

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 11 OF 2000

**CRDB BANK LIMITED.....PLAINTIFF/RESPONDENT
VERSUS
ARBOGHAST MKAHE OISO
T/a AUTO ASSESSORS COMPANY.....DEFENDANT/APPLICANT**

RULING

KALEGEYA, J:

The Defendant is applying for leave to defend in a summary suit filed under O. 35 of the Civil Procedure Code. This is in response to a suit filed by the plaintiff against Defendant for recovery of a sum of Shs.28,161,210.84 being an “outstanding balance made up of principal and interest in respect of” of an overdraft facility extended to Defendant by plaintiff.

The Defendant/Applicant is represented by Mr. Eustace, Advocate while Mr. Mwandambo represents the Plaintiff/Respondent.

Mr. Eustace, Advocate, vehemently argued that the Defendant has meritorious grounds which entitle his client to a leave to defend. He enumerated and argued them as follows: that the overdraft was given for the purposes of importing motor vehicle spare parts which were indeed ordered but due to exporter’s failure to send relevant documents the same (spare parts) have been blocked by Harbours’ Authority at Dar es Salaam port; that the interest of Shs.8,161,210.84 charged is above the agreed rate of 21% per annum which would have brought the figure to just Shs.4.5 Million; that this case is unmaintenable before this Court as the same issues are subject of Civil Case No. 270/99 filed in the High Court Registry in which a temporary injunction barring attachment or disposal of the mortgaged property was issued which factors would lead to conflicting decisions if this Court went ahead and gave a decision herein. He concluded by

imploing the Court to grant leave to defend. Other prayers made in the alternative of each other include ordering stay of proceedings in this matter pending the determination of Civil Case No. 270/99; consolidating the two cases or advise the plaintiff to file a counter-claim in Civil Case. No. 270/99.

In response Mr. Mwandambo submitted that liability for repayment on the overdraft facility did not depend on clearance of the spare parts from the harbour nor their sale as the overdraft was just part of working capital for importation of spare parts business; that the interest of Shs.8,161,210.84 is correct as it is compounded; that the parties and issues in Civil Case No. 270/99 are different from the present ones hence the question of unmaintenality or necessity of filing a counter-claim do not arise; and that there is no injunction order in force as the one passed 21/7/99 expired on 20/1/2000 in terms of O. 37, Rule 3 as amended by GN 508/91. He concluded by submitting that as there are no triable issues the leave sought should not be granted – referred to **Estratins Karageorgelis vs Emanuel Mavrondis; Misc. Civil Application No. 33/94, M. Yusuf vs NBC & another and Shivji vs M. Dewshi (1971) HCD 176.**

In rejoinder, Mr. Eustace insisted that the three cases cited are in his favour as leave was granted in all; that O. 4, Rule 3 CPC is couched in very wide terms covering facts of both case; that the overdraft agreement simply provided for 21% interest and nothing more. As regards the life span of the temporary injunction granted in Civil Case No. 270/99 Mr. Eustace, impresses that we should tread and be guided by its wording which expressly provided, “.....until the disposed of the application for temporary injunction interpartes or until further orders of this Court.”

I should out rightly make it clear from the outset that what is before this Court is an application to defend and nothing more. What the applicant is required to show at this stage is that there are triable issues which entitle him to a leave to defend, that is leave which would properly make him make representations to the Court in relation to the suit mounted against him. Once the Defendant manages to establish a prima facie triable issue the Court is bound to grant leave. After leave has been granted only then can the

Defendant present the defence including raising preliminary objections, if any. The cases referred to by Mr. Mwandambo for plaintiff portray nothing but the existing legal stand. On those premises it would not be proper at this stage to decide on whether repayment of the overdraft was pegged on the sale of the imported spare parts; whether the interest was compounded or simple (merely at 21%) or even whether the existence of Civil Case No. 270/99 bars institution of this case. What is required is for the defendant to merely raise these disputable matters. Once they are raised leave has to be granted. Then the mode of pursuing them will depend on the Defendant's decision – whether to raise them as preliminary objections if they fit the situation or leave them in the main body of the written statement of defence to be decided upon after full trial. This is so because short of that the Court will find itself going into evidence prematurely, and putting Defendant on defence which is exactly the basis of his prayer: that he be allowed to defend.

On those grounds, I hold that the detailed arguments and issues raise cannot be decided upon now. I am satisfied that there are triable issues which entitle the Defendant to be granted leave to defend and these include, as already expressed, whether sale of spare parts was a condition precedent to repayment of the overdraft, and whether the interest charged was compound or simple. Leave to defend is granted accordingly.

L.B. KALEGEYA

JUDGE

Order:

- (i) The Defendant to file his WSD by 18th May, 2000.
- (ii) The Plaintiff to file reply, if any, by 24th May, 2000.
- (iii) 1st Pre-trial and Scheduling Conference on 25th May, 2000.
- (iv) Ruling and order to be delivered by RCC or his Deputy as I will be attending a Workshop.



L.B. KALEGEYA

JUDGE

I Certify that this is a true and Correct
of the original order Judgment Ruling

Registrar

Commercial Court

Dar es Salaam

Dated 31/7/ of 2000