

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**CONSOLIDATED MISC. COMMERCIAL CAUSES NO. 58 OF  
2015 AND 94 OF 2015**

**ECICA TRADING**

**LIMITED.....1<sup>st</sup> APPLICANT/DEFENDANT**

**ELIAS ULISAJA**

**MWANJALA.....2<sup>ND</sup> APPLICANT/DEFENDANT**

**EVA ELIAS MWANJALA.....3<sup>RD</sup> APPLICANT/DEFENDANT**

**GRACE JOHN.....4<sup>TH</sup> APPLICANT/DEFENDANT**

***VERSUS***

**DIAMOND TRUST BANK**

**TANZANIA**

**LIMITED.....RESPONDENT/PLAINTIFF**

**RULING**

**Mansoor, J:**

**Date of Ruling- 24<sup>TH</sup> JULY 2015**

The plaintiff has filed a suit against all the defendants jointly and severally for recovery of THz 810,516,095.03 and interests.

It is the case of the plaintiff that on 30<sup>th</sup> November 2009, the plaintiff had given a Credit Facility of THz 200,000,000 in the form of an overdraft to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants had given their personal guarantees and indemnities towards the repayment obligations of the 1<sup>st</sup> defendant. The Facility was also secured by a legal mortgage on the 3<sup>rd</sup> defendant property situate at Plot No. 388, Block A, Kunduchi Mtongani, Dar es Salaam.

It is the plaintiff's case further that, on 6<sup>th</sup> June 2011, the Facility was renewed and enhanced to THz 350,000,000. The renewed Facility was additionally secured by a legal mortgage of the 3<sup>rd</sup> defendant property situate at Plot No. 212 Block 40, Hananasif Area, Dar es Salaam.

The Plaintiff averred in its plaint that the 1<sup>st</sup> defendant has failed and neglected to repay its accrued indebtedness under

the Facility, hence a default Notice was served upon the defendants on 26<sup>th</sup> July 2013, notwithstanding the Notice, the defendants failed or neglected to pay the outstanding loan amount which as at the date of the Notice stood at THz 810,516,095.03.

To the above claim of the plaintiff, the defendants, having been served, filed appearance and thereafter the first, second and third defendants filed an application No. 58 of 2015 under Order 35 Rule, 3 of the Civil Procedure Code, Cap 33 R: E 2002 while the 4<sup>th</sup> defendant filed an application No. 94 of 2015 citing Order 35 Rule 2(1) of the CPC. Both these applications were for seeking unconditional leave to defend the suit. These two applications were consolidated by the Order of the Court.

Learned Counsel appearing for the Plaintiff, Mr. Dilip Kesaria had objected the application saying that Misc. Application No. 58 of 2015 did not cite the applicable sub rule or paragraph of rule 3 of Order 35 of the CPC, and that Misc. Application No. 94 of 2015 was made under the wrong provision of the law.

The Counsel submitted that the correct applicable provision of the law for making applications for leave to appear and defend the suit filed Under Order 35 of the CPC, is Order XXXV rule 3 (1) ( c) of the CPC as amended by the Mortgage Financing (Special Provisions) Act 2008 (Act No. 17 of 2008). On this point, the Counsel referred me to the case of **Mazongera Building Contractors Limited and 3 others vs Diamond Trust Bank (T) Limited, Misc. Commercial Case No. 35 of 2015**, Songoro J, (unreported) and also a Ruling given by Hon. Justice Masati in the case of **Jangwani Sea Breeze Lodge Limited vs Guenter Grupp, Commercial Case No. 93 of 2012**, also unreported.

The Counsel for the Plaintiff also cited the case of **National Bank of Commerce vs Sadrudin Meghji (Civil Application No. 20 of 1997**, in which the Applicant had moved the Court of Appeal and cited the principal provisions correctly, the Court of Appeal held that the application was incompetent since the Applicant omitted to cite the relevant subsections. The Counsel therefore prayed for the striking out of both the

Applications, that is; Misc. Commercial Application No. 58 of 2015 for omitting to cite the full provisions of the applicable law namely Order XXXV rule 3 (1) (c), and Misc. Commercial Application no. 94 of 2015 for wrongly citing Order XXXV Rule 2 (1) instead of Order XXXV rule 3 (1) (c) of the CPC.

Mrs. Kato, the Counsel who represented the Applicants did not file Written Skeleton Arguments as required under Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012, and while submitting in support of the Applications, she simply stated that the Applications were properly before the Court and that the provisions cited by the Applicants, moved the Court to grant the reliefs sought. She submitted further that Order XXXV does not give the plaintiff an automatic right over the reliefs sought in its plaint, and that is why the defendants are given the right to defend the case, if there is a reasonable and good defense. She said, that right cannot be taken away simply because the applicants have omitted to cite the sub rules. She said also that, the Courts in various Rulings have also indicated that procedural rules are meant to

facilitate and not to defat justice. Mrs. Kato however, did not cite these Court Rulings she were referring to. In a summary of Mrs. Kato submissions, she admitted that both the applications are defective, but urged the Court to ignore the defects and continue to hear the applications on merits, despite the defects.

As conceded by the Counsel for the Applicants and as decided in the cases cited by the Counsel for the Respondent, and the case of **Mariam v Salum H Machwiko, Civil Application No. 42 of 2006 (unreported)**, which it was held that failure to cite the correct provision of the law renders an application incompetent, the consolidated applications i.e. Misc. Commercial Application No. 58 of 2015 and No. 94 of 2015 are all incompetent and are hereby struck out with costs, for omitting to cite sub rule (1) (c ) to Rule 3 of Order XXXV, and for wrong citation of the provisions of the law, respectively.

Since the applications have been struck out on a legal point of law, preliminarily, this Court shall not consider the

substantive arguments put forward by the parties regarding the merits of the applications.

The Applications are struck out with costs.

DATED at DAR ES SALAAM this 24<sup>th</sup> day of July, 2015

**MANSOOR**  
**JUDGE**  
**24<sup>th</sup> July 2015**