

IN THE HIGH COURT OF TANZANIA
(Commercial Division)
AT DAR ES SALAAM

COMM. CASE NO.23 OF 2000

CRDB BANK LTD.....PLAINTIFF/RESPONDENT
Versus
F. M. GENERAL MERCHANDISE Co. Ltd....1st DEFENDANT)
FARID MBARAKA SAID.....2nd DEFENDANT)
MOHAMED SAID.....3rd DEFENDANT) APPLICANTS
SAID MBARAKA.....4th DEFENDANT)

Counsel: Mr. D. Kashumbugu.....for the Applicants
Mr. D. Lyimo..... for the Respondent

U L I N G

BWANA, J.

The main suit was instituted under the Summary Procedure, Order XXXV of the Civil Procedure Code (CPC). The plaintiff therein prays for judgment against the defendants for payment of both a principal sum and interest thereon arising from the defendants' failure to pay a loan advanced to them by the former.

Invoking the provisions of Rule 3(1) of the said Order XXXV, the defendants jointly filed this application requesting this court to grant them leave to defend the suit. The role of this court at this juncture therefore and

as stated by the late Mwakasendwa Ag. J. (in David Sasson & Co. vs Navichandra Pate and others (1972 HCD 148) is.....

“ simply to decide upon the affidavits.. whether there is disclosed any issue fit to go for trial and no more...”

Are there (or is there any) triable issues raised by the Applicants in their joint affidavit? Examining it, three issues seem to be raised by the Applicants and vehemently controverted by counsel for the Respondent. The three issues concern the Applicants’ physical address; the promise to pay the interest; and the 21% interest claimed by the Respondent but categorically denied by the Applicants as not having been agreed upon. The three issues which form a basis for the main suit, are disputed and therefore ought to be tried.

In a recent Ruling of this court (per Nsekela, J) some Indian guidelines were adopted, citing the Indian case of M/S Mechalec Engineers and Manufactures Vs M/S Basic Equipment Corp. (1977) AIR SC 577. The said court was construing Order XXXVII of the Indian Civil Procedure Code which is “pari materia” with Order XXXV of our CPC. Simply put, the five guidelines may be succinctly stated as follows (after examining the Applicant’s Affidavit):-

1. The plaintiff is entitled to a judgment if the defendant’s , Affidavit raises no triable issue (s) or simply is a sham or illusory or “practically moonshine”.

2. The court may grant leave to the defendant to file a defence on condition that he pays into court or otherwise secured, the sum claimed by the plaintiff. In so doing the court will be exercising its mercy to the defendant by “enabling him to prove a defence”.

However


3. If the defendant's Affidavit satisfies the court that there are merits and triable issues, then he is entitled to an unconditional leave to defend. A judgment will not be entered in favour of the plaintiff as of right.
4. The same principle (as in 3 above) applies in situations where the defendant's Affidavit indicates that he has a fair or a bonafide or reasonable defence although not a positively good one.
5. Although the defendant's/applicant's Affidavit does not positively and immediately make it clear that he has a defence, if he discloses such facts as may be deemed sufficient to entitle him to defend or that he shows such a state of affairs that lead to the inference that at a trial of the action he may be able to establish a defence to the plaintiff's claim, such a defendant is entitled for leave to defend the suit.

In the instant application the Applicants aver that their physical addresses were known to the Applicant. Instead, the latter proceeded to effect service by publication, an act considered by the Applicants as having tarnished their image. As a result thereof, they claim for costs. The Respondent has raised a strong counter argument in his favour.

Likewise, the Applicants aver that the issue of charging 21% interest was nowhere agreed upon by the parties. The Respondent avers that it is there and shown in the Loan Agreement document.

All in all, I consider the foregoing matters to be triable, thus falling under the provisions of Rule 3(1) of Order XXXV. I therefore allow this Application – the Applicants are granted unconditional leave to defend this suit. However, no order as to costs is provided.




Sgd: S. J. Bwana

JUDGE

18/7/2000