

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 15 OF 2022

(Arising from Civil Case No. 4 of 2022 in the High Court of Tanzania at Mwanza)

LADISLAUS MICHAEL SWAI.....1ST APPLICANT

BLASIUS MICHEAL SWAI.....2ND APPLICANT

VERSUS

SAFINA SHABAN BYAMBWENU.....RESPONDENT

R U L I N G

7th & 8th June, 2022

DYANSOBERA, J.:

This is an application filed by the defendants herein under Order XXXV rule 3 (1) and (2) of the Civil Procedure Code [Cap. 33 R.E.2019] seeking for leave to appear and defend the plaintiff's suit filed under summary proceeding. The summary suit against the defendants is for payment of Tshs. 217, 200,000/= being part of the total debt of Tshs. 250,500,000/= accepted by the defendants in written promissory note under which the defendants expressly accepted and so promised to pay the same amount running from 31.07.2020 through 31.12.2021.

It is averred under paragraph 4 of the plaintiff's plaint that on or about 4th July, 2020 the defendants accepted to be indebted to the

plaintiff up to the tune of Tshs.250,500,000/= and unconditionally promised in writing to pay the said amount to the plaintiff. Pursuant to the terms and conditions of the relevant written promise, the defendants unconditionally promised to pay the plaintiff's claim of Tshs. 250,500,000/= by nine instalments in the manner as explained under paragraph 5 of the plaint. It is stated under paragraph 9 of the plaint that the terms and conditions of the written promise to pay the entire debt of Tshs. 250,500,000/= has never been varied and the defendants have failed to honour their promise to pay the relevant remaining amount of Tshs. 217,200,000/= within the agreed time as stipulated in their written promise.

The defendants are, in the instant application, seeking for leave appear and defend the suit on the grounds that despite their admitting the loan as indicated under paragraph 3 of the defendants'/applicants' joint affidavit, they are contesting the validity of the promissory note and argue that loan has already been repaid through the 1st defendant.

In their oral submissions in support and opposition of the application, Mr. Alex Richard Lwoga, learned Advocate for the

applicants/defendants and Mr. Inhard E. Mushongi, learned Counsel for the respondent/plaintiff, made elaborate account.

According to learned counsel for the applicants /defendants, the basis of the claim by the plaintiff is the contract agreement (Ann. SB 1). It is his argument that the applicants are contesting the validity of this document regarding the difference of the dates and signatures. The second ground for seeking leave is the absence of any document showing that the second applicant took the loan and the third ground is on the plaintiff's failure to state the source of money.

Replying, Counsel for the respondent/plaintiff urged the court to find that the applicants have failed to show any triable issues. Relying on the case of **Prosper Paul Massawe and 2 others v. Access Bank Tanzania Ltd**, Civil Appeal No. 39 of 2014 in which the Court of Appeal cited the case of **Mohamed Enterprises (T) Ltd** dates and sign learned Advocates for the parties they have already repaid the loan. through the 1st defendant. Contract agreement Ann. SB 1, there is nowhere indicated that the 2nd defendant took any loan and that the source of the money was not stated.

After going through the application, the affidavit and the submissions, I have no doubt that the law on granting leave to appear and defence is settled that for the court to grant an application for leave to appear and defend the defendant must satisfy a number of conditions. These conditions are given in the Indian case of **M/S Mechalec Engineers & Manufactures V M/S Basic Equipment Corporation** 1977 AIR 577. It is a persuasive decision because our Order XXXV is *in pari materia* with Order 37 of the Indian Civil Procedure Code but the same position was followed by this court (Hon. Kimaro, J. as she then was) in Commercial Case No. 103 of 2005 between **Euro Products Tanzania Ltd v. JUNACO (T) Ltd.**

The conditions to be satisfied are:

- i) The defendant has a good defence to the claim on its merits.
- ii) The defendant must raise triable issue(s) indicating that he has a fair or reasonable defence although not a positively good defence.
- iii) The defendant must disclose such facts as may be deemed sufficient to entitle him/her to defend.
- iv) The defence must not be sham or illusory or practically moonshine.

In addition, the basic requirement for the grant of leave under O. XXXV Rule 3 (1) (b) of the Civil Procedure Code is as stipulated hereunder:

“3. (1) The court shall upon application by the defendant, give leave to appear and defend the suit, upon affidavits which:

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

In the present case there is no material in the joint affidavit the submissions by learned Counsel for the applicants/defendants which does disclose any specific issues, which the court could consider triable. Besides, and there is nothing showing that the conditions stipulated by this court in the case of Euro **Products Tanzania Ltd v. JUNACO (T) Ltd.(supra) have been met.** So, the application has failed to meet the test under O. 35 Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019]. In my view, the application for leave must fail as it is nothing but a frivolity.

I am inspired by the wisdom given by the Court of Appeal of Kenya in Corporate **Insurance Co. Ltd v. Nyali Beach Hotel Ltd** [1995-1998] EA, the Court of Appeal of Kenya in which it was ruled that:

'Leave to appear and defend will not be given merely because there are several allegations of fact or law made in the defendant's affidavit. The allegations are investigated in order to decide whether leave should be given'.

As rightly argued by Mr. Mushongi, the applicants have admitted the liability under paragraphs 3 of their joint affidavits that:

"3. Kwamba baada ya kupitia hati ya madai yake inaonyesha kuwa mjibu maombi anawadai waleta maombi katika maombi haya kiasi cha Tsh. 217,000,000/= ambalo ni deni tulilokubali kupitia nyaraka ya kukiri kudaiwa ambayo tuliahidi kulipa kuanzia tarehe 31 Julai, 2020 hadi 31 Desemba, 2021.


Further, the applicants, at paragraph 7 of the same joint affidavit clearly stated:

"7. Kwamba nakala hizi za mkataaba pamoja na malipo kama inavyojionyesha katika aya ya 6 ya kiapo hiki yalikuwa ni baina ya mwombaji wa kwanza na mujibu maombi hivyo basi mjibu maombi hahusiki moja kwa moja kuhusiana na mikataba hiyo ya mkopo"

Having investigated the allegations from the applicants' joint affidavit and the submission by their learned Counsel, I find nothing material warranting this court to grant the leave to appear and defend.

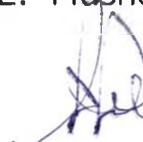
The application is dismissed with costs and summary judgment should be entered for the respondent/plaintiff.




W.P. Dyansobera
Judge
8.6.2022

This ruling is delivered under my hand and the seal of this Court on this 8th day of June, 2022 in the presence of all parties and in the presence of Mr. Alex Richard Lwoga, learned Advocate for the applicants and holding brief for Mr. Inhard E. Mushongi, learned Counsel for the respondent.




W.P. Dyansobera
Judge