

IN THE HIGH COURT OF TANZANIA

(DODOMA SUB REGISTRY)

AT DODOMA

MISC. LAND APPLICATION NO. 39 OF 2023

(Originating from Civil Case No. 8 of 2023)

FRANK JOHN NGONYANI..... APPLICANT

Versus

THE CITY COUNCIL OF DODOMA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last order: 09th April, 2024.

Date of Ruling: 10th May, 2024.

E.E. KAKOLAKI, J.

The applicant herein has moved this court under Order XXXV, Rule 3(1) of the Civil Procedure Code, [Cao. 33 R.E 2019] (the CPC), for grant of unconditional leave to file the Written Statement of Defence to defend the summary suit in Civil Case No. 08 of 2023 by the respondents against him. Subsequent to that, any other orders which this court will deem fit to grant including costs of the application to follow the event are prayed for. The application is supported by the applicant's affidavit stating the grounds as to why this Court should exercise its discretion to grant him the prayed orders. When the respondents were served with the application filed their counter

affidavit strenuously challenging its merit before hearing of the matter was order to proceed by way of written submission in which both parties complied with the filing schedule orders. The applicant hired legal services of Ms. Elizabeth Kagembe, learned advocate while the respondent represented by Mr. Omary Ngatanda, learned State Attorney.

Briefly in Civil Case No. 08 of 2023 pending before this Court, the respondents have instituted a suit against the applicant claiming among other claims for payment of rent arrears to the tune of Tshs. 407,000,000/- following applicant's breach of terms of lease agreement of the Chinangali Recreation Park area, located within Dodoma City, owned by the 1st respondent, executed on 27/01/2021 between the applicant and 1st respondent. It is out of that claim by the respondents in which the applicant is contesting, this application has been preferred. In paragraph 5 of his affidavit in support of the application the applicant has raised four contentious issues trying to convince this Court to exercise its discretion and grant him unconditional leave to defend the said suit. It is his contention in paragraph 5 of the plaint that, one, when the suit was instituted the rent arrears had stood at Tshs. 433,000,000/- out of which he had settled Tshs. 108,850,000/- hence the remaining actual debt is Tshs. 324,150,000/.

Secondly that, the rent arrears were calculated from the total leased area 60,270 square meters as per the lease agreement while in fact up to the time of institution of the pending suit the applicant had occupied only 32,000 square meters. Thirdly that, the applicant did not default rent payment for three consecutive months as claimed by the respondent that would entitle them to issue three months' notice of the intention for termination of the contract pursuant to clause 8 of the agreement. Fourthly that, there is dispute as to when the agreement started between the date of its execution and the date of handing over the leased premises to the applicant. Fifth and lastly that, there is pending application by the applicant for rent review before the 1st respondent.

On their joint counter affidavit the respondents are challenging merit of the application contending that, the applicant is not a lessee of the suit land for breaching terms of agreement as was ordered to vacate it since 05/06/2023. And that, the applicant failed to prove to the Court on the required standard that, the raised triable issue do exist. In respect of the first triable issue they countered that, the claimed amount as per the plaint stands at Tshs. 407,000,000/- and not the one deposed by the applicant. On the second one that, the applicant occupied the whole leased area totaling 60,270 square

meters and not otherwise. Thirdly in respect of notice that, the 1st respondent at all-time reminded and served the applicant with notices but the later failed to honour them. Fourthly that, the asserted uncertainty over starting date of the agreement is never there as the date of 27/01/2021 agreed earlier for start of the agreement was waived and postponed up to July, 2021 due to challenges on implementation of some terms of the agreement. And lastly that, the audit report in support of the claimed pending application for rent review is baseless and exaggerated as it was conducted by the applicant himself and not qualified auditors. They thus invite the court to dismiss the application for being unmeritorious.

The law is settled under Order XXXV Rule 3(1)(b) of the CPC that, this Court is seized with the jurisdiction to entertain this application and that, no leave to appear and defend summary suit shall be grant by the Court unless applicant's affidavit discloses some facts sufficient enough to support the application. The provision of Order XXXV Rule 3(1)(b) of the CPC reads:

*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;*

Much more postulation of the above exposition of the law was given by this Court in its 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 it was observed that, for leave to appear and defend the summary suit to be granted, the applicant must have disclosed first in his affidavit that there exist merits and triable issues or existence of bonafide or reasonable defence, though the same might not be positive one. See also the case of **Bagamoyo Eco Energy Company Vs. National College of Tourism and Another**, Misc. Civil Application No. 541 of 2021 (HC-unreported).

Back to the matter at hand, this Court spent considerable time to revisit applicant's affidavit, joint counter affidavit by the respondents and reply to counter affidavit by the applicant and consider the contending submission by the parties. From the above legal position of the law guiding grant of leave to defend suit, the issue for determination herein is whether the applicant has sufficiently demonstrated existence of bonafide or reasonable

defence or triable issues for the grant of unconditional leave to defend the suit in Civil Case No. 08 of 2023 pending before this Court.

