

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC. CIVIL APPLICATION NO. 54 OF 2021

(Originating from Civil Case No. 7 of 2020)

M. A. KHARAFI & SONS LTD..... APPLICANT

VERSUS

MWANGA DISTRICT COUNCIL..... RESPONDENT

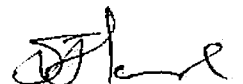
RULING

05/05/2022 & 28/6/2022

SIMFUKWE, J.

The applicant herein filed the instant application under **Order XXXV, Rule 8, and section 95 of the Civil Procedure Code, CAP 33 R.E 2002** (CPC) praying for the following orders:

- i. That, this Honourable Court be pleased to set aside execution and may give leave to the applicant/defendant to appear to the summons and to defend the suit in a Summary Suit instituted in the High Court of Tanzania at Moshi; in Civil Case No. 7 of 2020 before **Hon. S.H. Simfukwe, J.***
- ii. Costs of this application be provided.*



iii. Any other reliefs this Honorable Court may deem fit and just to grant.

The application was supported by the affidavit sworn by Mwesigwa George Ishengoma advocate of the applicant.

The application was argued by written submissions. Mr. Mwesigwa George Ishengoma learned counsel argued the application for the applicant, while Mr. Edwin Bayona Lusa learned State Attorney opposed the application for the respondent.

It was submitted for the applicant among other things that the applicant is a private company which is recognised under **the Companies Act, Cap 212 R.E 2019** and its head quatre is located at Kinondoni Municipal within Dar es Salaam Region, Tanzania. That, the company is registered in Egypt, but she won a contract No. ME-011/2013- 14/10/08 Same, Mwanga Korogwe Water Supply Phase 1-LOT 1 PACKAGE.

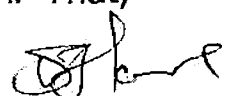
It was alleged that in Civil Case No. 7/2020, the applicant did not appear to defend the matter on the reason that the "Authority" ordered the Company Administrator to leave the country. Thus, they moved to Egypt. Therefore, it was impossible for them to enter appearance. The learned counsel for the applicant referred to **section 95 of the CPC** to the effect that the same confers inherent powers to this court to make 'orders' as

may be necessary for the ends of justice or to prevent an abuse of the Court's process as well as to set aside the decree.

Mr. Ishengoma also quoted **Order XXXV Rule 8 of the CPC** which states that *the court has powers to set aside a decree in exceptional circumstances and if necessary, stay or set aside execution and may give leave to the defendant to appear to the summons and defend the suit, if it seems reasonable for the court to do so, and on such terms as the court thinks fit.*

Mr. Ishengoma was of the opinion that the applicant has good reasons for seeking leave of the court as the applicant entered into a legal agreement with the Government of Tanzania. That, the Company undertook all projects' terms and conditions including paying different service levies as required by the law. The learned counsel cited authorities which are in respect of application for leave to defend which are distinguishable to the instant application which prays to set aside a decree of a summary suit. Thus, I did not find any reason to consider the irrelevant cited authorities in this application.

Mr. Ishengoma submitted further that, after being expelled, the applicant instituted a case against the Government of Tanzania before the International Chamber of Commerce, case number 25707/DDA. That,

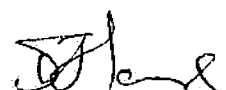


before the said case was determined, the Government met with the administration of the Company for amicable negotiations. He attached copies of letters in respect of the alleged amicable negotiations.

In his reply Mr. Edwin Lusa prayed to adopt his counter affidavit to form part of his submission. He contended that, the only ground for seeking to set aside the court decree is that the applicant was expelled by the Government and ordered to leave the country as stated under paragraph 8 of the applicant's affidavit. Mr. Lusa was of the view that the said allegations are serious allegation against the Government which should be proved by the applicant. However, termination letter which was attached by the applicant in his submission does not show that the administrators of the applicant were ordered to vacate the country.

Mr. Lusa averred further that, it is well settled by case law that when the affidavit contains untrue statement it becomes defective and has to be struck out. He subscribed to the High Court decision in **Misc. Civil Application No. 133 of 2020 between Ashura Salam versus Saza Gwasa Sebabili** (unreported) in which Hon. A.Z. Mgeyekwa J. held that:

"In view of above, I would conclude that the applicant's affidavit is incompetent for containing an untrue statement. As alluded above



the remedy of a defective affidavit is to strike out the application with costs."

