

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 2076 OF 2023

(C/F Civil Case No. 26126 of 2023 in the High Court of Tanzania at Moshi)

VIETTEL TANZANIA PUBLIC LIMITED

COMPANY (Trading as HALOTEL) APPLICANT

VERSUS

KIZUNGO VILLAGE COUNCIL

SAME DISTRICT COUNCIL

HONOURABLE ATTORNEY GENERAL

.....RESPONDENTS

RULING

Date of Last Order: 30.04.2024

Date of Ruling : 22.05.2024

MONGELLA, J.

In this application, the applicant is praying for leave to defend against Civil case No. 26126 of 2024 filed by the respondents under summary procedure suit. The application is preferred under **Order XXXV Rule 2, 3(1) and (2) of the Civil Procedure Code [Cap 33 RE 2019]**. The chamber summons is supported by the sworn affidavit of one Deogratius Cosmas Kundyia, the Assistant Branch Manager of Tanga region. The respondents challenged the application vide a joint counter affidavit of one, Glorian Issangya and Upendo Kivuyo, State Attorneys authorized to defend them.

The application was argued orally whereby both parties were represented. The applicant was represented by Mr. Emmanuel Anthony, learned advocate and the respondents by Ms. Glorian Issangya, learned state attorney.

In his submissions in chief, Mr. Anthny averred that the summons sent to the applicant contained a copy of the Plaintiff. That, in the Plaintiff, it is indicated that there was a contractual relationship between the applicant and 1st respondent. The same also shows that the applicant constructed a communication tower on 1st respondent's land. In the premises, he said, the applicant saw the need to file this application for leave to defend upon observing the mentioned contract.

Mr. Anthony asked this court to adopt the applicant's affidavit and to refer to paragraphs 7, 8, 8, 11, 12 and 13 of the applicant's affidavit as well as Paragraphs 9 and 10 of the respondent's joint counter affidavit. He contended that the mentioned paragraphs show that there is dispute as to whether there was an agreement for payment of rent for the communication tower. On that ground, he prayed for the application to be granted so that the dispute be determined on merit.

Ms. Issangya, in reply, also prayed for the respondent's counter affidavit to be adopted as part of her submissions. She opposed the application on three main grounds. **First**, she alleged that the application contained misrepresentation of facts and thus misleading to the court. She contended that under paragraph 10 of the applicant's affidavit it is stated that there was no notice issued to them and there was no any relationship between the parties. Disputing the

averments in the said paragraph, she argued that the demand notice was issued and there was a relationship between the parties as a series of meetings were held between them to inquire on why the applicant was not paying his dues.

Second, Ms. Issangya expounded that at paragraph 9 of her affidavit, the applicant averred that the agreement signed between the 1st respondent and the applicant had no monetary consideration. However, she opposed the assertion arguing that the attached contract showing that the applicant did not have to pay any dues had no lawful consideration.

Third, Ms. Issangya averred that there are no triable issues as the applicant has not advanced any sufficient facts for them to be granted leave. She found no base in the applicant's argument that they were exempted from paying rent since 2015. She thus prayed for the application to be dismissed.

Rejoining, Mr. Anthony denied the accusations that there was misrepresentation of facts regarding not being issued a demand notice. He contended that the 1st respondent never issued a demand notice to the applicant so that they could resolve the matter. He referred to paragraph 8 of the joint counter affidavit together with its annexures contending that the same shows that the demand notice was not issued by the parties to the case, but by the Executive Director.

Mr. Anthony had the stance that there are triable issues because while the applicant avers there was no monetary consideration, the

respondents claim otherwise. In the premises, he prayed for this court to grant the applicant leave to defend and for the respondents to prove their claim on merit. He prayed for no orders as to costs.

I have considered the applicant's supporting affidavit, the respondents' joint counter affidavit, and the rival submissions by both parties' counsels. It is well settled that in summary procedure, the defendant has no direct right to defend himself or herself unless leave is granted to that effect. This position is well laid out under **Order XXXV Rule 2(2) of the Civil Procedure Code** which states:

“In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from the judge or magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted...”

This position was also well expounded by the Court of Appeal in **M/S Roko Investment Co. Ltd vs. Tanzania Electric Supply Co. Ltd** (Civil Appeal 327 of 2019) [2022] TZCA 693 (9 November 2022) TANZLII, whereby the Court explained:

“It should be emphasized that, in suits filed under summary procedure, the defendant has no automatic right to enter appearance and file his written statement of defence. It is a mandatory requirement of the law that before the defendant appears and files his defence, he must first apply for leave to do so under Order XXXV Rule 2 (2) of the CPC.”

In granting leave to appear and defend, the court is to ensure that the applicant has displayed that there are triable issues. Since there is no written statement of defence (WSD) presented as such right depends on leave, such triable issues ought to be displayed in the applicant's affidavit. This position was well detailed in **Prosper Paulo Massawe & Others vs. Access Bank Tanzania Ltd** (Civil Appeal No. 39 of 2014) [2021] TZCA 321 (22 July 2021) TANZLII, in which the Court expounded:

“It is common ground that the underlying factor for grant of that leave is existence of triable issues, a matter of fact which has to be demonstrated by the applicant. 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 applicant has indicated in his affidavit that there was a contractual relationship between her and the 1st respondent and that there was no any monetary considerations. She also contended that there was no any demand notice issued in an attempt to settle the matter between her and 1st respondent. On the other hand, Ms. Issangya contended that there was never a contractual relationship between the applicant and 1st respondent. Further that, that the applicant was served the demand notice.

Discerning from the parties' affidavits and submissions, I find that the parties are at contest on whether there was a contractual relationship between the 1st respondent and the applicant. They are as well at contest on the terms of the alleged contract. I consider these two issues being sufficient triable issues to be resolved between the parties.

At this stage, it is enough to enter such finding and not to entertain the respondent's counsel's arguments contesting the existence of the contract and the terms therein. Doing that shall amount to determining the main suit prematurely.

In the foregoing, I find the application with merit and thus grant the applicant leave to appear and file her defence with respect to the respondents' suit in Civil Case No. 26126 of 2024. The WSD should be filed within 21 days from the date of this Ruling. Considering the nature of the application and that no costs were sought, I make no orders for costs.

Dated and delivered at Moshi on this 22nd day of May, 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA