions under Order XXXV rule 2 (1) and (2) of the CPC. Apart from the fact that the appellant was not served with the required summons as per rule 2 (1) of Order XXXV of the CPC, no leave to appear and defend the suit was applied for and granted to the appellant in accordance with rule 2 (2) of Order XXXV of the CPC. We agree with the learned counsel for the parties that, the irregularity is fatal

and that it rendered the whole trial and the subsequent appeal to the High Court, a nullity.

Consequently, for the above reasons and in the exercise of the powers of revision conferred to the Court by section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E.2019], we hereby quash the proceedings both of the trial court and of the High Court except for the plaint filed in the trial court by the respondent. We also set aside the judgment of the trial court as well as that of the High Court which upheld the trial court's decision. Lastly, we remit the original record in Civil Case No. 29 of 2016 to the trial court for retrial before another magistrate so that Order XXXV of the CPC is complied with. In the circumstances of this matter, we make no order as to costs.

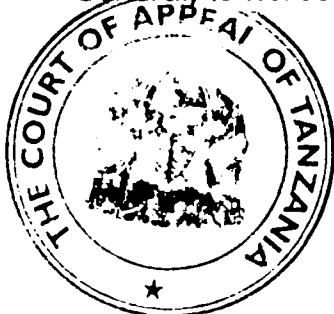
DATED at Tabora this 9th day of November, 2022.

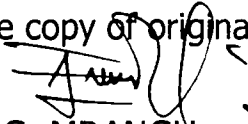
W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Ruling delivered this 9th day of November, 2022 in presence of Mr. kelvin Kayaga, learned counsel for the Appellant and Mr. Lameck Merumba, learned Senior State Attorney for the Respondent/Solicitor General, is hereby certified as a true copy of original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL