

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION/CAUSE

NO. 70 OF 2015

M/S ASSOCIATION OF KILIMANJARO

SPECIALITY COFFEE GROWERS

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

PHILEMON HAULE.....2ND APPLICANT/2ND DEFENDANT

BLANKA NDUNGURU.....3RD APPLICANT/3RD DEFENDANT

WILLIAM SHAO.....4TH APPLICANT/4TH DEFENDANT

ASAJILE KAYANGE.....5TH APPLICANT/5TH DEFENDANT

EMILINE SWAI.....6TH APPLICANT/6TH DEFENDANT

ADRIANO

MWALUSAMBO.....7TH APPLICANT/7TH DEFENDANT

GODFREY

MWANGULUMBI.....8TH APPLICANT/8TH DEFENDANT

VERSUS

EXIM BANK (TANZANIA)

LIMITED.....RESPONDENT/PLAINTIFF

RULING

Mansoor, J:

Date of Ruling- 5TH JUNE 2015

The plaintiff has filed a suit for recovery of US\$ 1,303,033 under the provisions of Order 35 of the CPC.

It is the case of the plaintiff that the first Applicant/Defendant was granted a Term Loan by the Bank which was converted to an overdraft facility. The rests of the defendants/Applicants are the directors of the first Applicant/Defendant and also gave their personal guarantee for repayment of the overdraft facility given to the 1st Applicant/Defendant. That the 1st Defendant/ Applicant defaulted paying the overdraft or shows lack of seriousness in servicing the overdraft facility, the Bank demanded payments of the facility, the 1st Applicant did not

heed to the demands, hence the plaintiff decided to bring a suit under summary procedure for recovery of the outstanding balance.

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 Issa Rajabu, who is Defendants' Advocate on the ground that the plaintiff has demanded the payment of US\$ 1,303,033.50 unequivocally and without certainty as it did not give the particulars of how it arrived to that figure. The Counsel also stated that 60% of the amount demanded is guaranteed by Private Agricultural Sector Support Trust (PASS) by way of lien on a fixed deposit. Apart from the fact that PASS was not sued in the plaint, the Counsel states that the amount of US\$ 1,303,033.50 was arrived at without taking into consideration that part of the amount which is to be paid by PASS. The Counsel stated further that the plaintiff has never

issued the Applicants/defendants and the guarantors with a statutory notice of default as mandatorily required by law. The Counsel referred me to the decision of the Court of Appeal in the case of **Makungu Investments Co. Limited vs. PETROSOL Tanzania Limited**, Civil Appeal No. 23 of 2013, whereby at page 7, His Lordship Mandia Justice of Appeal ruled that wherever there is a dispute, the role of the Court is to look at the evidence of the applicant as deposed in the affidavit and if it is shown that there is a dispute to be resolved, the court is duty bound to give unconditional leave to defend the suit.

Learned counsel appearing for the defendants argued that the defendants have 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.

The Counsel for the plaintiff, Mr. Kalolo had submitted that since the Applicants are not disputing the principal sum but

the interest, then they should be granted a conditional leave, and that they should be ordered to deposit in court the amount they do not dispute, and leave be granted to them to defend that part of interest in which they dispute. Mr. Kalolo did not cite any authority to back up his contentions.

I would say that from the evidence and the submissions of the Counsel for the Applicants, contrary to what is suggested by counsel Kalolo, the Applicants are also disputing the principal amount, and they question on how that amount was reached, as there was no breakdown of the claims submitted to them or to the court. They also dispute the fact that they are made liable to pay the entire amount of the outstanding balance of the facility while 60% of it is guaranteed by PASS, and this is why they asked for unconditional leave to defend the suit.

Further to the pointed query, 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 on how the plaintiff had arrived in the amount claimed in the plaint. Also there was an admission

that out of the balance claimed it is true that 60% of it is to be paid by PASS.

It is trite law that filing the Suit under Order XXXV of the Code of Civil Procedure it was necessary for the plaintiff to present the particulars of their claims clearly and with 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, and how much is to be paid by PASS. The plaint in this case did not give such particulars.

Consequently, in this case the plaint will have to be dealt with in ordinary way, the defendants are therefore granted unconditional leave to defend the suit.

As the defendants have been granted unconditional leave to defend, the defendants would file written statement of defense 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 13th July 2015.

DATED at DAR ES SALAAM this 5th day of May, 2015

**MANSOOR
JUDGE
5TH May 2015**