IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 31 OF 2022

BAHATI MOSHI MASABILE

(T/A NDONO FILLING STATION) ..... **APPLICANT**

VERSUS

HAMISI MAGANGA KILONGOZI .... RESPONDENT

RULING

27th June & 31st August, 2022

Kahyoza, J.:

This ruling is in respect of an application for leave to defend. Hamisi Maganga Kilongozi sued Bahati Moshi Masabite, T/A Ndono Filing Station under a summary procedure for payment among other things special damages to the tune of Tzs. 388,428,931/= being a debt balance.

The applicant had a defence to counter allegations in the plaint. He deponed that the plaintiff does not have tangible proof that the applicant was indebted to the tune of Tzs. 388,428,931/=. He added that the plaintiff did not attach proof that he supplied fuel. He contended that there was no consideration from the plaintiff. He contended that a contract to acknowledge debt which does not mention fuel supplied was not enough to

establish the claims. The applicant's advocate contended that the contract to pay the debt was fabricated.

The respondent deponed and his advocate submitted that the applicant failed grounds to support an application for leave to defend.

The plaintiff filed a summary suit under Order XXXV of the **Civil Procedure Code,** [Cap. 33 R.E. 2019] (the **CPC**). A summary suit is not an ordinary suit, it does not require the defendant to file a defence unless he demonstrates that he has an arguable defence. The purpose of a summary suit is to ensure in a case to which the defendant has a sham defence, the defendant is not given an opportunity to delay the plaintiff to enjoy the proceeds of a decree. See **Adina Zola and Baron Lwigi Parrilli (as Executors or Legal Representation of Bromislaw Sirley) V Ralli Brothers Limited and the Standard Bank Limited,** Civ. Appeal No.4/1969 EACA, where Adina Zola Newbold stated -

> *"Order XXXV intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being necessary kept from what is due to him by delaying tactics of the defendant... If the judge to whom the application is made considers that* ***there is any reasonable grounds of defence to the claim the plaintiff is not entitled to summary judgment*** *(Emphasis supplied)".*

There is no doubt that before a court allows the defendant in a summary suit to present his defence the court must to be satisfied that he has a *prima facie* defence, in other words that he has an arguable defence. A *prima facie* defence is a defence that is arguable; it is not for the court to determine whether the applicant/ defendant would win or lose at an application stage. See **M/s Mechelec Engineers & Manufacturers v. M/s Basic Equipment Corporation,** 1976 (4) SCC 687, (1977 AIR 577, 1977 SCR (1)1060), where the Supreme Court of India laid down the principles for granting leave to defend, thus-

> *"(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits;*
>
> *(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence;*
>
> *(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim;*
>
> *(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then the Defendant is not entitled to leave to defend;*

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.

The applicant deponed and his advocate submitted that the applicant and respondent are friends and that they used to support each other financially. Mr. Mujungu, the applicant's advocate submitted further, that there are triable issues as follow-

1. Whether there was a contract to supply fuel products on credit bases between the applicant/Defendant and the respondent/plaintiff.
2. Whether the contract to pay debt can stand in absence of the contract to supply the goods/fuel products.
3. Whether the contract in the name "*HATI YA MAKUBALIANO*" has any connection with the contract for supply of fuel consignment as alleged by the respondent/plaintiff in the summary suit in Civil Case No. 26 of 2021
4. Whether the alleged cheques for payment could stand in absence of any consideration from the respondent.

5. Whether the applicant is trading in the name of NDONO FILLING STATION as alleged by the respondent.

I will not reproduce the submissions of the parties' advocate at this stage, however, I will refer to the submissions while considering the defence.

I took pains to consider if the applicant has established a *prima facie* defence. With all due respect to the applicant's advocate, he has not been able to raise a *prima facie* defence. I find that the applicant's defence a mere sham. The applicant does not refute to enter into an agreement to settle debt but he contends that the agreement cannot stand in the absence of a contract for supply of fuel or proof that the respondent supplied fuel as alleged. The applicant seeks for leave to defend so as to put to task the respondent to establish if the contract acknowledging debt had any connection with supply of fuel as claimed in the summary plaint. I wish to repeat that this argument does not raise any issue to be tried by this court.

