

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

MISC COMMERCIAL APPLICATION 80 OF 2014  
(Originating from Civil Case No 18 of 2014)

**BETWEEN**

BLACK BERRIES ENTERPRISES LTD -----1ST APPLICANT  
OMARI MASALU NGHANYANGA-----2ND APPLICANT  
NANDI PASCHAL MWIYOMBELA-----3RD APPLICANT

VERSUS

AKIBA COMMERCIAL BANK LTD-----RESPONDENT

RULING

Date of hearing 23/3/2015  
Date of the Ruling 27/4/2015

SONGORO,J

On the 19/2/2014, Akiba Commercial Bank, the respondent instituted a summary suit under Order XXXV of the Civil Procedure Code, Cap 33 against Black Berries Enterprises , Omari Masalu Nghanyanga, and Nandi Paschal Mwoyombela the applicant to recover a sum of shs 78,708,283.46 which was an outstanding sum on the debt and overdraft facilities advanced to the first defendant.

In response to the plaint and respondent claim applicants filed an application under Order XXXV , Rule 3(1) of the Civil Procedure Code, Cap 33 R.E [2002] for leave to appear and defend the suit. Applicants application was supported by an affidavit sworn by Femini B. Mabachi who is the Managing Director and Chief Executive Officer of the first applicant company.

In his affidavit, Fermini Mabachi, for the applicant narrated that, it is true his company was given an overdraft facility with the respondent bank and there is outstanding amount which has not been paid to-date. He then narrated in paragraphs 8, 9 and 10 of his affidavit that, non repayment of the outstanding amount was due to under performance of his business and cash flow problems.

Likewise, Omari Masalu Nghanyanga and Nandi Paschal Mwiombela also filed an affidavit for leave to appear and defend the suit.

On his part Omari Masalu Nghanyanga, at paragraph 6 of his affidavit stated that, he is not the director of the first applicant company, but he admits that, he executed the Mortgage Deed which form security for overdraft facilities which was advanced to the first defendant company. He also contested that, was never informed by the first defendant if the loan has not been paid.

Further, he indicated in his affidavit that, the respondent has never issued to him any notice which inform him that, the first applicant has defaulted to pay the loan and outstanding amount as required by clause 19 of the Mortgage Deed-Annexure TMA 2. Furthermore, the applicant contests that, the amount a sum of shs 78,708,283.46

exceeds the amount which was advanced as loan to the first applicant, therefore the amount claim is in excess.

Similar legal, and factual arguments were raised by the third applicant Nandi Paschal Mwiombela in his affidavit, and he also prayed for leave to appear and defend the suit.

For those reasons and others he applied to be given leave to appear and defend the suit,

In view of applicants application for leave to appear and defend the suit, on the 23/3/2015 the court set the application for hearing and Mr. Ngalo, Learned Advocate appeared for the applicants whereas Mr. Kibatala Learned Advocate appeared for the respondent's bank.

To start with, Mr Ngalo in his submission, adopted the contents of the affidavit of applicants and submitted that, there is no counter affidavit which opposes the application.

He then indicated that, the second and third defendants are guarantors of the loan and they have never admitted indebtedness claim by the respondent.

Further, Mr Ngalo clarified that, pursuant to clause 19 of the Mortgage Deed-Annexure TMA 2 the respondent bank was under

obligation to furnish them with a notice if there was any default on the part of the first applicant for non payment of loan or any outstanding amount which was due.

Furthermore, applicants contests that, the applicant are disputing the claimed amount of shs 78,000,000/= so this is one of the ground which the court has to consider and grant them leave to appear and defend the suit.

Then relying on the decision in the case of NBC Versus Matt Hotels Limited Commercial Case No 1 of 2012 and reasons furnished in affidavits of applicants, Mr Ngalo indicated that, it will be just and fair if applicants will be given leave to appear and defend the suit, because the fault is on the respondent bank which failed to honour its obligation under the loan agreement to serve them a notice of default.

On his part Mr Kibatala, Learned Advocate for respondent bank straight pointed out that, lack of counter affidavit do not preclude the bank from opposing the application.

Further, the counsel indicated that, on the issue of wether or not the applicants should be given a leave to appear and defend the suit the court has legal duty to ascertain if the leave should be granted.

Next, the Learned Counsel maintained that, going by the affidavit of applicants there is no dispute that, the loan facility was extended to first applicant and first and second applicants were guarantors.

The respondent's counsel then indicated that, from the applicants affidavit there is no any indication if the loan or part of it has been paid to the respondent's bank. It was his submission that, if the loan or part of it has not been paid to-date and applicants have never explained to the court steps which they took to repay the loan.

