

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 235 OF 2021

(Arising from Civil Case No. 51 of 2021)

UAP INSURANCE TANZANIA LIMITED APPLICANT

VERSUS

SONGEA MUNICIPAL COUNCIL 1st RESPONDENT

ATTORNEY GENERAL 2nd RESPONDENT

LUKOLO COMPANY LIMITED 3rd RESPONDENT

RULING

Date: 18/04 & 02/06/2023

NKWABI, J.:

The 1st respondent and 2nd respondents have instituted a civil suit under summary procedure against the applicant and the 3rd respondent for a sum of T.shs 1,432,058,646.43 and other reliefs in Civil Case No. 51 of 2021. The applicant was served with summons to seek leave to defend the suit. She has brought the application for leave to appear and defend. She has the following prayers in the chamber summons:

1. The honourable Court be pleased to grant leave to the Applicant to defend the suit.
2. Costs be in the course, and
3. Any other relief the Court deems just and fit to grant.

The chamber summons is brought under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019, Order XXXV Rule 2 and Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019. It is supported by the affidavit of Venance Minja, Principal officer of the applicant. The application is resisted by the 1st and 2nd Respondents who filed a counter affidavit duly sworn by Ms. Lightness Godwin Msuya, learned State Attorney.

The application was heard by way of written submissions. Submissions for and against this application were filed save for rejoinder submission. Mr. Kephass Mayenje, learned counsel, drew and filed the submission for the applicant. Ms. Lightness Godwin Msuya, learned State Attorney, drew and filed the reply submission.

The counsel for the applicant contended, in support of the application, that looking at the affidavit in support of the application and the 1st and 2nd respondents' counter affidavit it is evident that there are triable issues between the applicant and the 1st respondent. Therefore, this Court has to grant the application. He cited paragraphs 6, 7, 8, 9 and 10 of the affidavit in support of the application. I was referred to **Prosper Paul Massawe &**

2 Others v. Access Bank Tanzania Limited, Civil Appeal No. 39 of 2014

CAT (unreported) where it was held that:

"The court's determination on whether or not there are triable issues has to be based on the affidavit, obviously because as of that stage, there is yet a statement of defence from the defendant."

The counsel for the applicant also referred me to **Makungu Investment Company Ltd v. Petrosol (T) Ltd**, Civil Appeal No. 23 of 2013, CAT (unreported) where the Court stated that:

"The role of the Court was in deciding whether or not there was a factual dispute to resolve which arose from the affidavital evidence present to him by the defendant."

In reply submission, the learned State Attorney prayed that I dismiss the application because the applicant has not demonstrated triable issues. It is pointed out that the Court has power to grant leave with the condition as stated in **Bagamoyo Eco Energy Company v. National College of Tourism & Others**, Civil Application No. 541 of 2021, HC (unreported) at page 11 which is that the applicant be ordered to deposit T.shs 1,432,058,646.43 to the 1st Respondent bank account as security.

The determination of this application shall not detain me much. This is because though the 1st and 2nd respondents say that there are no triable issues which have been demonstrated by the applicant, they still pray that the application be granted with security deposit to the 1st respondent. This contradiction, with respect, is unwarranted. Looking at the affidavit and the counter affidavit, there are critical facts raised by the applicant and the same are denied by the respondent. In the circumstances I rule that the applicant has demonstrated that there are triable issues between the applicant and the 1st and 2nd respondents. My decision, I believe, is properly guided by **Nasarisa Enterprises Co. Ltd & Others v. Diamond Trust Bank Ltd** Misc. Commercial Case No. 202 of 2015 cited by the learned State Attorney for the respondent are met by the applicant which are:

- 1. "The defendant must satisfy the Court she/has a good defense to the claim on its merit.*
- 2. If the defendant raises triable issues.*
- 3. If the defendant discloses such facts as may be deemed sufficient to entitle him/her to defend and others ..."*

One may also wish to have reference to **Mohamed Enterprises (T) Ltd v. Biashara Consumer Services Ltd** [2002] T.L.R. 149 where it was stated that:

"(I) In deciding whether a defendant should be granted leave to appear and defend a summary suit the role of the court is limited to looking at the affidavits filed by the defendant in order to decide whether there is any triable issue fit to go for trial."

As for the prayer that I order the applicant deposit T.shs 1,432,058,646.43 to the 1st Respondent bank account as security is rejected because it is not based on the pleadings of the parties particularly the 1st and 2nd respondents' counter affidavit, then the prayer is baseless and is rejected. In my decision of rejecting the prayer for security deposit I follow **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161 where it was stated that:

"The function of pleadings is to give notice of the case which has to be met. Party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with

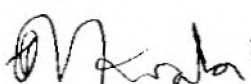
*clarity the issues on which the Court will be called upon to
adjudicate to determine the matters in dispute."*

Consequently, I find that the application for leave to appear and defend the
suit is merited and it is granted with costs.

It is so ordered.

DATED at DAR-ES-SALAAM this 2nd day of June, 2023.




J. F. NKWABI
JUDGE