

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 31 OF 2001

CRDB BANK LIMITEDPLAINTIFF
VERSUS

1. WAKWETU & CO. LIMITED |
2. ADAM GAMALIEL MOSHA | DEFENDANTS

R U L I N G

NSEKELA,J.

This chamber summons has been made under Order XXXV rule 3 of the Civil Procedure Code, 1966 seeking the following order, that –

" (a) the applicants be granted leave to appear and defend the suit filed against them."

In the main suit the plaintiff is CRDB Limited, a bank which is claiming from the two defendants jointly and severally the sum of Tshs. 21,372,769.26 being overdraft facilities and interest made to the 1st defendant, Wakwetu & Co. Ltd. The 2nd defendant, is one Adam Gamaliel Mosha who executed mortgage deeds in respect of Title Numbers 1130/11 and 32940 as security for the repayment of the overdraft facility. The chamber summons is supported by an affidavit sworn by James Mosha, an officer of the applicants/defendants. It reads in part as follows –

" 2. That the 1st applicant admits to have applied for the loan which is the subject matter of the suit. The loan amount was granted and disbursed to the applicant in instalments.

3. That the loan was for the purposes of injecting capital to the 1st applicant's supplies business to the Prisons Department in Morogoro Region. The Prisons Department has however delayed paying for the supplies which in turn has resulted in failure by the 1st applicant to service its loan to the respondent as scheduled.

4. That the 1st applicant could not repay the loan in accordance with the schedule given by the respondent because of various problems which besieged its businesses and which were accordingly and timely brought to the attention of the respondent/plaintiff branch in Morogoro.

5. That the 1st applicant serviced part of the said loan a fact which is not disclosed in the plaint. Applicants therefore dispute the amount claimed in the plaint as being Tshs.20m. The applicants state that the outstanding amount is less than Tshs. 18m only.

7. That in the premises, it is apparent that there are factual matters to be determined namely particularly the ascertainment of the amount due to the respondent as on the date of the suit.

8. That what is stated hereinabove is according to my knowledge as an officer of the 1st applicant and as explained to me by the 2nd applicant and is all true."

The 2nd applicant is the 2nd defendant, Adam Gamaliel Mosha who apparently furnished to the deponent all this information. The 2nd applicant seems to have evaded the responsibility to swear the affidavit in support of the application by letting James Mosha set out the facts obtained from him. There is nothing inherently wrong for this course of action under Order XXXV rule 1 of the CPC Order XXXV rule 3(1) and (2) provide as under –

" (1) The Court shall, upon application by the defendant, give leave to appear and defend the suit, upon affidavits which –

(a).....

(b) disclose such facts as the court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into court, giving security, framing and recording issues or otherwise as the court thinks fit."

Mr. Ringia, learned advocate for the applicants' has argued that the main issue to be sorted out is the outstanding amount of the loan that is actually payable to the respondent/plaintiff. This argument is also reflected in paragraph 5 of the affidavit in support. The second argument canvassed by the learned advocate is to be found in

paragraphs 3, 4 and 6 of the supporting affidavit. It is stated therein that the applicants' failure to repay the loan was occasioned by the default of the Prison's Department Morogoro to settle their bills to the applicants'. On his part Mr. Lyimo, learned advocate for the respondent/plaintiff has countered by submitting to the effect that the applicants' have admitted that the 1st applicant indeed received the loan, and has defaulted in its repayment. Mr. Lyimo added that the applicants' have not stated in the affidavit in support how much has been repaid and that there is no provision in the loan agreement that the repayment of the loan was dependent upon the Prison's Department Morogoro effecting payment to the applicants. In the alternative, Mr. Lyimo submitted that, in the event that the court is inclined to grant leave to appear and to defend the suit, then it must be conditional in that the outstanding loan should be deposited in court.

In the Kenya case of **Continental Butchery Ltd vs Samson Musila Nthiwa**, Civil Appeal No. 35 of 1977 (unreported), Madan JA stated the principle behind summary procedure in the following terms –

" with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure provided by O.35 subject to their being no triable issue which would entitle a defendant leave to defend.

If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defence raised are a sham."(See also: **Zola and Another v Ralli Brothers Limited and Another** [1969] EA 691; **Thseen-Stahlunion Export GMBH v Kibo Wire Industries Ltd** (1973) LRT n 54; **Souza Figuerido & Co.Ltd v Moorings Hotel Co.Ltd** (1959) EA 425; **Camille v Meralli** (1966) EA 411.)

I have already quoted Mr. James Mosha's affidavit in support of the application. Does it raise triable issues as enunciated in the cases I have referred to or is it merely a sham defence? The applicants' are required to state clearly and concisely what the defence is and the facts relied upon as supporting it. (See: **Paclantic v Moscow Narodny Bank Ltd** (1983) 1 W.L.R 1063). A triable issue should raise a defence to the suit. It is an issue or question in dispute which ought to be tried. The question is, what are the

defences raised in the affidavit that ought to be tried? The crux of the supporting affidavit is that the 1st applicant has a debtor, the Prisons Department Morogoro who has not paid the outstanding bills. That may well be so but it has nothing to do with the applicants liability to the respondent/defendant. This is undoubtedly a sham defence. It has been advanced for mere purposes of delay! Undaunted, Mr. Ringia, learned advocate for the applicants', in his oral presentation before me stated that the exact amount due and payable to the respondent/plaintiff has as yet to be ascertained. This is of course a rehash of paragraph 5 of the supporting affidavit. It is not stated in the affidavit how much is still outstanding. In my Ruling in Commercial Case No.12 of 2000 **CRDB Bank Limited v Danstan Electronics Ltd and Jamila Rasmussen** (unreported) I quoted with approval principles which should be considered whether or not leave to appear and to defend from the Indian case of **M/S Mechalec Engineers & Manufactures v Ms Basic Equipment Corporation** AIR 1977 SC 577. I would like to quote herein principle (e). It reads as follows –

