

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT MUSOMA)

Misc. CIVIL APPLICATION No. 6253 OF 2024

(Arising from Civil Case No. 27089 of 2023 pending before High Court

[Musoma Sub Registry at Musoma])

JOHN KIRONGOCHI MARWA **APPLICANT**

Versus

1. BUNDA TOWN COUNCIL **RESPONDENTS**

2. THE ATTORNEY GENERAL

RULING

08.05.2024 & 29.05.2024
Mtulya, J.:

Mr. Emmanuel Paul Mng'arwe, learned counsel for **Mr. John Kirongochi Marwa** (the applicant) appeared in this court on 8th May 2024 praying for this court to grant applicant leave to appear and enjoy the right to be heard in **Civil Case No. 27089** (the case). The applicant is sued by the respondents in the case for a claim of service levy amounting to Tanzanian Shillings 27,704,499.93/= from a turnover of business conducted within the jurisdiction of **Bunda Town Council** (the first respondent).

However, before the application for leave was heard and resolved, **Mr. Stamili A. Ndaru**, learned State Attorney for the respondents had registered a point of law for want of time limitation. It was fortunate that both learned officers of this court were aware of the enactment in section 3 (A) (1) and 3 (B) (2) of the **Civil Procedure Code [Cap. 33 R.E. 2022]** (the Civil Code) hence agreed

to argue both the protest and main application for want of speedy justice between the parties. This court noting the agreement will cherish the cited enactment, had granted the learned minds leave to argue both the point of law and merit of the application.

In submitting on a point of law, Mr. Ndaro briefly stated that the wife of the applicant was served summons on the existence of the case on 14th February 2024 and the present application was filed by the applicant on 22nd March 2024, which is more than twenty-one (21) days contrary to Item 1 of Part III of the First Schedule to the **Law of Limitation Act [Cap. 89 R.E. 2019]** (the Law of Limitation). In the opinion of Mr. Ndaro, summons served to any family member of the applicant is conclusive evidence that the applicant has received the same hence he cannot approach the court as he so wishes and lodge an application for leave to defend the case. According to him, the law requires the applicant to lodge an application for leave to defend the case within twenty-one (21) days and failure to do so leads to the dismissal of the application under section 3 (1) of the Law of Limitation for want of time limitation.

In replying the point of law, Mr. Mng'arwe submitted that the protest of Mr. Ndaro has no any merit whatsoever as the applicant had brought the instant application within time. According to Mr. Mng'arwe, the applicant had received summons to file a **Written Statement of Defence** from his wife on 10th March 2024 and

brought the present application on 22nd March 2024. According to Mr. Mng'arwe, mathematics on the subject shows that the applicant took steps within twelve (12) days of lodging the instant application. According to Mr. Mng'arwe, there is no any fault on part of the applicant to receive the summons on 10th March 2024, and if there is any delay of the summons from the wife to the applicant, the respondents should be blamed for failure to abide with Order V Rule 5 (1) of the Civil Code, which requires a party resident within the jurisdiction of the court to be served summons on himself unless a court order is issued. In Mr. Mng'arwe's opinion, in the present record, the order or leave of the court is missing.

Rejoining his earlier submission, Mr. Ndaró insisted that the application was filed out of time and that the same Civil Code, under Order V Rule 11 provides for summons to be served to any adult family member who resides at the defendant's resident. According to Mr. Ndaró, the applicant was served within time and had declined to file the instant application without abiding with the law regulating time limitation or leave of this court.

I have had an opportunity to scan the present record. It is unfortunate that the record is silent has to when the summons was issued and received by the applicant. I have perused the applicant's affidavit and found that it is mute on issues of summons. Similarly, the counter affidavit is silent on the subject. A copy of the

complained summons is neither pleaded nor attached in the instant record. Even if it is assumed that this application is part of the main case, still the protest will require further affidavit of the applicant to provide evidence as to when he had received the summons. After the indicated proof, if any, still this court will be required to resolve issues related to application of Order V Rules 5 (1) and 11 of the Civil Code, before inviting the interpretation of Item 1 of Part III of the Schedule to the Law of Limitation.

In my opinion, I think, the present species of contest displayed by the learned counsels is discouraged by the law and practice in resolving points of law. There is large bundle of precedents regulating the present subject, and this court cannot be detained to navigate on the course (see: **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd** [1969] E.A. 696; **Salehe Rajabu Ukwaju v. Marwa Wambura Ogunya**, Land Case No. 1 of 2022; **National Microfinance Bank PLC & Another v. Bwire Nyamwero Bwire & Five Others**, Misc. Land Application No. 96 of 2023).