In her submission in support of the application Ms. Kagembe contended that, the figure of Tshs. 407,000,000/- as deposited in the plaint by the respondent is exaggerated by far since the actual debt stands at Tshs. 324,150,000/- after payment of Tshs. 108,850,000/- as demonstrated in paragraph 5(a) of the applicant's affidavit. Together with other triable issues deposed in paragraph 5 of the applicant's affidavit Ms. Kagembe, impressed upon this Court that, the applicant has demonstrated triable issues warranting this Court exercise its discretion to grant the application as the rule of law is that a defendant is entitled to leave to appear and defend a summary suit if it is shown that there is triable issue in the case as held in the case of **Tanzania Telecommunication Company Limited Vs. Timothy Lwoga** [2002] TLR 158. According to her the raised issued would only be proved if the applicant is granted leave to appear and defend his case hence prayed the Court to grant him unconditional leave.

In rebuttal Mr. Ngatanda, urged the Court to dismiss the application on the ground that, the applicant has raised no defence at all and if any raised the same is illusory or sham or practically moonshine to entitle this Court grant

him unconditional leave to appear and defend the case as it was held in the cases of **Bagamoyo Eco Energy** (supra), **Nararisa Enterprises Co. Ltd and 3 Others Vs. Diamond Trust Bank Tanzania Ltd**, Misc. Commercial Cause No. 202 of 2015 and an Indian case of **Sam Higginbottom of Agriculture Technology and Science Vs. M/S Acurite Contractors and Engineers**, Civil Revision No. 14 of 2015, High Court of Judicature at Allahabad. According to him there is inconsistencies between what is deposed in paragraph 5 of the affidavit and its annexures hence going against the rule of evidence. He explained that, one, while the applicant is deposing to have paid Tshs. 108,850,000/- out of the rent due the annexed receipts indicate that the total amount paid is Tshs. 73,850,000/-. Secondly that, the annexed sketch map does not support the assertion that, the occupied leased area is 32,000 square meters out of 60,270 for indicating the leased area as 59,282,619 sqm and the occupied one as 29,574,346 sqm. Thirdly that, while the applicant is admitting to have defaulted payment of rent unjustifiably assert it was not so defaulted for three months consecutively. Fourthly that, there is no dispute at all as to when the agreement started to run since the starting date was shifted from 27/01/2021 to July, 2021 due to challenges in implementation of some terms

of agreement. And lastly that, the issue of pendency of applicant's application for review of rent before the 1st respondent does not constitute triable issue for not being supported by any provision of law or term of agreement.

It is Mr. Ngatanda's argument that all the facts allegedly constituting triable issue go against the provision of section 110(1) of the Evidence Act as well as the rule of **incumbit probation qui dicit, non qui negat**, that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative is usually incapable of proof. In view of that submission the Court was invited to dismiss the application with costs for want of merit.

In the alternative to the above prayer Mr. Ngatanda, argued since the applicant is admitting claims of Tshs. 324,150,000/- as unpaid rent arrears then conditional leave be granted to him subject to deposit of the said amount in Court while the Court proceeding to determine on the disputed claim of Tshs. 108,850,000 as held in the case of **Ms/ Mechelec Engineering and Manufactures Vs. Ms/ Basic Equipment Corporation** (1976) 4 SCC 687.

In rejoinder submission while reiterating her submission in chief Ms. Kagembe argued that, in application of this nature the Court is not required to venture into length arguments but rather consider deposed facts in the affidavit in support of the application and see whether have demonstrated a triable issues fit to go to the trial, which triable issues cannot be determined at this stage without availing the applicant chance to defend his case. As to the burden of proof in which the respondents want the applicant to be subject to, she contended the same is too heavy and so higher at this stage as even the relied on cases by the respondents positively support applicant's case as stated in **Mechalec Engineers Vs. Bsic Equipment Corporation** cited in the case of **NARRASSA** where the court observed that, *taking the elements stated in the said case in accumulative, were of opinion that the said case positively support the Applicant case for providing guidelines under which leave to defendant summary suit can be granted.* She said the guiding principles are one, the defendant must satisfy the court that he/she has good defence to the claim on merit. Second, if the defendant raised triable issue indicating that he has a fair or bonifide or reasonable defence although not positively good defence. Third, if the defendant disclose such facts as may be deemed sufficient to entitle him/ her to defend. Meaning that even if the

affidavit does not positively and immediately make it clear that applicant has a defence yet show that such a state of facts are leading to inference that he/ she may be able to establish defence to the plaintiff's claim at the trial of the action, then leave should be granted. In her submission, all the principles above stated are reflected in the facts deposed in paragraph 5 of the applicant's affidavit, hence the application meets all the requirements for its grant. She thus prayed the Court to grant it unconditionally.

