

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

COMMERCIAL CASE NO. 291 OF 2002

AFRICAN BANKING CORPORATION
TANZANIA LTD.....PLAINTIFF
VERSUS
LAKE TRANSPORT LTD.....1ST DEFENDANT
YUNUS SALUM.....2ND DEFENDANT
SHAMAUM SALUM.....3RD DEFENDANT

R U L I N G

KIMARO, J.

LAKE TRANSPORT LTD, YUNUS SALUM and SHAMAUM SALUM have been sued as the first, second and third defendants respectively. They have been sued by AFRICAN BANKING CORPORATION TANZANIA LIMITED, under a summary procedure, (Order XXXV of the Civil Procedure Code, 1966) for recovery of T.shs 212,113,965/56 allegedly being monies advanced to the defendants under Straight Financial Lease. In the plaint all the three defendants are simply described as business person much as it is clear that the first defendant is a legal person. The 2nd and 3rd defendants are shown to be sureties to the Straight Financial Lease and they signed a deed of suretyship to guarantee repayment of the loan by the first defendant.

It is averred in the plaint that the Straight Financial Lease was issued for purposes of purchase of vehicles to facilitate enhancement of the defendant's transport capacity. In the process of repayment, the first defendant issued five cheques which were dishonoured. It was then the

plaintiff filed a summary suit against the defendants. The plaintiffs are represented by Mr. Msechu, Learned Advocate.

Through services of Mr. Evody Mmanda, Learned Advocate, the defendants have filed an application for leave to appear and defend the suit. The application has been filed under Order XXXV rr 2 (1) and 3(1)(b) of the Civil Procedure Code 1966. The application is supported by affidavits sworn by both second and third defendants. Basically, the two defendants are disputing the amount which is due to the plaintiff. It is deposed in their affidavits that the Straight Financial Lease was for T.shs 179,800,000/=. The first defendant paid T. shs 98,159,400/=. In addition, the plaintiff seized two brand new buses from the first defendant (TZM 4841 and TZM 4842) and sold them. The defendants believe that the purchase price of each of the buses was more than T. shs 50,000,000/=. Given the fact that the first defendant paid T.shs 98,159,400/= and the plaintiff sold the two brand new buses at a purchase price of more than 100,000,000/= the defendants dispute that the plaintiff is entitled to the amount which she is claiming. On the facts which have been exposed above, Mr. Mmanda's argument is that there is a contentious matter on what the plaintiff is claiming.

In reply, Mr. Msechu mainly concentrated on the aspect of the dishonoured cheques. He questioned why the 1st defendant issues dishonoured cheques and remained silence in the application for leave to appear and defend. As for the money which the first defendant is said to have repayed the plaintiff, Mr. Msechu acknowledged receipt of the same. He equally admitted sale of the two buses but said the price fetched was not sufficient to cover the amount claimed by the plaintiff. He cited

the case of **M/S Mechalec Engineers & Manufactures V M/S Basic Equipment Corporation 1977 AIR 577.**

The decision cited by Mr. Msechu is a very good decision because our Civil Procedure Code has been adopted from India Civil Procedure Code. Our Order XXXV is in pari materia with Order 37 of the Indian Civil Procedure Code.

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

- i) *The defendant must satisfy the court that he/she has a good defence to the claim on its merits.*
- ii) *If the defendant raises triable issue indicating that he has a fair or bonifide or reasonable defence although not a positively good defence.*
- iii) *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.*
- iv) *If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the defendant is not entitled to leave to defend.*

- v) *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.*

Mr. Msechu tried to convince this court that the defendants should not be granted leave to defend because they do not have a bonifide defence. The only reason why Mr. Msechu shares that opinion is because of the dishonoured cheques issued by the defendant. Mr. Msechu has a fixed mind that where dishonoured cheques are issued, the defendant is not allowed by law to be granted leave to appear and defend.

With greatest respect to Mr. Msechu, I do not agree with him. A close perusal of the entire provisions of Order XXXV does not support Mr. Msechu's view. No single provision says that dishonoured cheques automatically denies the defendant the right to defend the suit. Nor would I agree with Mr. Msechu that issuances of dishonoured cheques would always leads to an inference that the defendant has no bonifide defence.

There is no dispute that the amount of the loan which the first defendant received from the plaintiff through the Straight Financial Lease was T.shs 179,800,000.00. The plaint shows that the plaintiff is now claiming for T.shs 212,113,963/56. It is on record that the first defendant paid T.shs 98,159,400/=. Two brand new buses were also sold. There is no breakdown of the amount of T.shs 212,113,963/56 claimed by the plaintiff. Nor has the plaintiff indicated the amount already repayed by

the first defendant. Under such circumstances I will entirely agree with Mr. Mmanda that the actual amount which the plaintiff is entitled to needs to be ascertained. The application by the defendants not only shows that they have a good defence but it also raises triable issues. The application is allowed with costs. They are granted unconditional leave to appear and defend.

N.P.KIMARO

JUDGE

02/04/03

I Certify that this is a true and Correct
of the original Judge endorsing
.....
Registrar
Commercial Court
Dar es Salaam
Dated 3/4/2003