

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

COMMERCIAL CASE NO. 131 OF 2015

**NOBLE MOTORS LIMITED PLAINTIFF
VERSUS
UAP INSURANCE TANZANIA LIMITED DEFENDANT**

12th & 25th July, 2016

SUMMARY JUDGMENT

MWAMBEGELE, J.:

On 30th ultimo, this court struck out the defendant's application for leave to defend this summary suit. The striking out was predicated upon the application being found incompetent for lacking the necessary support after the affidavit purporting to support it was found to be incurably defective. I thereafter fixed 12.07.2016 for the case to be called before me for necessary orders.

Come 12.07.2016, Mr. Nduruma Majembe and Mr. John Mhozya, learned counsel, joined forces to represent the plaintiff whereas Mr. Peter Swai, learned counsel, advocated for the defendant. Mr. Majembe, learned counsel, prayed for judgment against the defendant under the provisions of Order XXXV rule 2 (2) (a) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"). On the other hand, Mr. Swai, learned counsel for the defendants was of a different view. He stated that after the

striking out of the application, he filed an application for leave of this court to allow the defendant file an application for leave to defend this summary suit out of time. In the circumstances, the learned counsel prayed, it would be in the interest of justice if the present suit was kept at abeyance pending the hearing and finalization of the application for enlargement of time within which to file an application for leave to defend this suit. Otherwise, argued the learned counsel, that application will be rendered nugatory.

The prayer by Mr. Swai to have these proceedings stayed pending the hearing of his application met a strenuous objection from Mr. Majembe for the plaintiff. His objection was beacons on the fact that the application allegedly filed by the defendant was not a bar to the order sought in that it is not an application for stay of these proceedings; it is an application for extension of time within which the defendant can file an application for leave to defend the suit. He thus beckoned this court to grant the order sought.

I promised to decide on this point in the course of this judgment. I did so under the understanding that should I grant Mr. Swai's prayer, I would accordingly make necessary orders; that is, an order to stay these proceedings to await the determination of the application for enlargement of time within which to file an application for leave to defend this suit.

This issue will not detain me. The defendant had filed an application for leave to defend this summary suit. That application was struck out. Thus, so far, there is no defence filed the leave thereof having been struck out. I am not ready to accept Mr. Swai's prayer to have these proceedings stayed because there is no legal foundation upon which this court can grant the prayer. As rightly stated by Mr. Majembe, the application filed is not one for stay of execution. It is an application for enlargement of time within which to file an

application for leave to defend the present suit. If Mr. Swai wished to have these proceedings stayed, he would have filed an appropriate application and give reasons thereof through an affidavit rather than making an oral application from the bar and without asking leave of the court for taking such course. In the premises, I find myself loathe to agree with Mr. Swai. Instead, I agree with Mr. Majembe that the application filed is not a bar to the continuation of this case. I would accordingly proceed to determine Mr. Majembe's prayer to proceed with this suit under the provisions of the CPC referred to me by the learned counsel which assignment will also not detain me.

The Defendants' application to defend the summary suit having been struck out, there is no defence filed and therefore the plaintiff, in terms of Order XXXV rule 2 (2) (a) of the CPC, is unquestionably entitled to judgment as prayed for in the plaint – see: **CRDB Bank Limited Vs John Kagimbo Lwambagaza** [2002] TLR 117. Accordingly, in terms of those provisions [Order XXXV rule 2 (2) (a) of the CPC], I enter judgment for the plaintiff and, in terms of rule 67 (3) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012, proceed to declare and decree as follows:

1. The defendant is in breach of the Payment Guarantee Bond number 010/130/017447/2015 dated 9th July, 2015;
2. The defendant should pay the plaintiff United States Dollars Two Hundred Sixty Nine Thousand Eight Hundred Seventy Eight and Eighty Cents (US \$ 269,870.80);
3. The defendant should pay the plaintiff commercial interest on item 2 above at the rate of 21% per annum;

4. The defendant should pay the plaintiff interest at the court's rate of 7% per annum on the decretal sum from the date of judgment till satisfaction in full; and
5. The defendant should pay the plaintiff costs of the suit.

For the avoidance of doubt the fourth prayer in the plaint in respect of payment of United States Dollars One Hundred Thousand (US \$ 100,000.00) as damages for loss of business, financial discomfort and loss of use of money is disallowed for want of legal foundation upon which to grant the same. In my view, the prayer falls under the reliefs which must be specifically pleaded and proved – see: ***Tangamano Transport Service Ltd Vs Elias Raymond & Anor***, Commercial Case No. 50 of 2004 (unreported) and ***Masolele General Agenices Vs Arfica Inland Church Tanzania*** [TLR] 192 - which proof is wanting in the circumstances the present case has been finalized.

Order accordingly.

DATED at DAR ES SALAAM this 25th day of July, 2016.

J. C. M. MWAMBEGELE

JUDGE