

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 341 OF 1999

TANZANIA SARUJI CORPORATION PLAINTIFF

Versus

**AZANIA INVESTMENTS AND)
MANAGEMENT SERVICES) DEFENDANTS
LIMITED @ AIMS GROUP)**

RULING

CHIPETA, J.:

The plaintiff Corporation, namely, **Tanzania Saruji Corporation**, is suing the defendant, namely, **Azania Investments and Management Services Limited @ AIMS**, under **Summary Procedure** for arrears of rent amounting to **U.S.D. 25,000.00** and mesne profits at the rate of **U.S.D. 1,000.00** per month from **1st September, 1998** to date of vacant possession. This is an application for leave to appear and defend the suit.

In an affidavit of one **Jeetu Patel** in support of the application, the deponent has stated that the defendant company does not deny that rent is due to the respondent/plaintiff but that the defendant company has a counter-claim against the plaintiff. He did not elaborate.

During the hearing of this application, **Ms. H. Sheikh**, learned advocate for the applicant, submitted that there is a counter-claim and so leave should be granted as the parties could benefit from mediation and so avoid the filing of another suit.

Mr. Maira, learned counsel for the respondent submitted, in effect, that the application had no merits as no triable issues have been disclosed.

It is, I think, well settled that for an application of this kind to succeed, the applicant must show, by evidence, that there are **bona fide** triable issues. It will not succeed if the defence set up is illusory or sham. (See **Thseen Stahlunion Export v. Kibo Wire Industries**, (1973) LRT n. 54; and **Zola v. Ralli**, (1969) E.A. 691). The applicant is required to state clearly and concisely what the defence is and the facts on which that defence is based. (See **Paclantic v. Moscow Narodny Bank Limited**; (1983) 1 WLR 1063.

In other words, the duty is cast on the defendant to show clearly that he should have leave to defend the suit. It follows, therefore, that a mere allegation, such as “**lack of consideration**”, “**counter-claim**” or “**fraud**” will not suffice. A party who is entitled to a liquidated sum in the case of a clear admission by the other party is entitled to summary judgment on the basis of a dishonoured promissory note. The rationale of **Order 35 of the Civil Procedure Code**, I think, was succinctly stated in **Zola’s case (supra)** in which **Sir Charles Newbold, P.** stated, at page 694:

“Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant”.

In the instant case, the applicant/defendant clearly admits the debt in the affidavit in support of the application. The alleged counter-claim has not been particularized. In other words, there are no facts on which the same is based. So it remains as a mere allegation which a party can make at his whim. In such a case, it would be unreasonable to hold that a **bona fide** triable issue has been disclosed. I feel fortified in this view by the words of **Lord Blackburn** in the case of **Wallingford v. Mutual Society**, (1880) 5 A.C. 685 at page 704 in which he said:

“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 no enough to swear, “I say I owe the man nothing ...” But that is not enough. You must satisfy the judge that there is reasonable ground for saying. 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 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 to illegality, and every other defence that might be mentioned."

For these reasons, I hold that the applicant, on whom the duty lay, has failed to disclose a prima facie triable issue, and so this application fails and is hereby dismissed with costs. I accordingly enter judgment for the plaintiff as claimed in the plaint.



B. D. CHIPETA
JUDGE

28/6/2001

Coram: F.S.K. Mutungi, DR

For the Plaintiff: Maira

For the Defendant: Absent

CC: Maurice

Court:

Ruling read this 28/6/2001 in Court in the presence of **Mr. Maira** for the plaintiff but in the absence of **M/s H. Sheikh** though duly served to appear.
Read by **F.S.K. Mutungi, DR.**

(Sgd): F. S. K. MUTUNGI
DISTRICT REGISTRAR
28/6/2001