

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: BWANA, J.A; MANDIA, J.A; And ORIYO, J.A.)**

**CIVIL APPEAL NO. 23 OF 2013**

**MAKUNGU INVESTMENT COMPANY LTD ..... APPLICANT**

**VERSUS**

**PETROSOL (T) LIMITED ..... RESPONDENT**

**(Appeal from the decision of the High Court of**

**Tanzania at Arusha)**

**(Nyangarika, J.)**

**Dated 22<sup>nd</sup> day of November, 2012**

**In**

**Commercial Case No. 18 of 2012**

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**JUDGMENT**

24<sup>th</sup> Feb. & 19<sup>th</sup> March, 2014

**MANDIA, J.A.:**

The respondent filed a summary suit, under Order XXXV of the Civil Procedure Code, against the applicant. In the plaint, the respondent claimed that he supplied fuel to the appellant through delivery Notice No. 24 dated 21/9/2011, No. 32 dated 26/9/2011, No. 37 dated 30/9/2011 and No. 46 dated 5/10/2011. The respondent averred that the appellant confirmed delivery of the fuel by signing the delivery notice and thereafter issuing eleven cheques on various dates between 18/10/2011 and 17/7/2012. The total value of the cheques which the appellant drew in

favour of the respondent is shs 84,520,000/=. It was further averred by the respondent that when the respondent presented the cheques drawn in his favour by the appellant, all of them were dishonoured by the respective bankers i.e. Diamond Trust Bank and Bank M. The respondent further averred that he informed the appellant that the cheques had been dishonoured, but the appellant refused and/or ignored to pay. The respondent sued for the amount of the dishonoured cheques with interest and costs.

The suit was filed in the High Court of Tanzania, Commercial Division, on 30/10/2012. Service process was issued to the appellant on the date of filing of the suit i.e. 30/10/2012. The record shows that the appellant acknowledged service on 1/11/2012. On 22/11/2012 both parties appeared before the High Court, Commercial Division, for hearing of an application for leave to defend the suit. The application for leave to defend the suit was supported by the affidavit of one **Anna Ufoo Ulomi**, in which the deponent averred that there was no contractual relationship between the respondent and the appellant. The appellant also denied to have issued any of the cheques which were the subject matter of the summary suit.

The affidavit of Anna Ufoo Ulomi led to one **Latifa Suleman**, a principal officer of the respondent company, swearing a counter affidavit in which he disputed the aversion of Anna Ufoo Ulomi when she denied any connection with the delivery notes and dishonoured cheques. Latifa Suleiman confirmed that the appellant was supplied fuel by the respondent on divers dates, and attached copies of signed delivery notes as well as copies of dishonoured cheques purportedly drawn by the appellant in favour of the respondent.

On 22/11/2012 the application for leave to defend the suit was argued in the High Court. Mr. Kessy Emmanuel, learned advocate, argued before the High Court that there was no contractual relationship between the appellant, and that the appellant had not drawn the cheques attached to the plaint as annexures. He therefore prayed that the High Court grant him leave to defend the suit. On his part Mr. Albert Msando, argued that what the appellant had put forth in his application for leave to defend the suit is a blanket denial that he had no contractual relationship with the respondent. Mr. Albert Msando called this denial a "sham or illusory or moonlight defence". Mr. Albert Msando argued that his client had the original cheques and promissory notes to which the appellant had

acknowledged receipt, and that there was no averment that the cheques were forgeries, so the respondent has not disclosed any triable issue and his application for leave to defend the suit should be dismissed with costs.

The learned High Court judge discussed at length the legal requirement that in order for leave to defend a summary suit to be granted, the applicant must disclose that there is a triable issue shown in his application. The learned High Court Judge made an observation, at page 57 of the record, which goes thus:-

*"Leave to defend will not be given because there are allegations of facts or law made in the defendant's affidavit."*

Further down the same page, the learned High Court made another observation which read thus:-

*"...the applicant's solicitation on denial to have issued the cheques which bears its name as the drawer without any explanation how they found their way to respondent, is no here, no there, as the counsel would wish this court to believe."*

*With respect, this stand, in my view, is just a wishful denial and does not amount to a triable issue with a good defence against the summary suit"*

Further down the same page, the learned High Court judge made the following remark:-

*" An application for leave to appear and defend a summary suit is not granted as a matter of course of formality, but upon the applicant showing a good defence against the summary suit."*

The learned High Court judge then proceeded to dismiss the application and grant the respondent the relief he claimed.

The appellant was aggrieved by the ruling and decree of the High Court and filed the present appeal. The gravamen of the memorandum of appeal is the finding of the High Court that to make out a case in an application for leave to defend a summary suit the applicant must show a good defence against the summary suit.

Before us the appellant was represented by Mr. Anney Semu, learned advocate, while the respondent was represented by Mr. Loomu Ojaare learned advocate.

Both learned advocates agree that, where there is a triable issue or triable issues, leave to defend ought to be granted. The moot question is whether, in the particular circumstances of this case, a triable issue is shown to arise from the affidavit evidence presented by the appellant.

Again, both learned advocates agree that the argument presented by the appellant in the application for leave to defend the suit is that he (appellant) did not have any contractual relationship with the respondent, and did not issue any of the cheques attached to the plaint.

Mr. Anney Semu argued that the High Court went beyond the call of duty when it required the appellant to show a **defence on merit** before leave could be granted. Mr. Loomu Ojaare, on the other hand, argued that the terms **defence on merit** is a term of art and could as well mean triable issue so it may not be appropriate to infer that the High Court imposed a higher threshold in considering the application for leave to defend.

We have considered the opposite sides of the argument presented. One thing stands out clear, and this is the fact that the appellant denied having any contractual relations with the respondent, or issuing the cheques which were dishonored after being presented to the bank. There is therefore a dispute on facts here. The respondent is saying *"I sold you fuel and you gave me cheques which bounced when I presented them to the bank for encashment"*. The respondent is saying *"I never bought fuel from you, and I never wrote you any cheques. If you have any bounced cheques, they did not come from me"*.

This dispute of fact presents itself as a triable issue by any definition. It required each party to be heard on the commercial transaction involving the supply of oil, and the method of payment, if any. When the trial court called the appellant's denial of the transaction as being "wishful," it was going beyond the requirements of the law. The role of the court was in deciding whether or not there was a factual dispute to resolve which arose from the affidavital evidence presented to him by the defendant. Going further to require the defendant to **show a good defence against the summary suit** was going beyond the requirements of the law in an application to defend a summary suit. We say so because after the

application for leave to defend, the applicant is normally granted leave to file his/her written statement of defence. If he/she has already disclosed the defence on merit during the hearing of the application for leave to defend, what will he/she include in the statement of defence?

We are satisfied that a triable issue is disclosed in the application for leave to defend, and the applicant should have been given leave to defend. We therefore allow the appeal, quash the trial court's decision and set aside the decree. The appellant is hereby granted leave to appear and defend the summary suit in the trial court. The appellant is also awarded costs of this appeal.

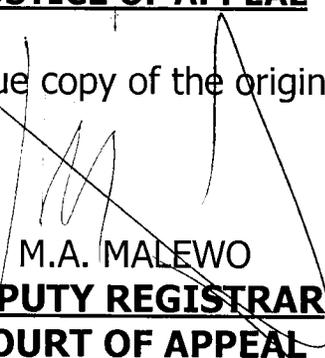
DATED at ARUSHA this 15<sup>th</sup> day of March, 2014.

S.J. BWANA  
**JUSTICE OF APPEAL**

W.S. MANDIA  
**JUSTICE OF APPEAL**

K.K. ORIYO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
M.A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**