“ (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence. ”

One of the purposes of Order XXXV rule 3 of the CPC is to enable a defendant to set out his defence on oath, that is by swearing an affidavit/affidavits. The deponent of the affidavit under consideration is not one of the defendants in this suit, but as I have said, there is nothing improper in this. The 2nd defendant has not sworn an affidavit.

To recapitulate, in paragraph 5 of the affidavit in support, the applicants' /defendants seem to be disputing the actual amount owing to the respondent/plaintiff – whether it is Tshs. 20 million or less than Tshs.18 million. Under these circumstances, it is very important that in order to clarify paragraph 5, there should be an affidavit from a person able himself to substantiate the allegation in paragraph 5. And this person must be the 2nd defendant, Adam Gamaliel Mosha.

In the premises, I postpone to make my decision on this application and do hereby give to the 2nd defendant, Adam Gamaliel Mosha, leave to file a supplementary affidavit within fourteen (14) days of the date hereof to clarify paragraph 5 of the supporting affidavit so as to substantiate how much of the loan has been repaid, when and what is the actual amount that is outstanding. It is accordingly ordered.

H.R.Nsekela,

Judge.

Ruling delivered in the presence of Mr. Lyimo, learned advocate for the plaintiff.

H.R.Nsekela,

Judge

12.4.2001

25.4.2001

In my Ruling dated the 12.4.2001, I deferred my decision on this application and gave to the 2nd defendant, one Adam Gamaliel Mosha, leave to file a supplementary affidavit within fourteen (14) days of the date thereof in order to clarify paragraph 5 of the supporting affidavit so as to substantiate how much of the loan had been repaid, when and what is the actual amount that is still outstanding. The case came up for mention on the 14.5.2001 and the notice to the applicants was duly acknowledged by H. H. H. Nyange, Advocates, Raha Towers on the 2.5.2001. On the 14.5.2001, Mr. Lyimo learned advocate, duly entered appearance on behalf of the respondent but neither the applicants nor their learned advocate showed up despite being served with notice to that effect. Needless to say as of that date, that is the 14.5.2001 Adam Gamaliel Mosha had not filed a supplementary affidavit within the prescribed time and none has been filed so far. In the supporting affidavit sworn by James Mosha, it is admitted that the respondent did disburse the loan. This is in paragraph 5. It is evident to me, that the applicants are being evasive as regards the amount which they claim to have repaid to the respondent. It is also evident to me that on reading paragraph 4 of the affidavit, that the applicants are pleading impecuniosity for their inability to repay the loan. This is hardly a defence. For

my part, I would have expected the applicants to make some offer to the respondent to reschedule the repayment of the said loan and discharge it by agreed instalments and not to make spurious applications designed to keep the respondent out of his monies unnecessarily. The response to paragraph 5 is I think succinctly stated by Lord Blackburn in **Wallingford v Mutual Society** (1880) 5 App. Cas 685 at page 704 –

“ I think that when affidavits are brought forward to raise a defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, ‘I say I owe the man nothing? Doubtless, if it was true, that he owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud so as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.”

The applicants should state in no uncertain terms how much they have paid and how much is still outstanding. It is no answer to state blandly that the amount outstanding is less than Tshs. 18 million only. In paragraph 3 of the supporting affidavit, the applicants seem to throw the blame for their failure to honour their contractual obligations to the respondent to the Prisons Department, Morogoro. The affidavit however does not state that the repayment of the loan was dependent upon the Prisons Department to honour their financial obligations to the applicants. This again to me is a sham or illusory defence. I am fully conscious of the fact that there are at least two competing policy issues, first, that summary procedure should assist in the expeditious disposal of cases to which Order XXXV of the CPC applies; and second, that a defendant ought not to be shut out of his right to a defence except in the clearest circumstances. I am satisfied, however, that the applicants herein have no defence at all. The purported defences, are illusory or sham or practically moonshine. I have seriously considered the option that the applicants should deposit into court the amount claimed. This in my view would be a useless exercise and unwarranted compassion in the circumstances, which of course is not the function of the court.

In the circumstances, I do hereby refuse to grant leave to defend the suit and enter judgment for the plaintiff under Order XXXV rule 2 (2)(a) of the Civil Procedure Code. It is accordingly ordered.

H.R.Nsekela,
Judge

25.5.2001

Ruling delivered in the presence of Mr. Lyimo, learned advocate for the plaintiff.

H.R.Nsekela,
Judge

25.5.2001

I Certify that this is a true and correct
copy of the original order of the court.
.....
Registrar

Commercial Court
Dar es Salaam

Dated 28th of May 2001