

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
LAND CASE NO. 26 OF 2021**

**AKIBA COMMERCIAL BANK----- PLAINTIFF
VERSUS
1. PHILIP ISAAC MASAMBA.....1st DEFFENDANT
2. OLIVA KABAKOBWA----- 2nd DEFFENDANT**

JUDGMENT

Last Order: 17.05.2022

Judgement Date: 20.05.2022

M. MNYUKWA, J.

This is a suit filed in accordance with the summary suit procedure brought under the provision of Order XXXV of the Civil Procedure Code, Cap 33 R.E 2019. This suit was filed on 20/09/2021 by plaintiff where he prayed for judgement and decree on the following order:

- (i) *The defendant give vacant possession of the house on plot No. 585 Block "BIX" situated at Mkuyuni Kanyerere in Mwanza city.*



- (ii) *Costs of the suit.*
- (iii) *Any other relief or further relief this court may deem just and appropriate to grant.*

Briefly, it goes that; sometimes in 2017 the plaintiff issued a loan of Tsh. 15,000,000/= to the first defendant and the second defendant signed a spouse consent and both of them mortgaged the house on Plot No 585 Block "BIX" situated at Kanyerere in Mwanza City. That, the defendants failed to honour the terms of the loan agreement which compelled the plaintiff to issue notice to remind them to pay their debts. Despite the issuance of notice, still the defendants did not honour the terms of the loan agreement. This resulted the plaintiff to deploy her right under mortgage whereby through Kapera Auction Mart they issued a notice to evict the defendants, instead of them continue to default. That after the expiration of notice, the plaintiff advertised auction of the mortgaged property. The auction was conducted and the highest bidder was obtained.

That up to date the defendants have neglected to give vacant possession of the house on plot No 585 Block "BIX" situated at Kanyerere in Mwanza City which caused inconvenience to plaintiff.



The court record shows that, summons was issued to the defendants requiring them to obtain leave from the court to appear and defend the suit within 21 days but they were not willing to receive it. The court process server swore an affidavit to the effects that both defendants were reachable through their respective mobile number but they were not willing to receive summons.

On 17/05/2022 when the suit came before me, defendants had not sought leave from this court to appear and defend the suit whereas Mr. Prudence Buberwa, learned counsel for the plaintiff prayed that, judgement be entered against the defendants and the defendants be granted an order for vacant possession of the mortgaged house situated at plot No 585 Block "BIX" situated at Kanyerere in Mwanza City.

It is worth to note that, Order XXXV Rule 2(2) of the Civil Procedure Code, Cap 33 R.E 2019 provides that: -

"(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; and in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled;

(b) where the suit arises out of a mortgage and is for delivery of possession, redemption, discharge or transfer to a decree in



accordance with the provisions of Order XXXII and other provisions of this Code and such decree may, subject to the exercise by the court of such powers as it may have unless it is a preliminary decree, be executed forthwith."

Since the suit falls under Order XXXV Rule 1 (c) (ii) of the Civil Procedure Code, Cap 33 R.E 2019, this Order contemplates that the court shall pass a decree in a summary suit where the defendant has not obtained leave to appear and defend. Thus, in default of the defendants' obtaining such leave the allegations in the plaint shall be deemed to be admitted and the plaintiff will be entitled to a decree.

In the upshot, I do hereby enter judgement for the plaintiff as prayed with costs.

It is so ordered.




M.MNYUKWA
JUDGE
20/05/2022

Court: Judgement delivered on this day 20th May 2022 in absence of both parties.


M.MNYUKWA
JUDGE
20/05/2022