Mr. Lusa went on to state that the main case Civil Case No. 7 of 2020 between the applicant and the respondent was instituted on 04th November 2020 and the contract between the Government of Tanzania and the applicant was terminated on 29th December 2020, which means that the suit was instituted before termination of contract. That, it is the requirement of the law that where a suit is instituted under Summary Procedure the defendant has no right to appear for defending unless leave of the court is obtained. That, the Court on 6th November 2020 issued summons to the parties for appearance in court on 11/11/2020 for mention. The defendant now the applicant in this application was properly served and one Mr. Rahim Yeyeye appeared in Court on 11th November 2020 and 26th November 2020 as a representative of the applicant. Thus, the applicant was aware of Civil Case No. 7/2020. It was the submission of Mr. Lusa that since the applicant had engaged its official to represent the Company in Court, he could have lodged the application for leave to defend the suit within the time. Thus, the respondent believes that the applicant intends to misuse the court process. Mr. Lusa prayed the application to be dismissed with costs.



The learned State Attorney recalled that on 26th November 2020 the court gave the defendant second chance to file his application but he did not do so, rather he filed Written Statement of Defence contrary to the law. That, the applicant in his submission has failed to disclose any sufficient reason to convince the Court to grant them another chance to defend.

It was contended further for the respondent that the applicant has a statutory duty to pay the service levy to the respondent as Same Mwanga Korogwe Water Supply improvement Project was executed within its jurisdiction. That, up to date the applicant has the branch office situated within Mwanga District Council. Therefore, the respondent and Kinondoni Municipal Council are two different statutory bodies. Payment of service levy is paid to the District Authority where the project is executed with main office or branch of the Company executing the project. Mr. Lusa cited **section 7 (1) (y) of the Local Government Finance Act, Cap 290 R.E 2019** which provides that:

"All monies derived from the service levy payable by corporate entities or a person conducting business with business licence at the rate not exceeding 0.3 percent of the turnover net of the value added tax and excise duty:



Provided that, the branches of corporate entities shall pay services levy to the district councils in whose areas of jurisdiction they are located."

Reference was also made to the case of **Korogwe District Council vs SBI International Holding AG, Miscellaneous Civil Case No. 09 of 2016** (unreported), HC at page 6 where Hon. Aboud, J. held that:

"It is not disputed that the defendant executed the project within the plaintiff's areas. The law requires them to pay service levy for all the branches to the district councils where they are located."

On the basis of the above authority, Mr. Lusa submitted that as the project is executed in Mwanga district Council and the applicant having the branch office at Njia Panda Village within Mwanga District, the applicant was vested with statutory duty to pay the respondent the service levy accordingly.

It was submitted further that, paragraph 4 of the affidavit of the applicant proves that the applicant instructed his official to appear and defend the suit but he dodged. He said that the issue is whether the respondent in this application or the court can be liable for the act of the applicant's official and whether the applicant can benefit from its wrong. That, the answer to that issue is clearly no as the party cannot benefit from his own

wrong. Otherwise, the applicant or its representative was duty bound to make follow up of the suit before the court. The learned State Attorney was of the view that there is no need of setting aside the decision of this honourable court for recklessness of the applicant to take measures or defend the suit before the court. He referred to page 3 of the applicant's written submission where the statement of **Justice C. K. Thakker (Takwan)** stated that:

"The test whether leave to defend should be granted or not is to see whether the defence raises a real, honest and bona fide dispute and raised a triable issue or not. If is satisfied that the defence has raised a triable issue or fair dispute has arisen, leave to defend should not be refused. And it is hazardous and unfair dispute to pronounce a categorical opinion before the evidence is taken."

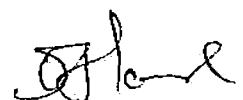
Mr. Lusa was of the opinion that the statement above failed to disclose the real, honest and bona fide dispute. That, the applicant failed to prove in his affidavit and in his written submission the probable reasons as to why he failed to lodge an application for leave to defend, but tried to mislead the court by stating that the applicant's administrators were ordered to vacate the country by the Government the fact which has not been proved. He stated further that, triable issues were to be disclosed

when the applicant lodges an application to defend the summary suit as per **Order XXXV Rule 3**. Mr. Lusa referred to **Mulla's Civil Procedure Code, 16th Edition at page 3641** which states that:

