

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

MISC. APPLICATION NO. 80 OF 2023

*(Arising from Commercial Case No. 1 of 2023 at the High Court of Tanzania –
Musoma Sub Registry)*

BETWEEN

JAMES A. BIA APPLICANT

VERSUS

FINCA MICROFINANCE BANK LTD RESPONDENT

RULING

13th & 20th March, 2024

M. L. KOMBA, J.:

The applicant, **James A. Bia** has been sued by the respondent herein under summary procedure suit (High Court Commercial Case No. 01 of 2023) premised under Order XXXV Rule 1 (c) of the Civil Procedure Code [CAP 33 R.E 2019]. The respondent claims the total sum of TZS. 92,801,346.55 against the applicant being an outstanding principal loan and accrued contractual interest and late payment fee due as at 17th January 2023.

Summarily, the respondent herein facilitated the applicant with the loan to the tune of TZS. 80,000,000/= on 12th March, 2020. Among others, the agreed terms of repayments were the loan to be serviced within 36

months and the applicant secured the loan by a mortgage over his two houses and shop inventories. The applicant defaulted to pay the loan as per agreed terms, hence the respondent filed a summary suit against him.

As it has been provided by the law (Order XXXV Rule 2 (1)), under summary procedure the defendant has no automatic right to enter appearance and defend the suit against him/her unless he/she obtains the leave of the Court to do so. See also the case of **M/s Roko Investment Co. Ltd vs Tanzania Electric Supply Co. Ltd (Civil Appeal 327 of 2019) [2022] TZCA 693 (9 November 2022)**.

Thus, now, by way of chamber summons premised under Order XXXV Rule 2 (1) and (2) of the Civil Procedure Code [CAP 33 R.E 2019], the applicant lodged the present application praying for the following orders:

- 1. That, this Honorable Court be pleased to grant the applicant leave to appear and defend Commercial Case No. 01 of 2023, which has been filed by the respondent against him.*
- 2. Costs to be in the course.*

The application was supported by an affidavit deposed by the applicant. Responding to application, the respondent filed a counter affidavit to contest the application.

In his affidavit, the applicant deponed that on 12th March, 2020 he borrowed Tshs. 80,000,000/= from the respondent which it has to be repaid within 36 months. He averred that he was repaid the said loan at the rate of 1,000,000/= per month for 24 months, and from 10th November, 2020 he requested the respondent to allow him to repay the loan at Tshs. 500,000/= every month with effect from the same date till on 14th December, 2022 hence he has repaid a total amount of Tshs. 24,500,000/=. He argued that he was in full communication with the respondent but he was never received any demand note lather he has seen them in plaint. He attached the bank statement showing loan repayment made up to 15th March 2023 (annexture ICA – 1)

The respondent in her counter affidavit deponed by her Principal Officer **Gabriel Ipyana** she averred that, a request by the applicant to rescheduling the payment rate from Tshs. 3,400,000/= to Tshs. 1,000,000/= through his letter dated 8th October, 2020 was rejected by the respondent through his letter dated 15th February, 2021 and 12th May, 2021 (annexture KZR/2 and KZR/3) and the applicant was required to proceed at with the payment of the loan at the agreed rate of Tshs. 3,400,000/=. .

The respondent further averred that, the applicant through his letter dated 11th March, 2021 he acknowledges having received demand notice

dated 17th November, 2020 from the respondent requesting him to fulfill his contractual obligation. She added that the applicant also denied the 60 days default notice, served by Alex S. Mugabo, the process server. She bolstered her averment by attaching a copy of the applicant's letter (annexture 4) and a copy of 60 days default notice together with a copy of an affidavit of the process server (annexture 5).

When the application was brought before this court for hearing, the applicant was represented by Mr. Thomas Ilanga while on the other hand the respondent had the service of Ms. Tupege Mwambosya, both being an advocate.

Submitting in support of the applicant's application, Mr. Ilanga argued that their intention for this application is to be granted right to be heard as basis of natural justice. He added that it is constitutional right which about fairness and equity before the law as per Article 13 (6) (a). The counsel was of the views that, in absence of his client defence, the applicant will get irreparable loss. He therefore prayed his application to be granted and the costs to be in the cause.