It is true that the agreement did not disclose the why was the debt incurred. Could that be a reason for conducting granting leave to defend and go through agony of trying the case? Could it make any defence if, after trial this court finds it proved the debt arose from the timber business and not fuel business transactions between the parties? The answer is negative one. It will not make any difference. I wish to emphasis that a valid debt

acknowledgement deed or agreement is a *prima facie* proof of the debt. The applicant can refute the weight debt acknowledgement deed carries by adducing facts to show *on the face of it* that the deed was not valid. The applicant's mere denials or allegations that the debt did not arise from the fuel business transactions between the parties, is unconvincing argument. I do not find merit in that argument.

The applicant argued also that the debt acknowledgement deed cannot stand in the absence of the contract and proof that the respondent supplied fuel. These arguments are weak in the presence of the valid debt acknowledgement deed. The debt acknowledgement deed setting out the amount of outstanding debt and the applicant's promise to pay is the evidence of the debt. The respondent has no burden to prove the existence of the debt but to show that the debt acknowledgement deed is valid. Since the applicant does not seek to challenge the validity of the debt acknowledgement deed, he has not established a *prima facie* case for this Court to grant him leave to defend.

I also examined rule 3 (1) Order XXXV of the CPC, which provides for condition for granting leave. It states that-

> ***(1) The court shall, upon application by the defendant,*** *give leave to appear and to defend the suit, upon affidavits which-*

(a) disclose such facts as would make it incumbent on the holder to prove consideration, where the suit is on a bill of exchange or promissory note;

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

(c) in suits arising out of mortgages, where the mortgagor demonstrate that-

(i) loan or the portion of the loan claimed is indeed discharged; or

(ii) loan was actually not taken.

The applicant's advocate submitted that the respondent was required by subs-rule (1) of rule 3 of Order XXXV of the CPC to prove that there was consideration as the suit was based on the bill of exchange. The respondent's claim stems from an agreement, where the applicant acknowledged a debt and promised to pay. To show his commitment to pay, the applicant issued a postdated cheque. Thus, the respondent's suit is not based merely on a bill of exchange. Even if, it was based on the bill of exchange I do not find that the applicant has adduced facts that would make it incumbent on the respondent to prove consideration.

I am of the firm view that since the respondent's suit is based on the agreement to pay the debt not solely on a bill of exchange or promissory note, the respondent cannot be called upon to prove that there was

consideration for the promise to pay the debt. The bill of exchange was issued to support the agreement to pay the debt.

In addition, I agree with the respondent's advocate that even if, there was a requirement for proving that the respondent gave consideration, the contract titled "Hati ya Makubaliano" spoke loud that there was consideration for executing a contract. The applicant did not adduce facts which would suggest that there was no consideration.

Further, like the respondent's advocate, I am of the firm view that the respondent's forbearance to present a cheque was consideration for the applicant to issue a postdated cheque. Thus, the argument that there is no consideration is feeble.

The applicant contended that he was from April 2018, conducting business in the name of the Company. The respondent's advocate did not refute that allegation but he submitted that it was not enough to establish an arguable defence. He argued that the applicant signed the contract with free will and that the contract stated that the debt arose from the applicant's personal business. He concluded that the alleged defence that the applicant was conducting business in the Company's name was frivolous.

I wish to state at the outset that the applicant's advocate did not convince me by his argument that at the time *"Hati ya Makubaliano"* was

executed, the applicant was conducting business as a Company and the respondent alleged in the plaint that the applicant executed the contract to pay the debt in his personal capacity raises an arguable case. This is also a lame argument. It is nowhere provided in the law that if a person conducts business as a company is barred from conducting a similar business in personal capacity. Not only that but also, that defence would not satisfy any of the conditions under rule 3 (1) Order XXXV of the CPC.

In the end, I find that the applicant has not established a prima facie case for this Court to grant leave to defend. Consequently, I dismiss the application for leave to defend with costs.

It is so ordered accordingly.

DATED at **Mwanza**, this 31st day of August, 2022

J. R. Kahyoza
JUDGE

Court: Ruling delivered in the presence of Mr. Nanyaro adv. for the applicant and Ms. Mwambosya Adv. for the respondent. B/C Jackline (RMA) present.

J. R. Kahyoza
JUDGE
31/8/2022