In the end, I overrule the objection raised by Mr. Ndaro, which requires further materials from other case files in violation of the rules regulating pleadings and protest on points of law. Having said so, I hereby proceed to determine the application on merit. In the main case, Mr. Mng'arwe submitted that the applicant prays the right

to be heard in the case for reasons that the respondents' plaint displays the amount of a claim of service levy amounting to Tanzanian Shillings 27,704,499.93/= from a turnover of business conducted within the jurisdiction of **Bunda Town Council** (the first respondent), which was wrongly calculated.

According to Mr. Mng'arwe, the applicant had rendered services in different districts of Mara Region and has been paying services levies in appropriate councils, but the respondents have filed the case claiming service levies in several districts out of its jurisdiction contrary to the law. Mr. Mng'arwe submitted further that the confusion brought by the respondents in the case is supposed to be fairly resolved by inviting the applicant to explain on what exactly transpired on payments of service levies.

In his opinion, if the applicant shows that there is a triable issue in the case, and there is no need to produce evidence at this stage of the application. In order to persuade this court in favor of his move, Mr. Mng'arwe cited the precedent of this court in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** [2002] TLR 150 and Court of Appeal in **Makungu Investment Company Ltd v. Petrosol (T) Limited**, Civil Appeal No. 23 of 2013. Finally, Mr. Mng'arwe prayed the application be granted under Order XXXV Rule 3 (1) (b) of the Civil Procedure Code for the applicant to enjoy the

right to be heard under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution).

In contesting the application, Mr. Ndaru submitted that the submission of Mr. Mng'arwe is essentially a legal issue which invites the application of section 6 (1) (u) of the **Local Government Finance Act [Cap. 290 R.E. 2019]** (the Finance Act), which relates to payment of service levies. According to Mr. Ndaru, the indicated law distinguishes two tax payers, in corporate entities (artificial bodies) and natural persons.

Mr. Ndaru submitted further that the applicant is a natural person and did not dispute to have business license issued by Bunda District Council and his offices are located at Bunda District. According to Mr. Ndaru, the applicant admitted in his third, fourth and fifth paragraphs of the affidavit that he has a shop for business at Bunda District, but conducts his businesses at Bunda and other locations, hence the law requires him to pay at his registered authority of Bunda Town Council. In the opinion of Mr. Ndaru, even the allegation of the applicant that he has been paying service levies to other authorities is not justified by official receipts and in any case that will be a breach of section 3 of the **Business Licensing Act [Cap. 208 R.E. 2019]** (the Business Act).

In substantiating his submission, Mr. Ndaru cited the precedents in **Mbeya District Council v. Mbeya Cement Company Limited**, Civil

Case No. 4 of 2018 and **PEK Brother Company Ltd v. Bunda Town Council**, Civil Case No. 4067 of 2024, where this court stated that service levies are payable at the registered office where it is located. According to Mr. Ndaru, the applicant has produced list of customers who had bought items from his shop in annexures, but had declined a display of buyers, sellers and tax authorities. Regarding the authority in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra), Mr. Ndaru submitted that the precedent is not applicable in the present application as the applicant has introduced a point of law to be resolved by this court, and not facts showing a triable issue.

Finally, Mr. Ndaru submitted that applications for leave to defend suits cannot be blindly granted in order to avoid abuse of a court process. In his opinion, the applicant has failed to produce sufficient reason to be granted leave to file written statement of defence in the case hence the application be dismissed to avoid mash of the applicant.

Rejoining the submission, Mr. Mng'arwe argued that the application shows a triable issue and this court may grant the same. According to him, to dispute the entities in the annexure is wrong at this stage as the applicant will explain the entities and their authorities if granted leave to bring the materials in the main case. On the precedent of **PEK Brother Company Ltd v. Bunda Town**

Council (supra), Mr. Mng'arwe submitted that the case is still disputed at the Court of Appeal to have the appropriate legal position. In the opinion of Mr. Mng'arwe the precedent in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra) has produced a principle that there is no need of evidence at this stage and what is required is a triable issue in the main case. According to Mr. Mng'arwe the precedent in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra) insist the right to be heard in cases registered in our courts and this court may wish to follow the course.

I have read Rule 2 (2) of Order XXXV of the Civil Code and the four (4) indicated precedents in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra), **Makungu Investment Company Ltd v. Petrosol (T) Limited** (supra), **Mbeya District Council v. Mbeya Cement Company Limited** (supra) and **PEK Brother Company Ltd v. Bunda Town Council** (supra). The indicated Rule 2 (2) of the Civil Code empowers this court to resolve issues related to leave to defend suits in summary procedures.