"Therefore, the Court of judges dealing with summary suit can proceed to the stage of hearing the summons for judgment and passing judgment in favor of the plaintiff if,

- (i) The defendant had not applied for leave to defend or if such application has been made and refused or*
- (ii) The defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted."*

Mr. Lusa reiterated that in the main case the applicant was granted leave to lodge an application for leave to defend but instead of doing so he filed written statement of defence. He agreed that the Court can set aside the decree in a summary suit judgment and grant leave to defend to the applicant/defendant. However, he said that the same can be done in exceptional circumstances as provided under **Order XXXV Rule 8 of the CPC** (supra). Mr. Lusa was of the view that to prove exceptional circumstances the applicant must advance strong and good reasons for his delay to file the application for leave to defend, a bona fide act in delay and not intentionally negligent or unproved allegation of fact.



Concerning the ongoing negotiation, the learned State Attorney submitted that the same is between the applicant and the Government of Tanzania not between the applicant and the respondent. He added that, the ongoing negotiation is very less concerned with the claim of payment of service levy in Civil Case No. 7 of 2020 between the applicant and the respondent.

Mr. Lusa also raised the issue that the learned counsel for the applicant lacks resolution of the Company authorizing him to prosecute the instant application. He cited **section 147 (1) of the Company's Act, Cap 212 R.E 2002** and the case of **Pita Kempamp Ltd vs Kibelo Agrovvet Suppliers, Civil Application No. 128 of 2004**, CAT (unreported) to cement his point. Mr. Lusa prayed that this application should be dismissed with costs.

Having considered the submissions of both parties as well as their respective affidavits, the issue is ***whether the applicant has advances sufficient and good reasons for this court to invoke its discretion to set aside its decree in a summary judgment.***

On the face of pleadings of the applicant, the applicant's application is vague as he prays for setting aside the Decree in Civil Case No. 7/2020, he prays for stay of execution and leave to defend in a Summary Suit at

the same time. I find the application to be vague since the prayers are not designed in a systematic manner. Even the reasons advanced in the supporting affidavit are contradictory. At paragraph 4 of his affidavit the learned counsel for the applicant deponed that:

*"That, the Applicant/Defendant is of the late knowledge on the suit because he was not present while this matter was proceeding as well, **also the representative who was trusted to represent unfortunately he dodged the case** although we were agreed that he will be appeared the matter and give me information."* (sic)

Emphasis added

At paragraph 6 the learned counsel stated inter alia that the applicant is **seeking leave of the court to stay of execution of the Decree.** At paragraph 7 Mr. Mwesigwa Ishengoma deponed that:

*"That, this summary suit filed is unfair because the Applicant/Defendant in his knowledge he was not breaching any duty or statutory performance of paying service levy to the plaintiff in reason (sic) **that the said levy was paid correctly and on time through Kinondoni Municipal Council.**"* Emphasis added

Making the matter worse, Mr. Ishengoma at paragraph 8 advanced another reason for failure to defend the summary suit that the applicant

was expelled by the Government. This reason contradicts the reason advanced at paragraph 4 of the affidavit.

I find the reasons supporting the application to be contradictory due to the fact that, one cannot 'dodge' appearance in the matter which he had started appearing at the same time allege that he was expelled from the country.

Without prejudice to the defects raised by the learned State Attorney for the respondent which seem to hold water, with due respect, reasons advanced by the applicant do not constitute good reasons warranting this court to set aside the decree in Civil Case No. 7/2020. In a case of ***Zilaje v. Feubora [1972] HCD 3*** it was held that:

"Court will not readily interfere in order to give remedy where the party seeking such remedy sat on his rights and did not act with reasonable promptitude."

In this case, as rightly submitted by the learned State Attorney, the applicant was aware of the Summary Suit which was instituted by the respondent, thus Civil Case No. 7/2020. On 26th November 2020 the applicant filed Written Statement Defense without leave of the court. Thus, the court granted leave to the applicant to file an application seeking leave to defend the summary suit in compliance to the law. The

applicant never filed the said application for leave to defend the Summary Suit and defaulted appearance. Therefore, this court finds the reasons advanced by the applicant for failure to file the application to defend the summary suit to be afterthoughts and manifestly, reveal negligence and ignorance on part of the applicant.

I therefore find this application to be frivolous, vexatious and lacks merit.

The application is dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 28th day of June 2022




S. H. Simfukwe

Judge

28/6/2022