

IN THE HIGH COURT OF TANZANIA**AT DAR ES SALAAM****CIVIL APPEAL NO.88 OF 2004**

(Arising from RM Civil Case No.74 of 2001 RM's Court at Kisutu dated
14th May 2002)

YUSUFU GULAM SILVA..... APPELLANT

VERSUS

PROF. ABILLAH H. OMARI..... RESPONDENT

Date of last order: 5/12/2006

Date of Judgment: 22-2-2007

JUDGMENT

MANENTO, JK:

This is an appeal against the order of the trial courts failure to enter judgment on a counter claim after the Plaintiff had failed to file the reply in time. The counter claim was dismissed on the ground that it was not proved. The appellant was aggrieved by that decision hence this appeal. The appellant raised two grounds of appeal, namely:-

- 1) That the learned Principal Resident Magistrate erred in law in disallowing the counter claim.
- 2) That the magistrate erred in law in holding that the undisputed counter claim needed to be proved.

In submitting for the appellant, Mr. Rutenge, learned counsel started with giving the brief facts of the case before the trial court which I adopt. That the suit against the appellant in lower court related into a piece of land which the respondent claimed ownership. The appellant in the counter claim claimed to be the rightful owner of the plot No.450 Block E. Tegeta. The trial magistrate upheld the 2nd defendant's preliminary objection and dismissed the suit. However, there was a counter claim to which the respondent did not reply in time as required by rule 11 OR. VIII of the Civil Procedure Code, 1966. However, the reply to the counter claim was filed late, and the 1st defendant/now appellant raised a preliminary objection that the reply to the counter claim was filed out of time. The trial magistrate agreed. However, the trial magistrate dismissed the counter claim because it was not proved.

The learned counsel submitted that there was a misdirection on the part of the trial magistrate because he ought to pronounce judgment in terms of Order VIII rule 14(1) of the Civil Procedure Code, 1966 instead of dismissing it for lack of proof. The learned counsel relied on his submissions on the Court of Appeal decision, *Joe R.M. Rugarabamu v. Tanzania Tea Blenders Ltd* (1990) TLR 24. He

finally submitted that failure by the trial court to determine that the appellant was the rightful owner of the disputed plot or not occasioned failure of justice.

On the other hand Mr. Kilingo, learned counsel submitted that rule 14 of Order VIII should be read as a whole and no one sub rule is independent from the other. However, each sub rule could be applied independently depending on the circumstances of the case. He agreed with the submissions of the appellants learned counsel that the magistrate ought to make a ruling as to whether the defendant was the rightful owner of the disputed plot or not. Still, in the absence of evidence from the defendant, the trial magistrate could not make a finding on the strength of the pleadings itself. I agree.

What is gathered from the submissions of the learned counsel is the application of rule 14 of Order VIII of the Civil Procedure Code, 1966. I find it appropriate to reproduce the rule in question for ease of reference.

Rule 14 – (1) Where any party has been required to present a written statement under sub rule (1) of rule 1 or a reply under rule 11 of this Order and fails to present the same within the time fixed by the court, the court shall

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Rule 14 – (1) Where any party has been required to present a written statement under sub rule (1) of rule 1 or a reply under rule 11 of this Order and fails to present the same within the time fixed by the court, the court shall

pronounce judgment against him or make such order in relation to the suit or counter claim as the case may be, as it thinks fit.

(2) In any case in which a defendant who is required under sub-rule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that sub-rule, within the period of such extension, the court may:

(a) where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of summons, enter judgment in favour of the plaintiff without requiring him to prove his claim.

In any other case, upon application **in writing** by the plaintiff, fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.

In the issue before the court, the trial magistrate believed that rule 14 of Order VIII must be read as a whole and on reading it as a whole, he found as

I do find that, all the sub-rules 1 and 2 are not independent from each other. They all need pronouncement of judgments for the plaintiff if the defendant fails to reply on the prescribed period. Sub rule 2(a) gives situation where the claim is for a liquidated sum not exceeding one thousand shillings, the court is required to enter judgment in favour of the plaintiff without requiring him to prove his claim. However, in any other case, upon application in writing by the plaintiff, fix a day for ex-parte proof and the court may pronounce judgment in favour of the plaintiff upon such proof of his claim. In conclusion on this point, I hold that proof is needed either by affidavit or by oral evidence ex-parte on application in writing to the court by the plaintiff.

