

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 675 OF 2020

(Originating from Civil Case No. 113 of 2020)

CAMEL CONCRETE (T) LTD..... APPLICANT

VERSUS

TANZANIA NATIONAL ROADS AGENCY (TANROADS).....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last Order: 10/02/2022.

Date of Ruling: 25/02/2022.

E.E. KAKOLAKI, J

In this application the applicant is seeking for leave to appear and defend the suit in Civil Case No. 113 of 2020 pending before this court. The application has been preferred under Order XXXV Rule 3(1)(b) of the Civil Procedure Code, [Cap. 33 R.E 2019] referred herein as CPC and any other enabling law supported by affidavit of one Salim Bawa, the applicant's appointed legal representative. However, the same has been strenuously resisted by the respondents who filed their counter affidavit to that effect through the 1st Respondent's Principal Officer one Partick A.L. Mfugale.

Hearing of the matter proceeded by way of written submissions as both parties were represented by their respective counsels. The applicant hired the services of Mr. Hassan J. Zungiza learned counsel whereas the respondents enjoyed the legal services of Mr. Stanley Mahenge, learned State Attorney.

Briefly in Civil Case No. 113 of 2020 before this court under summary suit the Respondents sued the applicant claiming for Tshs. 254,500,000/- being costs for reconstruction of Mabey Bridge situated along Banana-Kinyerezi Tabata Road which was damaged by the Applicant's truck with the Registration No. T. 366 CMZ. What is gleaned from the applicant's affidavit and respondents' counter affidavit is that, the applicant is not disputing liability on his part apart from claiming under paragraph 4.1 and 4.2 of the affidavit that she apologised and requested to maintain the bridge under supervision of the 1st respondent, but without response from the respondents, something which is disputed by the respondents who state that, they availed her the said reconstruction costs vide their letter annexure OSG1 of paragraph 4 of the Counter Affidavit but the applicant opted not to cooperate hence the suit against her. It is from that instituted suit the applicant has preferred this application seeking for leave to appear and

defend it which application as alluded to above is vehemently contested by the respondents.

It is the law 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. Order XXXV Rule (1)(b) of the CPC 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;** (Emphasis is mine).*

The above provision is reflected in the court decisions as articulated in a number of cases some of which are **Mohamed Enterprises (T) Ltd Vs. Biashara Consumer Services Ltd** (2002) TLR 150 and **Icundalal Restaurant Vs. Devshi & Co** (1952) EACA 77 where the court observed that, the applicant must disclose in his affidavit that there exist merits and triable issues or existence of bonafide or reasonable defence by the applicant although might not be positive one as major conditions for grant of leave to appear and defend the summary suit. The afore stated being the position of

the law, the issue pending 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.

Submitting in support of the applicant's application Mr. Zungiza argued that, the applicant has bonafide triable issues which are to be disclosed in his defence such that if grant of leave to defend is withheld, applicant's rights will be in jeopardy since there are strong issues of illegality to be raised in the main suit on the jurisdiction of this court. He further contended the issue of costs of re-construction of the bridge is the main issue to be decided in the main case as the applicant is strongly disputing those costs. He said to deny the applicant of his right to defend herself in the main case is tantamount to granting the respondents undeserving rights. While citing the case of **Cabot Asset Purchase Ireland Ltd Vs. Cathal Bayle** (2019) IEHC 401 which held the overriding principle is the gear for guiding the court on how to achieve end of justice, he argued under the same principle a party should be accorded with right to respond to litigation as it is also provide under Article 107A(e) of the Constitution of the United Republic of Tanzania,

1977 as amended. He therefore prayed the court to grant the application for interest of justice.

In rebuttal, Mr. Mahenge for the respondent resisted Mr. Zungiza's submission contending that, the application lacks merit as the applicant has failed to meet the requirement of the law as the supporting affidavit does not demonstrate triable issues warranting this court to grant the applicant leave to defend the suit. He said, what is stated in the applicant's submission that there is issue of illegality intended to be raised in the main suit, is a mere statement from the bar for not being pleaded in the applicant's affidavit as submission by the advocate is not a substitute of evidence. To buttress his submission on the point that advocate's submission does not amount to evidence, Mr. Mahenge referred the court to the cases of **Tina & Co. Limited and 2 Other Vs. Eurafrikan Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported), **Madam Mary Silvanus Qorro Vs. Edith Donath Kweka & Another**, Civil Appeal No. 102 of 2016, **Fatuma Idha Salum Vs. Khamis Said** (2004) TLR 423 and **Makori J.B Wassaa and Joshua Mwaikambo & Another** (1997) TLR 88. As regard to the issue of costs he said there is no dispute that the applicant destroyed the bridge as she admits that fact. According to him, the