Now back to the above raised issue, what is deduced from paragraph 5(a) of the applicant's affidavit and the submission by Ms. Kagembe is the undisputed fact that, the applicant breached the terms of lease agreement for failure to pay rent of the leased property as according to him the rent due stood at Tshs. 324,150,000/- at the time of institution of this suit and that the breach was not for three months consecutively to entitle the respondents issue him a notice for vacant possession for breach contract as per the terms of agreement. What is he disputing is the total amount of rent arrears standing at Tshs. 407,000,000/- as claimed by the respondent since he had already settled the sum of Tshs. 108,850,000/- which plus the rent due of Tshs. 324,150,000/- makes a total amount of rent due to be Tshs. 433,000,000/-, the debt which the respondents disputes that no payments

has ever been effected to that effect. In view of those uncontroverted fact it is the findings of this Court therefore that, a total amount of rent due of Tshs. 324,150,000/- is uncontested by the applicant, as what seem to be contested by him is the rest of the amount of rent due out of the claimed Tshs. 407,000,000/- which is Tshs. 82,850,000/-. Now whether such contested unpaid rent of 82,850,000/- has justification I find is the triable issue calling for determination by this Court.

As to the other four disputed claims or raised issued on the area occupied by the applicant visa viz the total leased area, justification in issuance of notice of vacant possession in absence of breach of rent payment terms for three months consecutively, when did the lease agreement start to run and whether the claimed pending application for rent review has legal justification or not, I find they constitute triable issues fit for determination by this Court. The reason I am so holding is not far-fetched as their proof requires calling in of evidence and therefore their determination at this stage is tantamount to disposal of the main suit on merit without affording the applicant with the right to defence. What the court is entitled to do at this stage in my profound view is to evaluate the facts deposed by the applicant in the affidavit and satisfy itself whether they disclose existence of any triable

issue and bonafide or reasonable defence and not proof of the said triable issues to such higher standard as Mr. Ngatanda would want this Court to believe. It is so as the principle object for provision of summary procedure in certain classes of suits was to prevent unreasonable obstruction by the defendant who had no real defence thereby assisting in securing speedy and expeditious disposal of cases. See the case of **Sam Higginbottom of Agriculture Technology and Science** (supra) which though persuasive I find the principle therein relevant to this case and adopt it. However, the summary suit procedure was not intended to bar the defendant with reasonable or bonafide defence to defend the case against him on the pretext or name of speedy disposal of case as that goes against the principle of natural justice on the right of the party to be heard in any matter affecting his rights before its disposal.

In cherishing that principle of natural justice on the right to be heard, sometimes the Court may grant conditional leave to defend by requiring the applicant to deposit the claimed amount if he has no defence or his defence is illusory or sham or practically moonshine in a bid to try to avail him with opportunity to prove his defence. In that legal stance I find solace in the Indian case of **Ms/ Mechelec Engineering and Manufactures (supra)**

which though persuasive is relevant to the facts of this case and was also cited with approval in the case of **Nararisa Enterprises Company Limited and 3 Others** (supra) whereby the Court in deliberating on the circumstances under which unconditional leave can be granted or the defendant put on terms, had this to say in one of the terms:

"If the defendant has no defence or the defence is illusory or sham or practically moonshine then although the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

In this matter even if the applicant had failed to demonstrate to the court's satisfaction existence facts in his affidavit constituting triable issues for determination by this Court in the main suit or bonafide or reasonable defence, I hold still it was in the discretion of this Court to grant him or not conditional leave upon deposit of the claimed amount. However, since the applicant has sufficiently demonstrated to the court existence of triable issues or bonafide or reasonable defence, I find the application is meritorious and deserve to be granted. Whether the same should be granted

unconditionally or conditionally, since the applicant is admitting part of the claim, I do not find as to why he should not make it good before entering his defence.

All said and done, the application is granted as the applicant is allowed to file a Written Statement of Defence in respect of Civil Case No. 08 of 2023, subject to the condition that a total amount of Tshs. Tshs. 324,150,000/- which is uncontested be deposited first in Court's Bank account, within 30 days of this ruling.

Each party bear its own costs.

Order accordingly.

Dated at Dodoma this 10th May, 2024.



E. E. KAKOLAKI
JUGDE
10/05/2024.

The Ruling has been delivered at Dodoma today on 10th day of May, 2024, in the presence of Ms. Eizabeth Kagembe, advocate for the Applicant, Mr. Nicodemus Agweyo, State Attorney for the 1st and 2nd Respondents, and Ms. Veradina Matikila, Court clerk.

Right of appeal explained.



E. E. KAKOLAKI
JUGDE
10/05/2024.

