

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 541 OF 2021
(Originating from Civil Case No 31 of 2020)

BAGAMOYO ECO ENERGY COMPANY.....APPLICANT

VERSUS

NATIONAL COLLEGE OF TOURISM.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of Last Order: 22/09/2022

Date of Ruling: 04/11/2022

E.E. KAKOLAKI, J.

Pursuant to Order XXXV Rule 3(1) (b), Rule 3 (2) and section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] (the CPC), the applicant is seeking for leave to appear and defend the suit in Civil Case No. 31 of 2020, pending before this court. The application brought under chamber summons is supported by an affidavit of Anders Bergfors, applicant's director and principal officer. Nevertheless, the same is strongly resisted by the respondents who filed their counter affidavit to that effect duly deposed by one Munguabela Kakulima, the principal officer to the 1st respondent.

The facts leading to this application as can be discerned from the affidavit and counter affidavit are simple be narrated thus, the respondent filed a civil case against the applicant under summary procedure claiming among other things payment of USD 28,710.00 being outstanding rent arrears to the first respondent, payment of interest rate at 25% per year from the date of default to the date of judgment, cost of the suit and interest calculated at courts rate plus other reliefs as it deems fit to the court to grant. The applicant does not dispute the rental agreement between them, or existence of rent arrears but disputes, one, the charging of USD 4,000 as rent arrears for the period from December 2016 to 11th January 2017, alleging that the same is erroneously and excessively charged in contravention of the lease agreement. Secondly, she also disputes the interest of 25% charged claiming that, they did not expressly agree on such arrangement and lastly the period in which the said USD 4,000 was charged. With the above three disputed facts the applicant claims that, there are triable issues to be determined during hearing of the case, thus this application be granted. All those disputed facts are resisted by the respondents who claims there is no evidence to justify them, thus leave should not be granted to the applicant rather she be ordered to pay the outstanding debt.

Hearing of the application proceeded viva voce, as both parties were represented. Whereas the applicant hired the services of Mr. Brian Mambosho, learned counsel the respondents enjoyed the representation of Ms. Rehema Mtulya, learned State Attorney.

The law is very clear under Order XXXV Rule 3(1)(b) of the CPC that, Court shall grant leave to appear and defend summary suit upon the applicant's affidavit disclosing some facts which the court may consider sufficient enough to support the application. The same is provided for under Order XXXV Rule (1)(b) of the CPC which provides:

*3.- (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-
(b) disclose such facts as the court may deem sufficient to support the application;*

The above exposition of the law is reflected in the Court's decisions such as the case of **Mohamed Enterprises (T) Ltd Vs. Biashara Consumer Services Ltd** (2002) TLR 150 (HC) and **Nararisa Enterprises Company Limited & 30 others Vs. Diamond Trust Bank Tanzania Limited**, Misc. Commercial Cause No.202 of 2015 (HC-Unreported) where the court observed that, for leave to appear and defend the summary suit to be granted, the applicant must disclose in his affidavit that there exist merits

and triable issues or existence of bonafide or reasonable defence by him/her though the same might not be positive one.

The above being the position on the conditions for grant of leave to appear and defend summary procedure suit, the calling issue for determination by this *court is whether the applicant has managed to demonstrate existence of meritorious and triable issues or existence of bonafide or reasonable defence warranting this court grant him leave to appear and defend the main suit as prayed.*

In support of the application, Mr. Mambosho counsel for the applicant fronted his submission by adopting the affidavit in support of the application. He then told the Court that, the reasons as to why the applicant is seeking for leave of this Court to appear and defend the main suit is premised on three (3) major grounds or reasons:

Firstly, that the claim by the respondent is erroneously and excessively entered. He referred the court to paragraph 10 (f) of the plaint annexed to the applicant's affidavit as annexure BEE1 where the claimed amount as per invoice No. 00000569, dated 13/01/2017 is USD 4000, charged for two months while it was supposed to be charged for less period from December

2016 up to 11 January, 2017 which was the ending date of the lease agreement dated 12/05/2016 as annexed to the affidavit as annexure BEE2, and not the whole of January, 2017 as the second month. According to him, the error was admitted by the 1st respondent vide her letter, annexure BEE3 to the applicant's affidavit. In his view, the correct charge of the said invoice is USD 2710, though to his surprise, the erroneous invoice is included in the claim and general claim of USD 28,710, in the plaint as per item (a) of the respondent's prayers.