Mr Kibatala maintained that, from what is pleaded in the applicant's affidavit it appears that, all applicants have no defence to offer on the claimed sum. He therefore pray to the court to decline to give applicants leave to appear, and defend the suit.

In brief rejoinder, Mr Ngalo maintained that, the second and third applicants were guarantors of the first defendants, and pursuant to the loan agreement, were entitled to be served with notice, and they have not been served with one.

The Counsel for applicants maintained that, the second and third applicant they did not know if there was a default in payment of the loan. He insisted that, it will be fair and just if applicants will be given leave to appear, and defend the suit.

I have carefully considered and analyse the applicant application for leave to appear and defend the suit, submission from the parties, and application for leave to appear and defend the summary suit is always governed by Rule 3(1) (a) or (b) of (c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] depending on the nature of transaction.

In the instant application it said that, the respondent's bank wants to enforce its rights under mortgage deed to recover a sum of shs 78, 708 283 being the principal sum of the amount advanced to the first applicant as a loan, and interests.

In the said Mortgage Deed entered on the 15/5/1999, the first applicant was beneficiary of the loan and second and third respondent were guarantors of the loan and they mortgaged their Title CT No 82965 of Plot No 1, Block 32D, Kinondoni Area Dar es Salaam as security for loan. The respondent bank claim that, the loan has no been paid.

On the other hand, I noted from the applicant affidavit and submission that, the applicant in his application for leave to appear and defend the summary suit relies on the Rule 3(1) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002]

Turning to Rule 3(1) of Order XXXV of Cap 33 cited above I noted that, it has clauses (a) (b) and (c) and applicants did not state in their application and even submission if their application is based on clause (a) or (b) or (c) of Rule 3(1) of Order XXXV of Cap 33.

In view of the above, the court revisited the claim which is before it and find the suit is arising from mortgage, and the relevant Rule is 3(1) (c) of Order XXXV of Cap 33.

Next the court found Rule 3(1) (c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] was amended by Mortgage (Financing Provisions) Act No 17 of 2008 in order to govern application for leave to appear and defend the suit arising out of mortgages, like the present.

Pursuant to Rule 3(1) (C) of Order XXXV of Cap 33, it requires a mortgagor or mortgagors like applicants before being given leave to appear and defend the suit they have to establish before the court that;

- (i) loan or portion of the loan claim is indeed discharged, or*
- (ii) the loan was not actually taken*

Thus bearing in mind what is stated in Rule 3 (1)(c) of the of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] as amended by Mortgage (Financing Provisions) Act No 17 of 2008 I revisited the affidavit of Femini B. Mabichi the managing director of the first

applicant company and find he state in black and white that, the loan was taken and it was secured by Mortgage Deed. Further, I noted in his affidavit and submission from Mr Ngalo, that, there is no statement which established that, the loan, or part of it was paid.

Next, I revisited an affidavit Omari Masalu Nghanyanga the third applicant and find in the affidavit in support of the application, he states the loan was secured by him through mortgage deed which he also executed it. Further, I did not find any statement in his affidavit or submission of Mr Ngalo which established that, the loan or part of it has been paid.

In view of the above, I find the affidavit of applicants there is no indication if the loan or part of it was paid. Instead I noted from their affidavits applicants key complaint against the respondent's bank is that, they were not furnished with a notice of default by the bank as required by mortgage deed and were not aware with the terms and conditions of the loan. Honestly, I find the above-mentioned applicants complaint may not be a defence on non payment of loan.

The court find applicants as "mortgagors" and parties to the Mortgage Deed were supposed to ensure that, the terms and conditions of their mortgage , including a condition for payment of the loan are adhered too from time to time by all parties including themselves.



Bearing in mind that, the respondent suit arises from the *mortgage and*, Rule 3 (1)(c) of the of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] as amended by Mortgage (Financing Provisions) Act No 17 of 2008 requires applicants to show if the loan or part of it has been paid in order to be granted leave to appear and defend the suit, I find honestly, applicants have failed to establish if the loan or part of it was paid, so as to be granted leave to appear and defend suit.

In that, regard, I find the application for leave and defend the suit has no merit because applicants did not met the legal requirement emphasized in Rule 3(1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] as amended by Mortgage (Financing Provisions) Act No 17 of 2008 which requires them to prove if the loan or part of it has been paid.

For the above stated reason I decline grant leave to applicants to appear and defend summary suit. Consequently I dismiss the application with costs in favour of the respondent bank.

Dated at Dar es Salaam this 28th day of April , 2015

  
H.T.SONGORO

JUDGE

Delivered at Dar es Salaam this 28th day of April, 2015

  
H.T.SONGORO  
JUDGE



The Ruling was delivered in the presence of Mr. Herin Manento, Learned Advocate for the Applicant, and Mr. Peter Kibatala, Learned Advocate for the Respondent