In the case of Joel Rugarabamu (*supra*), it was not clear if the judgment was solely based on rule 14 Order VIII because there was no mention of it. It was based on rules 11 and 13 of the Civil Procedure Code, 1966. Therefore, it is distinguished, though they all end on ex-parte judgment. Rule 14 goes deep in explaining the procedure to be followed before the judgment is entered.

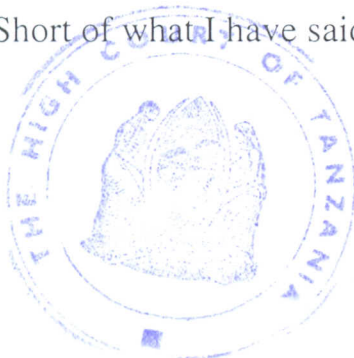
The relief before the subordinate court sought in the counter claim which are mainly the subject matter, but which were not dealt with by the trial court were mainly two. The eviction of Plaintiff from plot No.450 block 'E' Tegeta and demolition of structure built by the plaintiff on the plot.

From the ruling of the trial court, it was ruled that the suit by the respondent was hopelessly time barred. Thus, it was dismissed. That meant the respondent/plaintiff had no claim of right of ownership on plot No.450 block E Tegeta. The fact that the claim by the plaintiff/respondent that he was the owner of plot No.450 Block E Tegeta was dismissed, then it meant that the said plot belonged to the appellant, who was the 1st defendant. His ownership stood unchallenged so he was not required to prove ownership since there was no suit against him after the dismissal of the plaintiff's suit. Then if the appellant was the only person lawfully holding plot No.450 Block E Tegeta, then, he ought not prove anything.

I had early said that as per rule 14(1) of the Civil Procedure Code, 1966, and on the circumstances of this counter claim, which was not challenged in any way, the appellant was not required to prove anything more. The plaintiff/respondent had never denied to have trespassed into plot No.450 Block E Tegeta by erecting a structure thereon. On those circumstances, the trial court ought just to order for the eviction of the respondent in plot No.450 Block E Tegeta and demolish any structure he has put in there without further proof. But for general damages and interests claimed in the counter claim, the appellant ought to prove them under rule 14(2)(b) of the Civil Procedure Code, 1966 as shown above. I say so

because they fall under liquidated sum of money and the trial court ought to dismiss them in the absence of proof *exparte* on application in writing.

Without further explanations, I come to the conclusion that the trial magistrate erred in disallowing the prayer for eviction of the respondent from plot No. 450 Block E. Tegeta and ordering for the demolition of structure he put in there. It is hereby, then ordered that the respondent do vacate and demolish whatever structure effected on plot no.450 Block E Tegeta by him forth with. He has to comply with this order within fifteen days (15) from the date of reading this judgment. If he fails, then he will presume no more claim of right over any structure put in there and or the appellant will have the right to demolish it. For the liquidated sum of money prayed for as general damages and interest, the appeal is dismissed. Short of what I have said, the appeal is allowed with costs.




A.R. Manento

JAJI KIONGOZI.

22-2-07

Coram: Rwakibarila, SDR/HC

For the appellant: Mr. Rutenge for the respondent

For the Respondent: Prof. Abilah Omari

Appellant states: My counsel Mr. Kilingo is attending funeral in Moshi and I am prepared to appear alone today in this matter.

ORDER

Judgment has been read thoroughly to appellant (in person) and Mr. Rutenge (for Respondent) this 22nd day of February, 2007 and right to appeal in time has been explained properly to them.

G.K. Rwakibarila

SENIOR DEPUTY REGISTRAR-HIGH COURT

22-02-2007