submission that the costs incurred to reconstruct the bridge is disputed is unfounded as there is no single paragraph deposed by the applicant disputing costs incurred so as to justify the contention that there is triable issue apart from advocate's submission forming part of the bar statement which in law is no evidence. As to the assertion that the applicant was denied of the costs incurred to re-construct the bridge when requested them from the 1st respondents, Mr. Mahenge argued, the submission intends to mislead the court as costs were provided her (applicant) as shown under paragraph 4 of the Counter Affidavit and annexure OSG1, thus the applicant was aware of the same but turned her ears deaf. He was therefore view that, there is no triable issue disclosed by the applicant and proceeded to invite the court to dismiss the application for want of merit.

I have dispassionately paid parties' submission the deserving consideration and weight. As alluded to above, 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. In his submission Mr. Zungiza has raised two points as triable issue in the main suit as sufficient and reasonable facts worth of consideration by this court in granting the application. To start with the argument of existence of strong issues of illegality to be raised by the

applicant in the main case particularly on the jurisdiction on this court to entertain the main suit, I am at one with Mr. Mahenge that this is a mere statement from the bar which does not amount to evidence for not being supported by the deposed facts in the applicant's affidavit. A glance of an eye to the applicant's affidavit has undisputedly established absence of any fact stating of issues of illegality in the main suit in particular the intention to raise a point of law on the jurisdiction of this court to entertain the main suit. As no fact was deposed to that effect the submission on issues of illegality exists in the intended suit to be defended, I find such submission is a mere statement from the bar which as rightly submitted by Mr. Mahenge does not amount to evidence as it was held in the case of **Tina & Co. Limited and 2 Other** (supra) that arguments and submission by an advocate in court cannot be a substitute of evidence. Similar stance was aired by the Court of Appeal of Uganda in the case of **Trasafrika Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A cited with approval by the Court of Appeal in the case of **Tina & Co. Limited and 2 Other** (supra) where the court held that:

"As is well known a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on."

Travelling in the same footsteps of the two above cited superior courts and given the fact that in this matter the raised issue of illegality and jurisdiction of this court was not deposed in the applicant's affidavit I refrain from considering Mr. Zungiza's submission for being a mere statement from the bar. I therefore find this point not disclosing facts sufficient enough to support the application as per the requirement of Order XXXV Rule 3(1)(b) of the CPC.

Next for determination is the issue of costs which Mr. Zungiza submits despite of being requested to allow the applicant to re-construct the bridge and request for costs of the said bridge the respondent refuted to respond to while Mr. Mahenge challenges it in that, the same was supplied to the applicant but she remained mute till when she was summoned to court. Having weighed these two rival submission I am unable to believe applicant's submission that she was denied of the estimated costs for construction of the bridge. My stand is premised on the evidence of paragraph 4 of the Counter Affidavit which annexed 1st respondent's response letter dated 17/04/2015 with Ref. No. RM/TANROADS/DSM/R.90.523/Vol.1/100 responding to the applicant's letter dated 17/04/2015 with Ref. No. CAMEL/TNRD/DSM/02 concerning estimated costs of Tshs. 254,500,000/=.

The applicant never filed the reply to respondents' counter affidavit challenging that, fact something which amounts to admission of the fact that, the applicant was served with the estimate costs but opted to remain mute as rightly submitted by Mr. Mahenge. With all that undisputed evidence by the respondents, this court is of the finding that the issue of applicant not being supplied with the estimated costs for construction of the damaged bridge as claimed which is not established, cannot form part of the triable or arguable issue in the main case. On the basis of the above findings, I conclude there is no bonafide triable issues demonstrated by the applicant in this matter to warrant this court grant him leave to appear and defend the main suit as prayed.

All said and done, I find this application is without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 25th day of February, 2022.



E. E. KAKOLAKI

JUDGE

25/02/2022.

The Ruling has been delivered at Dar es Salaam today on 25th day of February, 2022 in the presence of the Mr. Benson Florence advocate holding brief for advocate Hassan Zungiza for the applicant, Mr. Stanley Mahenge, State Attorney for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

25/02/2022