Responding, Ms. Tupege concurred with the applicant's advocate submission on right to be heard as per constitution, but she was of the opinion that every general rule has exceptions. The counsel submitted

that they filed commercial case which is civil in nature and that the applicant depend on Civil Procedure Code (the CPC) which has directives on how the summary suit can be filed and be defended. She added that Order XXXV Rule 3 (1) (c) of the CPC is about leave to appear when the mortgage has been discharged or loan not taken. She proceeded that the applicant should have show in affidavit that he paid loan or he has never applied for loan. Affidavit by the applicant has admission that he borrowed the money and he did not explain whether he paid the loan, even he did not show the party payment if any. She insists that the applicant explain about exchange of letters instead of proving the payment. She prayed the application to be dismissed.

In rejoinder, the applicant's counsel argued that, paragraph 3 of the applicant's affidavit is clear that he paid Tshs. 24,500,000/= by December and he has attached the bank statement.

Having been heard the submissions of the parties and pass through the application records, it is now the duty of this court to see whether the applicant has established the triable issues which warranting him to be granted leave to defend the case instituted against him by the respondent.

The decision in the case of **M/S Mechalec Engineers & Manufactures vs M/S Basic Equipment Corporation** 1977 AIR 577

set out the principles to be followed while considering the question of granting leave to defend. These principles are:

- 1. The defendant must satisfy the court that he/she has a good defence to the claim on its merits.*
- 2. If the defendant raises triable issue indicating that he has a fair or bonifide or reasonable defence although not a positively good defence.*
- 3. If the defendant discloses such facts as may be deemed sufficient to entitle him/her to defend. That is to say although the affidavit does not positively and immediately make it clear that he/she has a defence yet shows that such a state of facts as leads to the inference that at the trial of the action he/she may be able to establish a defence to the plaintiff's claim.*
- 4. If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then or practically moonshine then ordinarily the defendant is not entitled to leave to defend.*
- 5. If the defendant has no defence or the defence is illusory or sham or practically moonshine the defendant may be denied leave. Alternatively, the court can allow the defendant to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such conditions.*

It is undisputed that the applicant obtained the loan from respondent and secured it with his mortgaged properties. That means upon default the respondent was correct to file the suit against him under Order XXXV Rule 1 (c) of the CPC.

In his affidavit the applicant averred that on 10th November, 2020 he requested the respondent to reschedule the payment rate from TZS 1,000,000/= every month which he has used to pay for 24 months to TZS 500,000/= with effect from that date and that up 14th December, 2022 he has already repaid a total amount of TZS 24,500,000/=. He also contended that he has been in communication with the respondent but he has never received any demand note.

I am at one with the respondent's counsel that the applicant should have to succeed to obtain the leave to defend his case when his mortgage has been discharged or he had not taken a loan as stipulated under Order XXXV Rule 3 (1) (c) of the CPC. For more clearance the said provisions state as follows:

3.- (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-

(a) disclose such facts as would make it incumbent on the holder to prove consideration, where the suit is on a bill of exchange or promissory note;

(b) disclose such facts as the court may deem sufficient to support the application; or

(c) in suits arising out of mortgages, where the mortgagor demonstrate that-

*(i) **loan or the portion of the loan claimed is indeed discharged;** or*

(ii) loan was actually not taken.

In the case of the **Felix Gamaliel Mosha & Another vs Exim Bank (T) Limited (Misc. Commercial Cause 273 of 2015) [2016] TZHCComD 2 (12 May 2016)** it was said:

*"The statutory criteria set by Rule 3 (1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] states that leave to appear and defend the suit is granted when it is established either (1) the loan was not taken (2) the loan has been paid (3) **part of the loan** has been paid. It seems payment envisaged under the above-mentioned Rule is payment done for the purpose of liquidating the loan to the bank.*

Since in the Applicant affidavit, there is no proof if he has paid the loan or part of it, I find the reasons advanced by the Applicant for leave to appear and defend the suit, with great respect did not met the statutory criteria

stated under Rule 3 (1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002} under which the court may exercise its powers and grant the application.”

Unlike the situation in the case of **Felix Gamaliel Mosha (supra)**, in the case at hand the applicant has proved to this court that he had already paid part of the loan. He had also contended that he had requested the change of payment schedule rate to the respondent and that he had been paid TZS 1,000,000/= per month in 24 months although the respondent contended that she has never agreed with applicant to change the payment rate from TZS 3,400,000/= as per terms of contract.

Under such circumstances I agree with the applicant that he entitled the right to appear and defend the claim against him. The application by the applicant not only shows that he has a good defence but it also raises triable issues.

Basing under Order XXXV Rule 3 (1) (c) (i) of the CPC the application is allowed. The applicant is hereby granted leave to appear and defend his case as per this court calendar. Costs to follow the events.

It is so ordered.



Nk
M. L. KOMBA
JUDGE