In the precedent of **PEK Brother Company Ltd v. Bunda Town Council** (supra), this court had refused leave for the applicant to defend a suit for reasons of failure to disclose triable issue or a plausible defence. In the opinion of the court at page 13 of the decision: *the facts averred by the applicant shows that there is no*

triable issue or plausible explanation, but interpretation of the law, which the parties have addressed and the same has been resolved.

Similarly, the decision in **Mbeya District Council v. Mbeya Cement Company Limited** (supra), this court thought at page 1 of the judgment that: *the crux of the matter lies on interpretation of section 7 (1) (a) of the Local Government Finances Act [Cap. 290 R.E. 2019].* In replying the root of the matter, this court at page 9 of the judgment had resolved that: service levy is paid from total amount of goods sold by the company during particular period of time. According to the court in the precedent, when cement was transported from the plaintiff's jurisdiction to other areas where the defendant had depots and later sold, the sales are deemed to have been done from the cooperate entity.

On the other hand, this court in the precedent of **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra), at page 150 of the Ruling held that: defendant is entitled to leave to appear and defend a summary suit if it is shown that there is a triable issue. According to the court, at page 158 of the Ruling: 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 in the precedent was issued on 5th September 2000 and three (3) years on, the course was followed by the same court

in the case of **African Banking Corporation Tanzania Limited v. Lake Transport Ltd & Two Others**, Commercial Case No. 291 of 2002. In the case, this court had cited an Indian case of **M/S Mechalec Engineering & Manufactures v. M/S Basic Equipment Corporation** (1997) AIR 577, and listed down five criteria in resolving applications, like the instant one. This court then, at page 4 of the Ruling, thought that: no single provision under Order XXXV of the Civil Code that automatically bars right to defend a suit for reasons of dishonored cheques. Finally, at page 5 of the Ruling, the court held that: *the application by the defendants not only shows that they have good defence, but also raised triable issues*. This court then granted the application and allowed the applicant to file a defence in the case without any conditions. The reason of doing so is cited at page 5 of the Ruling, that: *the actual amount which the plaintiff is entitled to needs to be ascertained*.

The practice in commonwealth jurisdiction of India and this court had found the support of the Court of Appeal (the Court) in the indicated precedent of **Makungu Investment Company Ltd v. Petrosol (T) Limited** (supra). The Court, at page 7 of the judgment, thought 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...if he has already disclosed the defence on merit during the hearing of the application for leave to defend, what will he include in the statement of defence?... we are satisfied that a triable issue is disclosed in the application for leave to defend and the applicant should have been given leave to defend.

Noting the position of the two (2) indicated precedents of this court in **Tanzania Telecommunications Company Limited v. Timothy Lwoga** (supra) and **African Banking Corporation Tanzania Limited v. Lake Transport Ltd & Two Others** (supra) and the decision of the Court in **Makungu Investment Company Ltd v. Petrosol (T) Limited** (supra), it is obvious that when there is a triable issue in an application like the present one, this court may grant the application for leave to defend a summary suit. The question before this court in the instant application is whether the applicant has disclosed any triable issue.

In my considered opinion, the learned minds of the parties in the present application have displayed three (3) disputes containing both facts and law, namely: first, whether the applicant actually paid

part of the claimed levies to other authorities; second, whether the authorities are taxing authorities; and finally, whether the claimed payment to the other authorities, if substantiated, was proper in law. The three (3) issues cannot be resolved in the instant application. That will be going beyond the requirements of the law in an application to defend a summary suit. In brief, the three (3) disputes show that the present application displays triable issues.

I am aware of the decision in **Mbeya District Council v. Mbeya Cement Company Limited** (supra). However, this court in the precedent was resolving the main case, not application for leave. This court at this stage is restricted to go such far beyond searching for merit of the case. Similarly, I decline the decision in **PEK Brother Company Ltd v. Bunda Town Council** (supra) as it is distinct from the present application which shows a dispute of mixed materials of points of law and facts. In any case, this court is not bound by its own previous decisions. When it appears right to depart, it may do so. Finally, the current trend in this court is in favor of the right to be heard as part of cherishing enactment in article 13 (6) (a) of the Constitution.

Having said so, I grant the applicant leave to defend the case. However, before the applicant can appear and produce his defence in the case, he must deposit in the Judiciary Bank Account a half of

the claimed sum in the case. I award no costs in the instant application as the parties are still in search of their rights in the case.

Ordered accordingly.



F.H. Mtulya

Judge

29.05.2024

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

29.05.2024