

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
MISC. CIVIL APPLICATION NO.10 OF 2021

(Originating from Civil Case No. 3 of 2021)

ROSA HAULAGE LIMITED APPELLANT

VERSUS

TANZANIA ROAD AGENCY (TANROADS)..... RESPONDENT

ATTORNEY GENERAL RESPONDENT

RULING

Date of Last of Order: 13/01/2023

Date of Judgement: 17/02/2023

NDUNGURU, J

The applicant, Rosa Haulage Ltd seeks leave of this Court to appear and defend Civil Case No. 3 of 2021 brought to this court under Summary Procedure, Order XXXV Rule 3 (1) of the Civil Procedure Code, Cap 33 RE 2019. The application is supported by an affidavit sworn by Mr. Mathias Budodi, Learned Advocate.

By a plaint filed in this court on 03rd February, 2021, the respondents herein, filed Civil Case No. 03 of 2021 under summary procedure against Rosa Haulage Ltd, the applicant. The applicant filed

the present application seeking leave to appear and defend the case against them.

When the application came for hearing on 17th May, 2022, Mr. Kipsha, Learned Advocate appeared for the applicant while Mr. Kamugisha, State Attorney appeared for the respondents. The application proceeded orally.

Submitting in support of the application the learned Advocate for applicant prayed first for the affidavit be adopted and further submitted that the grounds of the application meet the criteria set in the case of **Naransa Enterprises Company Limited vs Diamond Trust Bank**, Misc. Commercial Cause No. 202 of 2015 at page 7. He maintained that in his affidavit at para, 4, 5 and 6 he has raised a triable issues to be addressed in the main case. He submitted further that there is a valid cover note, thus he intended to join the insurance to indemnify. He finally prayed for the court to grant leave to defend in the main suit.

In reply, Mr. Kamugisha, Learned State Attorney first he prayed for the affidavit be adopted and be part of the submission. He submitted that as regard para 5 of the applicant's affidavit, according to the annexure attached interim cover note. He contended that the said cover note, is not a triable issue, thus the learned counsel has

misconceived. Submitting in respect of the letter relating to cover note, he said the letter states that the accident occurred on 09/02/2020. The letter was received on 19/02/2020. He maintained that the cover note provides that the accident must be reported verbally within 48 hours and in writing within 7 days at the head office. Thus, he submitted that the accident was reported out of time for three days. Thus, the applicant has delayed to report, thus there was no triable issues. Further, he submitted that the trailer No. T. 171 CAX was not covered in the cover note. The cover note is silent on the number of trailer. Thus, insurance denies the applicant as the document speaks itself. Thus, para 5 has no triable issue.

As regard para 4 he submitted there was no triable issue, because there was evidence. The applicant has not produced any alternative bill. Thus, there was no triable issue. Therefore, the applicant has brought statement from the bar. It could not be triable issue.

In the premise, he winded up that the applicant's affidavit has contravened the requirement of Order XXXV as there was not triable issue. He therefore prayed for the application be dismissed as it intended to delay the summary suit. If the court deems just to grant the suit he prayed it be with condition to deposit.

In rejoinder, Mr. Kipsha submitted that the cases cited are distinguishable as in his affidavit he has disputed the bill, which alone was a triable issue. He contended that the case of **Mohamed Enterprises (T) Ltd vs Biashara** [2002] TLR does not assist him but it was assistance to the applicant. Further he maintained that what is contained in the cover note is a matter to be tried during the trial, thus it was a triable issue. The evidence is subject to a full trial not in such kind of application. His application is not a delaying tactic as submitted by the learned State Attorney. He finally prayed for the application be granted under the conditions the court deems just and equitable.

Now, having considered the submissions by the parties, the record and the law, I will now determine the merit of the application.

It is a trite law that where a summary suit is filed the defendant cannot enter appearance and defend the suit until he obtains leave of the court. In the event of failure to obtain leave the allegation/claim contained in the plaint shall be deemed to be admitted by the defendant and the plaintiff shall be entitled to decree as per Order XXXV Rule 2 (2) (a) to (c) of the Civil Procedure Code.

In the case of **J. Mwanauta & Company Hunting Safaris (T) Limited & 2 Others vs National Bank of Commerce**, Commercial Case No. 3 of 2014, unreported, that;

"In application of this nature, the court is not required to involve itself in 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 to go trial. The applicant is only required to show a fair and reasonable defence."

Reverting back to the applicant's affidavit supporting the application that the principal alleged claim by the respondents of Tshs. 9,550,000/= as being compensation for road damages are founded on undated Bill of Quantity which suggests the same are mere estimate and the Bill of Quantity does not reveals the person who prepared and his/her capacity for the court to be satisfied as to whether it was prepared by a qualified Quantity Surveyor. Also, that the motor vehicle involved in an accident was insured by Insurance Group of Tanzania Ltd, and at the time of accident it had a valid insurance cover note a fact which was within the knowledge of the respondents. Thus, the said

averments raised triable issues which can only be proved if the applicant is granted leave to appear and defend Civil Case No. 3 of 2021.

Having subjected the reasons as pointed out herein, this court is satisfied and convinced that the applicant has demonstrated such facts as the court may justify as sufficient and reasonable to support the application to be entitled for leave to appear and defend the summary suit filed by the respondents.

In the premise, the leave sought to appear and defend in the Civil Case No. 3 of 2021 is granted unconditionally. The applicant is to file her defence within twenty-one (21) days from the date of this ruling.

It is so ordered.




D. B. NDUNGURU

JUDGE

17.02.2023

Date - 17/02/2023
Coram - Hon. M.S. Kasonde – DR
Applicant - Present
For Applicant - Mr Deogratias Sanga – Adv.
Respondent -
For Respondent - Mr. Usaje Mwambene – SSA Assisted by Mr.
Ndano Lweno S/A
B/C - A.K. Sichilima - PRMA

Mr. Usaje Mwambene - Senior State Attorney: The matter is for
Ruling ad we are ready

Mr. Deogratias Sanga – Advocate: We are ready too.




M.S. KASONDE
DEPUTY REGISTRAR
17/02/2023

Court: Ruling delivered this 17th February 2023, in the presence of
Mr. Usaje Mwambene Senior State Attorney being assisted
by Mr. Ndano Lweno, State Attorney for the Respondent and
Mr. Deogratias Sanga, Advocate for the Appellant.




M.S. KASONDE
DEPUTY REGISTRAR
17/02/2023