

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 200 OF 2015

ECICA TRADING
LIMITED.....1st APPLICANT/DEFENDANT

ELIAS ULISAJA
MWANJALA.....2ND APPLICANT/DEFENDANT

EVA ELIAS MWANJALA.....3RD APPLICANT/DEFENDANT

GRACE JOHN.....4TH APPLICANT/DEFENDANT

VERSUS

DIAMOND TRUST BANK
TANZANIA
LIMITED.....RESPONDENT/PLAINTIFF

RULING

Mansoor, J:

Date of Ruling- 06TH NOVEMBER 2015

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

It is the plaintiff's case further that, on 6th 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 3rd defendant property situate at Plot No. 212 Block 40, Hananasif Area, Dar es Salaam.

The Plaintiff averred in its plaint that the 1st defendant has failed and neglected to repay its accrued indebtedness under the Facility, hence a default Notice was served upon the defendants on 26th July 2013, notwithstanding the Notice, the defendants failed or neglected to pay the outstanding loan

amount which was 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 filed an application No. 200 of 2015 under Order 35 Rule, 2 (2) and Rule 3 (1) (b), and (c) of the Civil Procedure Code, Cap 33 R: E 2002 seeking for unconditional leave to defend the suit.

Learned Counsel appearing for the Plaintiff, Mr. Dilip Kesaria who along with the Skeleton Arguments filed in Court, had argued that the law in summary suit is to the effect that the defendant has no automatic right to defend the suit unless leave is sought and obtained. He said under Order XXXV Rule 3 (c) as amended by s 25 (b) of the Mortgage Financing (Special Provisions) Act, 2008 in order to obtain leave to defend, the Applicant's affidavit must demonstrate that the loan or portion of the loan claimed was indeed discharged, or the loan was actually not taken. The Applicant in his affidavit admits that he has taken the loan, and also at paragraph 12 of the Affidavit of Mr. Elias Ulisaja Mwanjala and Eva Elias

Mwanjala stating that the 1st Applicant managed to pay to the Bank the total of THz 243,781,665.80, thus the Applicants have demonstrated that they have paid a portion of the loan, thus satisfying the conditions set out in s 25 of the Mortgage Financing (Special Provisions), Act 2008.

To support his arguments, the Counsel for the respondent referred me to the case of. **National Bank of Commerce vs Edward Laswai**, Misc. Commercial Case No. 115 of 2011, (unreported). The judge dismissed the application for leave to defend on the grounds that the applicants did not satisfy the grounds stated in the law. Hon Judge Nyangarika had this to say:

“I wish to underscore, at the outset that the law currently in vogue relating to summary suit arising out of mortgages has changed the landscape of the legal pre requisites for the grant of leave to defend such a suit by setting up new parameters for the courts adjudicating such matters. The parameters are that, the defendànt should demonstrate either that (i) loan or the portion of the loan claimed is indeed discharged; or that (ii) the

loan was actually not taken.....short of that standard, and in admission of the said loan, the defense disclosed, no matter how good or conscionable it might appear, cannot warrant leave and appearance to defend the suit. That in terms of section 25 (b) of Act No. 17 (supra) which amended Order XXXV rule 3 of Cap 33 R: E 2002 (supra).”

Coming to the facts of the present case, I would say that the defense taken by the defendant in leave to defend the suit is acceptable and does qualify the Applicants to be given leave to defend the suit. The law requires that the Applicant has to satisfy the conditions given in the law. The Applicants have to either deny that they have not taken the loan, or they have to show that they have paid either all or part of the loan. The Applicants in the present case admits to have taken the loan, and also have pleaded in their affidavit that they have paid a portion of the loan. The Applicants have demonstrated that they actually paid at least the initial periodical instalments of the loan amount as pleaded in paragraph 12 of the Affidavit in support of the Application.

Since the Applicants have satisfied the conditions set in Order XXXV Rule 3 of the CPC as amended by the Mortgage Financing (Special Provisions) Act, 2008, leave is hereby granted to the Applicants to defend the summary suit.

The Provisions of section 25 of the Mortgage Financing (Special Provisions) Act, 2008, applies upon the Mortgagor in suits arising out of mortgages, thus as regards to the 4th Applicant, the question of whether or not she ceased to be a mortgagor upon her title being transferred to the 2nd Applicant raises an arguable issue which needs to be tried in a normal suit. In such circumstances, leave is granted to all the Applicants to defend the summary suit

Application allowed, costs to follow the cause in the main suit.

DATED at DAR ES SALAAM this 06th day of NOVEMBER, 2015

**MANSOOR
JUDGE
06th NOVEMBER 2015**