

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 107 OF 2022**

*(Arising from Land Case No. 17/2022 of the High Court Arusha)*

**CHISSELS LIMITED..... APPLICANT**

**VERSUS**

**ARUSHA INTERNATIONAL CONFERENCE CENTER .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**RULING**

23<sup>rd</sup> November & 17<sup>th</sup> February 2023

**TIGANGA, J.**

This ruling is in respect of the application for leave to appear and defend the summary Suit instituted by the respondent in this Court in Land Case No. 17 of 2022. The applicant also asks for the cost of this application and any other relief which this Court may deem fit and just to grant. The Court has been moved by the chamber summons filed under Order XXXV, Rule 3(1)(b) of the **Civil Procedure Code** [Cap 33 R.E 2019] (hereinafter the CPC) and it is supported by an affidavit sworn and filed by Mr. Anselm William Minja who introduced himself as the Managing Director of the applicant company. The facts in the affidavit narrates the background of the application and the reasons for the present application.

The background information building the reasons for the application are that, the applicant entered into a lease agreement with the respondent to occupy and use the respondent's premises. The agreed rent was USD 555 per month. The said tenancy agreement was at first of one year commencing from 13<sup>th</sup> March 2001, and it was renewable. However, the lease terms were changed in the year 2003. The changes included additional rented premises which attracted the increase of rent from USD 555 to 2970 per month, to say the least. Parties were required by their lease agreement to meet their contractual obligations.

In the main case, the applicant is sued for failure to meet her contractual obligations by defaulting to pay rent plus penalties worthy USD 155,157.31 which is equivalent to 24,262,240.00/=. The applicant was sued under the summary procedure in which, the law does not give the defendant an automatic right to defend the claim. She may defend the suit only when she seeks and obtain leave to defend from the court before which the summary suit is filed.

In this application, the reasons as to why the applicant should be granted leave to defend are stated in the affidavit sworn and filed by the Director of the applicant. Some of the reasons as stated in the affidavit are that, the plaint is bad in law because the respondent does not qualify

to sue under the summary procedure. It has also been disputed that the applicant is actually indebted as alleged and that the suit instituted by the respondent is time barred. It is on the base of these intricacies, the applicant is seeking for leave to defend.

The respondent opposed the application, by filing the counter affidavit sworn and filed by one Savos Mung'ong'o who introduced himself as the Acting Managing Director of the 1<sup>st</sup> respondent. In the counter affidavit, the respondent objected the application, he in fact said that, the applicant has adduced no reasons for being granted leave to defend.

At the hearing of this application, the applicant was represented by Mr. Peter Nyamwero, learned Advocate, while the respondent was represented by Ms. Fabiola Kisarika, learned State Attorney from the 1<sup>st</sup> Respondent. In the submission in support of the application, Mr. Nyamwero adopted the affidavit filed in support of the application. He submitted that, for the application of this nature to be granted, the applicant must as a matter of law, establish some triable issue. This principle has been emphasized in the case of **TTCL vs Timoth Luoga** [2002] TLR 150 where it was held *inter alia* that, the defendant is entitled to leave to appear and defend if he establishes that, there is a triable issue.

The counsel submitted that, the triable issue must be made clear in the affidavit filed in support of the application as held in the case of **Mohamed Enterprises (T) Limited vs Biashara Consumer Services Ltd** [2002] TLR 159

The counsel further submitted that, in the affidavit filed in support of the application, there is no dispute that the applicant was the first respondent's tenant since March 2001, and he has been renewing lease agreement time after time. It is the applicant's contention that, the rent has been paid on time the fact which convinced and made possible the periodic renewal of the tenancy agreement. That facts also support the findings that, there is no pending claim against her. Therefore, the applicant disputes to be indebted to the amount claimed. That is USD 42,498 for room No. 3 Ngorongoro wing because was still under refurbishment. He submitted that any disputes in case is considered as a triable issue. In support of this proposition, he cited the authority in the case of **Makungu Investment Company Limited vs Petrolsol Tanzania Limited**, Civil Appeal No. 23 of 2013.

The other ground which the applicant considers as the triable issue is the issue of time limitation. He averred that, as there is the contention that the 1<sup>st</sup> respondent stopped to operate Arusha Duty Free Shop

because the room was affected by flood and the 1<sup>st</sup> respondent was aware and promised to share the costs for renovation hence, they are intending to file the counter claim, which also raises the contentious or triable issue. It is on that base that the applicant asks for this court to grant him leave to defend Civil Case No. 23 of 2022.

Responding to the submission in chief, the learned State Attorney started by adopting the content of the counter affidavit. She also submitted in opposition of the application on the ground that the applicant has not fulfilled the requirement established in the case of Makungu at page 7 where it was held that, the role of the court was to decide as to whether there was a factual dispute to resolve which arose from the affidavital evidence presented to him by the defendant. In her view, this was supposed to have been preliminarily established for him to show the fair and reasonable defence. In support of this principle, he cited the case of **Nararisa Enterprises Company Limited and 3 others vs Diamond Trust Bank Tanzania Limited**, Misc. Commercial Case No. 202 of 2015 at page 3-5 where the court held that, there must be first the triable issues and secondly the applicant is required to show a reasonable defence.

In her view, the affidavit filed by the applicant, contains mere words without evidential contents because there is no evidence attached as a proof of that reasonable defence. She said skipping the proof of payment negates the principle for granting the leave to appear and defend the summary suit.

Further to that, she submitted that, the provision of order XXXV Rule 1(b) of the CPC, the law requires the applicant to disclose in the affidavit the facts which are establishing the triable issues as well as a probable and reasonable defence.

In the rejoinder submission, the applicant submitted that, the affidavit is a sworn evidence to prove that payments were actually made. He referred the court to the authority in **Mohamed Enterprises case (supra)** that the affidavit is sworn evidence, therefore looking at the affidavit filed by the applicant, in his view the same had really fulfilled the conditions in the cited case authorities and has further fulfilled the requirement in the case of **Laemthong Rice Co. Ltd vs Principal Secretary Ministry of Finance Zanzibar**, Civil Appeal No. 259 of 2019 and the principle provided under Order XXXV Rule 3 (1) (b) of the CPC. On that base he prayed the court to allow the application thereby granting leave to appear and defend the suit.

I have passionately considered the rival arguments by both learned counsel, I am convinced to incline that all cases cited by the learned counsel are good law in as far as providing the guidance in the application of this nature. However, of all, I choose to be guided by the principle in the case of **Nararisa Enterprises Company Limited and 3 others vs Diamond Trust Bank Tanzania Limited**, (Supra) decided by my Senior Brother, Mwambegele J, (as he then was) in which he also cited two cases of **Mwanauta & Company Hunting Safaris () Limited & 2 others vs National Bank of Commerce**, Commercial Case No, 3 of 2014, by Hon. Nyangarika, J and **Mohamed Enterprises (T) Limited vs Biashara Consumer Services Ltd** (supra), Hon. Bwana, J (as he then was) that,

*"In the application of this nature, the court is not required to involve its lengthy arguments but, rather to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue fit to go for trial. The applicant is only required to show a fair and reasonable defence."*

As rightly submitted that, the court has been moved under Order XXXV Rule 3(1)(b) of the CPC which for purposes of easy reference it is hereby reproduced.

*"Rule 3(1) The court shall upon application by the defendant give leave to appear and to defend the suit upon affidavit:-  
(b) discloses such fact as the Court may deems sufficient to support the application."*

While interpreting the above cited provision, my senior brother Hon. Nchalla, J. in the case of **Tanzania Telecommunication Company Limited vs Timothy Lwoga**, [2002] TLR 150 it was held that, a defendant is entitled to leave to appear and defend a summary suit if it is shown that, there is a triable issue. Also Order XXXV Rule 3 (1)(b) the provision under which this application has been preferred enjoins the court to grant an application for leave to defend where the court is satisfied that, the affidavit filed in support of such application discloses such facts as the court may deem sufficient to support the application.

Now reviewing the affidavit filed in support of the application, I find the applicant has demonstrated that, the plaint is bad in law because the respondent does not qualify to sue under the summary procedure. It has also been disputed that, the applicant is not actually a defaulter as alleged and that, the suit instituted by the respondent is time barred. It has also been deposed in the affidavit that, the applicant stopped the business in one of the room after the premises had been affected by flood which was an act of God. That, according to him, necessitated an agreement by the



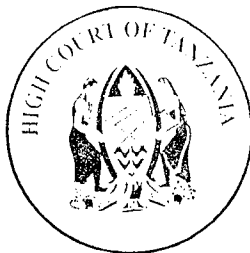
parties that, its renovation would be on joint effort. Now that the respondent did not honour her obligation, then the applicant is intending to raise the counter claim in the main suit.

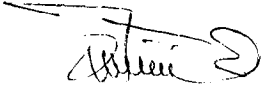
Now considering these facts in the arguments by the learned counsel and reading between lines the contents of the affidavit filed in support of the application, when related with the case authorities and the provision of the law upon which the application was preferred, it is proved that the applicant has managed to establish the existence of the triable issues in the main suit. Therefore, the court is satisfied that, the applicant has disclosed such facts sufficient to support the application.

In the premises the application is hereby granted, the applicant is given leave to appear and defend the summary suit in Land Case No. 17 of 2022. She is hereby given 21 days within which to file the written statement of defence. The cost of this application shall follow suit.

It is so ordered.

**DATED at ARUSHA, this 17<sup>th</sup> day February, 2023.**



  
**J. C. TIGANGA**  
**JUDGE**