

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT MUSOMA)

Misc. CIVIL APPLICATION No. 4715 OF 2024

(Arising from Civil Case No. 27199 of 2023 pending before High Court

[Musoma Sub Registry at Musoma])

MWANZA CITY RADIATORS

COMPANY LIMITED APPLICANT

Versus

1. BUNDA TOWN COUNCIL RESPONDENTS

2. THE ATTORNEY GENERAL

RULING

08.05.2024 & 30.05.2024
Mtulya, J.:

This court on 5th September 2000, in the decision of **Tanzania Telecommunications Company Limited v. Timothy Lwoga** [2002] TLR 150, had resolved, at page 158 of the Ruling, that: *if there is one triable issue contained in the affidavit supporting the application for leave to appear and defend then the applicant is entitled to have leave to appear and defend the suit.* The Ruling had immediately received support of the same court in three (3) days, specifically on 8th September 2000 in the precedent of **Mohamed Enterprises (T) Ltd v. Biashara Consumer Services** [2002] TLR 159.

The thinking of this court in the decision of **Mohamed Enterprises (T) Ltd v. Biashara Consumer Services** (supra), at page 163 of the Ruling, was that: *although the intention of filing summary suit pursuant to Order XXXV of the Civil Code was to*

*obtain judgment expeditiously, the **audi alteram partem rule** has its **proprio vigore**. The applicant should therefore be given unconditional leave to defend the suit.* After the dual indicated decisions, a bunch of precedents of this court, for a number of decades, had followed the course (see: **Bagamoyo Eco Energy Company v. National Collage of Tourism & Another**, Misc. Civil Application No. 541 of 2021; **Chissels Limited v. Arusha International Conference Center & Another**, Misc. Civil Application No. 102 of 2022; and **African Banking Corporation Tanzania Limited v. Lake Transport Ltd & Two Others**, Commercial Case No. 291 of 2002).

Our superior court in judicial hierarchy, the Court of Appeal (the Court), had appreciated the move in the precedent of **Makungu Investment Company Ltd v. Petrosol (T) Limited**, Civil Appeal No. 23 of 2013. In the precedent, at page 7 of the judgment, the Court believed that:

The dispute of fact represents itself as a triable issue by any definition...the role of the court was in deciding whether or not there was a factual dispute to resolve which arose from the affidavital evidence presented to him by the defendant. Going further to require the defendant to show a good defence against the summary suit was

going beyond the requirements of the law in an application

to defend a summary suit...

Being conversant with the enactment of Rule 2 (2) of Order XXXV of the Civil Procedure Code [Cap. 33 R.E. 2022] (the Civil Code) and the precedent of this court in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra) and the Court in **Makungu Investment Company Ltd v. Petrosol (T) Limited** (supra), **Mr. Emmanuel Mng'arwe**, learned counsel for **Mwanza City Radiators Company Limited** (the applicant), Mr. Emmanuel Mng'arwe, came to this court on 8th May 2024 praying for leave for the applicant to appear and defend **Civil Case No. 27199 of 2024** (the case) lodged in this court. In the fourth and fifth paragraphs of the applicant's affidavit, the applicant states that **Bunda Town Council** (the first respondent) claims service levy amounting to Tanzanian Shillings 23,593,828.25/= from services rendered outside its jurisdiction.

During submission in favor of the application, Mr. Mng'arwe submitted that the applicant works for gain in Bunda District and Musoma Municipality and in both areas has business license for his activities, but the first respondent claims service levy in the case by combining the arrears in all the two (2) indicated authorities which is contrary to section 6 (1) (u) of the **Local Government Finance Act [Cap. 290 R.E. 2019]** (the Finance Act). According to Mr. Mng'arwe,

the cited section provides for the branches of corporate entities to pay services levy to the urban authorities in whose areas of jurisdiction they are located. In the opinion of Mr. Mng'arwe, the combined levies from two distinct authorities are wrong as the applicant has already paid the levies in Musoma Municipality hence he prays for leave to lodge a defence in the case in order to clear the confusion brought in the case by the first respondent.

The submission and arguments produced by Mr. Mng'arwe was protested by dual learned State Attorneys, Mr. Abdallah Makulo and Mr. Stamili Ndaru, who had appeared for the respondents. According to the dual, the reason produced by the applicant is sham and his prayer for leave may be refused. In their view, the reason of having two (2) branch offices in Bunda District and Musoma Municipality has no merit as the applicant is silent on service rendered, items sold and contribution to each authority.

Similarly, the dual argued that the annexures in receipts are indicating from one (1) EFD Machine which does not support his allegation of having two (2) branches in two (2) distinct authorities. The dual submitted further that the applicant is not honest in his application as he deliberately declined important report showing transactions of 2019 and 2020, which are part of the complaint and important evidence in the case.

In the opinion of the learned State Attorneys, if this court sees there is any merit in the reason produced by the applicant, it may grant the applicant leave with conditions related to the sum of the claimed monies. In substantiating their prayer, the dual cited the authority in **African Banking Corporation Tanzania Limited v. Lake Transport Ltd & Two Others** (supra). In a brief rejoinder, Mr. Mng'arwe submitted that the protest registered by the respondents' State Attorneys is an enquiry into the evidence of the main case in an application for leave, which is contrary to the law and practice. According to him, at the application stage, the court is supposed to scrutinize whether there is any triable issue to be argued in the main case, and no further scrutiny of the evidence.

In the views of Mr. Mng'arwe, during hearing of the main case, exhibits will be produced and contested to resolve the uncertainty on the exact amount which are claimed by the first respondent. Finally, Mr. Mng'arwe submitted that the applicant is only praying for the right to be heard as per article 13 (6) (a) of the **Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution).

Reading the record of present application, it is vivid that both parties are in agreement that there is uncertainty of the amount to be claimed by the first respondent in **Civil Case No. 27199 of 2024**. According to the Court in the precedent **Makungu Investment Company Ltd v. Petrosol (T) Limited** (supra): *the dispute of fact*

represents itself as a triable issue by any definition. The practice has been followed by this court in **African Banking Corporation Tanzania Limited v. Lake Transport Ltd & Two Others** (supra), at page 5 of the Ruling, that: *the actual amount which the plaintiff is entitled to needs to be ascertained.*

Regarding important materials in evidences such as: service rendered; items sold; contribution to each authority; species of EFD Machine; reports showing transactions of 2019 & 2020; and issues related to dishonest of the applicant shall be resolved in the main case. That is the position of the law in the decision of **Makungu Investment Company Ltd v. Petrosol (T) Limited** (supra): *Going further to require the defendant to show a good defence against the summary suit was going beyond the requirements of the law in an application to defend a summary suit.*

In the end, I think the instant applicant has produced plausible explanation to persuade this court to resolve the application in his favor, as I hereby do so. The applicant is granted leave to appear and defend the case. However, before cherishing the right to appear and defend the case, the applicant must deposit in the Judiciary Bank Account a half of the claimed sum of Tanzanian Shillings amount 23,593,828.25/= within forty-two (42) days from the date of this Ruling. I award no costs in this application for obvious reason

that the parties are in search for certainty of the amount of service levy claimed by the first respondent in the case.

Ordered accordingly.



F.H. Mtulya

Judge

30.05.2024

This Ruling was delivered in Chambers under the Seal of this court in the presence of **Ms. Suzana Jacob Gibai**, learned counsel for the applicant and in the presence of **Mr. Stamili A. Ndaru**, learned State Attorney for the defendants through teleconference attached in this court.

F.H. Mtulya

Judge

30.05.2024