Secondly, he asserted, the applicant is disputing the respondents' claim of interest at the rate of 25% on the claimed amount per year from the date of judgment to the date of payment. He argued that, in summary procedure, only liquidated claim can be raised by the plaintiff and interest can be claimed only if stipulated in the agreement, upon default by the other party. He added that, as a matter of logic one cannot claim interest on something which was not so agreed. The learned counsel fortified his stance by citing a book by Justice Richard Kuloba, titled **Summary Judgment, (2008)** published by Law Africa at page 3, where it is stated that, a claim for interest is not a liquidated claim within the meaning of Order 35 if there is no provision for interest under agreement sued upon or claimable under statute.

He also referred the court to the case of **Haja Arjabu Kasule Vs. F.T Ka** (1957) EA 611 (HCU), where the issue of charging interest on liquidated claim in a summary suit was also addressed.

On the third ground according Mr. Mambosho, the applicant is challenging the period in which the claimed amount of USD 4,000 was charged. According to him, the applicant wants to move this court to determine on ascertainment of the period to be charged. As to whether the whole claimed amount is contested, he charged, the applicant admits the rest of the claim up to November 2016, thus, prayed for leave to defend so as to challenge for the charged rent for December 2016 to January, 2017, under the invoice indicated in paragraph 10 (f) of the plaint, the interest rate and the period for charging that rent.

Basing on the said three (3) grounds, it was Mr. Mambosho's argument that, where the applicant shows that there are triable issues, the court has to grant him or her with leave to defend. He cited plethora of cases supporting his stance such as the case of **Mohamed Enterprises (T) Limited Vs. Biashara Consumers Services Ltd** (2002) TLR 159, **Tanzania Telecommunications Company LTD Vs. Timothy Luoga** (2002) TLR 150, **Mbezi Fresh Market Ltd & 2 Others Vs. International**

Commercial Bank (Tanzania) Ltd, Misc. Commercial Application No 176 of 2021 (HC) and **MCAR Tanzania Ltd & 6 Others Vs. Standard Chartered Bank (T) Ltd**, Misc. Commercial Application No. 72 of 2019 (HC).

In rebuttal, Ms. Mtulya contended that, the underlying factors for grant of leave are availability of triable issues which are deduced from the applicant's affidavit. She said, in this matter the outstanding rent has not been paid to date as evidenced by annexure NCT 4 of the plaint and annexure BEE1, to the applicant's affidavit, in which applicants admitted the claimed amount and promised to pay. According to her, there is no any triable issues raised by the applicant in her affidavit warranting this court grant her the prayer sought. She argued that, the applicant is not telling the truth about the actual amount to be paid to the respondent as outstanding claim of rent. Ms. Mtulya re-cited the case of **Mohamed Enterprises Limited (T)** (supra) cited by the applicant, and referred at page 162, which explained the aim of summary suit, and principles for the grant of leave.

Concerning the claim of interest of 25% she said, the applicant is subjected to it for her failure to issue notice of termination of the contract while aware that, the demised premises was for commercial purposes. In winding up, she submitted that, there is no triable issues raised by the applicant thus,

implored the court to dismiss the application for want of merit. In a short rejoinder, Mr. Mambosho attacked Ms. Mtulya's submission arguing that, the three grounds disclosed by the applicant present serious triable issues warranting this court to grant her with leave to defend. With regard to the issue of interest, he insisted, the respondents have failed to establish to the court's satisfaction that it is chargeable as per their agreement. Regarding the cited case of **Mohamed Enterprises** (supra), it was his submission that, the same supports applicant's case and added that, the respondent said nothing concerning the disputed invoice of USD 4,000 for the months of December 2016 to January 2017 which was already deduced to USD 2,710 but reclaimed in the plaint. He concluded by praying the court to find that the applicant has demonstrated triable issues hence grant the applicant with leave to defend the main suit.

I have dispassionately considered the rival arguments by the two legal minds and thoroughly perused the affidavit, counter affidavit and the annexures thereto, as well as the law applicable. As alluded to earlier on, the issue for determination is whether the applicant has demonstrated existence of triable issue in the main suit for this court to grant the sought leave. Looking at paragraph 9 of her affidavit and in his submission, applicant has raised some

points as triable issue in the main suit claiming them to be sufficient and reasonable facts worth consideration by this court. To start with the argument of existence erroneous and excessive claims as per paragraph 10 (f) of the plaint the applicant alleges that, the claimed amount per invoice No. 00000569 dated 13/01/2017 of USD 4000 was charged for two fully months while in fact it was supposed to be charged from December 2016 up to 11 January, 2017, the ending date of the lease agreement dated 12/05/2016, the error which was admitted by the 1st respondent vide her letter, but erroneously reclaimed and included in the general claim of USD 28,710 as per item (a) of the respondent's prayers. It is noted that the respondents did not respond to this issue. Thus I am satisfied that, this raises a triable issue for determination by this Court in the main suit.

As to the second ground raised by the applicant on claim of interest at the rate of 25% of the claimed amount per year from the date of judgment to the date of payment, since the issue is whether the liquidated claim can be raised by the plaintiff and whether interest can be claimed if not stipulated in the agreement, I am at one with Mr. Mabosho that, the same raise arguable issues for determination by this Court. My finding is premised on the position of the law as stated in the book of Summary Judgment by

Richard Kuloba, Law Africa, at page 39 which I find to be not only persuasive but also the correct interpretation of the Order 35 to the CPC, where the learned author stated on whether interest is a liquidated claim or not. It was stated that:

"Interest can only be claimed if the claim is based on an agreement for interest in the document sued on or by statute. A claim for interest is not liquidated claim within the meaning of Order 35 if there is no provision for interest under the agreement sued upon or claimable under the statute... interest cannot be claimed in a suit under Order 33 of the civil Procedure Rules of Uganda which is similar to Order 35, unless based on an agreement for interest in the document sued on or on statute."

Similarly, in the third ground, on the period in which the claimed amount of USD 4,000 was to be charged, the respondents counsel did not respond on too. It is therefore my profound view, this ground also raises arguable issue worth determination by this Court in the main case.

In totality therefore, I answer the raised issue in affirmative in that, the applicant has managed to demonstrate to the court that triable issues warranting this Court to grant the prayer sought do exist in this main case. Before concluding I wish to address the undisputed claimed amount of USD

28,710 minus USD 4,000 which is contested as well as interest chargeable at the rate 25% of the claimed amount from the date of judgment till full payment, subject of the triable issues for determination by this Court in the main case. Since the respondents are not contesting over the claimed amount of USD 24,710 as outstanding rent arrears after deduction of the disputed claim of USD 4,000, I find no reason as to why the applicant should not be ordered to pay the same.

In the upshot, I hereby grant the applicant with conditional leave for her to file the defence upon payment to the 1st respondent of the undisputed outstanding rent arrears of USD 24,710, within thirty (30) days from the date of this ruling.

Costs to follow the event.

It is so ordered.

Dated at Dar es Salaam this 4th November, 2022



E. E. KAKOLAKI

JUDGE

04/11/2022.

The Ruling has been delivered at Dar es Salaam today 04th day of November, 2022 in the presence of Mr. Brian Mambosho, advocate for the applicant, Mr. Rehema Mtulya, State Attorney for the respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
04/11/2022.

