

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 239 OF 2014

EXIM BANK (TANZANIA)

LIMITED.....RESPONDENT/PLAINTIFF

VERSUS

M/S SERO LEASE AND FINANCE

LIMITED.....1ST APPLICANT/1ST DEFENDANT

VICTORIA KISYOMBE.....2ND APPLICANT/2ND DEFENDANT

FAUSTA LEMA.....3RD APPLICANT/3RD DEFENDANT

ERRINE TUKAI NJIKU.....4TH APPLICANT/4TH DEFENDANT

MARY MBEYELA.....5TH APPLICANT/5TH DEFENDANT

IRINE KASAMBALA.....6TH APPLICANT/6TH DEFENDANT

M/S SERO BUSINESS

WOMEN ASSOCIATION

(SEBA).....7TH APPLICANT/7TH DEFENDANT



FABYAN SHEMAPEMBA....8TH APPLICANT/8TH DEFENDANT

RULING

Mansoor, J:

Date of hearing – 12th MARCH 2015

Date of Ruling- 19th MARCH 2015

The plaintiff has filed a suit for recovery of Tshs 2,019,724,766.42 and US\$ 9,215.38 under the provisions of Order 35 of the CPC.

It is the case of the plaintiff that the plaintiff has given five different term loans to the 1st defendant so as to increase the coverage of credit services to business women. The rests of the defendants gave their personal and corporate guarantee, and a promissory note to guarantee payment of the loan amount and interest. The loan amount and interest was supposed to be paid in 16 equal instalments after a moratorium period of 12 months from the date of the 1st disbursement. The first two Term Loan Facilities and the 4th Loan attracted interest of 16 percent per annum together with a penal interest of 27% per annum on



default. The Third Loan attracted the interest of 11% per annum and a penal interest of 14.5 %, and the 5th Loan attracted the interest of 17% per annum and a penal interest of 27%. It is the plaintiff case that the outstanding unpaid loan amount inclusive of interest and penal interest as at 31st August 2014 was Tshs 2,019,724,766.42 and US\$ 9,215.38.

To the above claim of the plaintiff, the defendants, having been served, filed appearance and thereafter filed an application under Order 35 Rule 2 (2) (a), 3 (1) (b) and (c) and Order XLIII Rule 2 of the CPC seeking unconditional leave to defend the suit. This prayer was made by the applicants supported by an affidavit of one Yona Abraham Kalinga, who is 1st Defendant's Principal Officer on the ground that the plaintiff has demanded the whole amount of the Term Loan without taking into consideration that the considerable amount of the Loan were already paid, that the matter is Res Judicata as the matter on the same cause of action and between the same parties was dismissed by this Court (Commercial Case No. 161/2014 before



Hon. Nchimbi J) since 28/01/2014. The case was dismissed under Rule 31 of the Commercial Rules, 2012 for non appearance of the Plaintiff during 1st Pre Trial Conference, and that some of the claims were time barred.

Learned counsel appearing for the defendants argued that the defendants has made out an arguable case and has prima-facie created a doubt in the credibility of the amount of the claim raised by the plaintiff and triable issues arise in the present case, which would entitle the defendants for grant of unconditional leave.

Coming to the facts of the present case, it cannot be said that the defense taken by the defendant in leave to defend application is totally sham. There are certain circumstances, coupled with certain facts on the part of the plaintiff which may prima facie raise some doubt about the credibility of its version of the outstanding amount of loan remained unpaid as at 31st August 2014 and may lend some credence to the defense taken by the defendant that the outstanding loan amount in question, and the interest, plus the penal interests did not take into



consideration the amount of payment already made to the bank. The bank statement attached to the affidavit of Yona Abraham Mwakalinga shows that as at 21 February 2012, the 1st Defendant made a disbursements of Tshs 1,027,707,173.00 towards the restructured loan, and the balance outstanding inclusive of interest as at that date was Tshs 86,498,079.62 only.

Although as per the plaintiff, claims that the unpaid balance as at 31st August 2014 was Tshs 2,019,724,766.42 and US\$ 9,215.38, not a single statement or report was written and attached by the plaintiff to its plaint or counter affidavit showing the exact amount of the outstanding principal sum of the loan, the interests and the penalty, and also showing how much was already paid by the defendant. Further to the pointed query from the Court, learned counsel for the plaintiff made candid admission to the effect that no such statement or detailed account of that sort was filed in court to enable the Court make a finding that the amount claimed in the plaint is actually the amount which is outstanding. It is not explained by the plaintiff



as on what account the payments made by the 1st defendant (if any) were received (credited). Filing the Suit under Order XXXV of the Code of Civil Procedure it was still necessary for the plaintiff to present the proper and detailed statement of account showing the exact amount of Loan disbursed to the defendants, how was the loan serviced by the defendants, how much is the outstanding principal sum as at the date of filing the suit, how much is the interest, and how much is the penalty. This was not done. Thus the defendants have raised good defense and triable issue indicating that they have fair and bonafide defense. In this case the plaint will have to be dealt with in ordinary way.

It is settled rule of law that wherever the defense put forth by the applicant/defendant is bonafide, raises triable issues and is not a moonshine, the applicant/defendant would be entitled to leave to defend conditional or unconditional depending upon the facts and circumstances of each case.

Rule XXXV of the CPC vests pervasive judicial discretion in the Court to grant, refuse or grant conditional leave to defend, the suit, by the defendant. This discretion, of course, has to be



exercised in accordance with settled principles of law. Where the Court exercises its discretion either way, it must have a direct nexus and relation to the contents and specific pleadings of the parties. The interest of justice demand that interest of no party should be jeopardized. Where the interest of the plaintiff is to be secured, the defendant should also have a fair chance to prove his defense. This Court have considered the following factors for granting an unconditional leave to the defendants to defend this suit:

(a) The defendants have satisfied the Court that they have a good defense to the claim on merits;

(b) The defendants raised a triable issue indicating that they have a fair or bonafide or reasonable defense, although not a possibly good defense;

(c) The defendants disclosed such facts sufficient to entitle them to defend, that is, the affidavit disclosed that at the trial they may be able to establish a defense to the plaintiff's claim,



(d) The defendants have shown that their defense is not sham or illusory or practically moonshine.

As the defendants have been granted unconditional leave to defend, the defendants would file written statement of defence within 21 days from today with a copy to counsel for the plaintiff, who may file reply thereto within two weeks thereafter. The parties would file original documents in their power and possession along with their pleadings now. The case shall be listed before me for 1st Pre Trial Conference on 15th April 2015.

DATED at DAR ES SALAAM this 19th day of March, 2015


MANSOOR
JUDGE
19TH March 2015

