

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

**MISCELLANEOUS COMMERCIAL CAUSE NO. 202 OF 2015**  
**(Arising from Commercial Case No. 77 of 2015)**

|   |   |                         |
|---|---|-------------------------|
| <b>NARARISA ENTERPRISES COMPANY LIMITED</b> | } | <b>..... APPLICANTS</b> |
| <b>HAIDARY YAHAYA RASHID</b>                |   |                         |
| <b>SAFINA MUHILE</b>                        |   |                         |
| <b>SALUM SAID MGOMEAEK A</b>                |   |                         |

**VERSUS**

**DIAMOND TRUST BANK TANZANIA LIMITED ..... RESPONDENT**

19<sup>th</sup> May & 16<sup>th</sup> June, 2016

**RULING**

**MWAMBEGELE, J.:**

This is a ruling in respect of an application for leave to defend a summary suit. The application has been made under the provisions of Order XXXV rule 3 (1) (c) (i) of the Civil Procedure Rules; the first schedule to, made under the provisions of section 80 of, the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC).

By a plaint filed in this court on 06.07.2015, Diamond Trust Bank Limited; the respondent herein, filed Commercial Case No. 27 of 2014 under summary procedure against Nararisa Enterprises Company Limited, Haidary Yahaya

Rashid, Safina Muhile and Salum Said Mgombeaka; the applicants herein craving for several orders. Upon being served with the plaint, the defendants; the applicants herein, filed the present application. The application was argued before me on 19.05.2016 during which Mr. Rwebangira, learned counsel, appeared for the applicants and Mr. Rwegasira, learned advocate, appeared for the respondent bank. The oral hearing was preceded by skeleton written arguments filed by the parties within three working days before the hearing as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

It was Mr. Rwebangira for the applicants who kicked the ball rolling. The learned counsel, having adopted the affidavit filed in support of the application as well as the skeleton arguments earlier filed, argued for the application that the amount issued to the 1<sup>st</sup> applicant was guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants was Tshs. 850,000,000/= but that the respondent has claimed in the plaint the sum of 2, 208,405,254/74. He submitted that that amount was paid by the 1<sup>st</sup> applicant by depositing into the Bank account. He submitted further that these deposits off-set the amount borrowed and it is said that there is a balance thereof. The subsequent amount above the Tshs. 850,000,000/= was not guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants, he submitted.

He argued therefore that the amount claimed by the respondent under summary suit ought to have featured in the Bank Statement (Annexure P6 to the plaint); nothing has been stated in the plaint which is the amount accruing and which is the principal sum and, worse still, the amount deposited has not been deducted. If the applicants are given leave to defend

the suit, stressed the learned counsel, they will come and prove that the debt has been satisfied in full. The learned counsel has cited authorities in the skeleton arguments supporting the application. These are ***M/S Mechalec Engineers & Manufactures Vs M/S Basic Equipment Corporation*** 1977, AIR 577 as adopted in ***Mohamed Enterprises (T) Ltd Vs Biashara Consumer Services Ltd*** [2002] TLR 159 and ***Makungu Investment Company Ltd Vs Petrosol (T) Ltd***, Civil Appeal No. 23 of 2013 (unreported) as well as a legal text book - Mulla: **the Code of Civil Procedure** (16<sup>th</sup> Edition) at page 3652.

The learned counsel intimated to the court that he was aware of the amendment introduced in Order XXXV of the CPC by the Mortgage Financing Act, 2008 to the effect that in order for an applicant to be granted leave to appear and defend a summary suit, he is supposed to prove that he did not take the loan and if he did, he has paid it. Given the fact that the amount claimed under the present summary suit cannot be ascertained in the amount claimed and does not feature in the Bank Statement and given the fact that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 3<sup>rd</sup> applicants did not guarantee the sum other than Tshs. 850,000,000/= which is claimed to have been paid in full, it is his submission that there is a friable issue in the case which necessitates that the applicants be granted leave to defend the suit unconditionally, he submitted.

on the other hand, Mr. Rwegasira for the respondents, having adopted the three counter-affidavits and skeleton written arguments, submitted that the authorities cited by Mr. Rwebangira, learned counsel for the applicants, are not on mortgage; ***Makungu*** is on the supply of oil and method of payment and ***Mohamed Enterprises*** is on supply of rice. Mr. Rwegasira, thus submitted that these cases are not relevant to the subject under enquiry in

the instant application. To buttress this point, he cited sections 44 and 45 of the Evidence Act, Cap. 6 of the Revised Edition which require that the authorities should be relevant to the inquiry.

He submitted further that the respondent served the applicants jointly and severally for their indebtedness on three sets of credit facilities; a term loan and two overdrafts which amounts were taken by the 1<sup>st</sup> applicant and guaranteed by the rest. The credit facilities have not been paid to date and therefore that there is no bonafide triable issue arising from the affidavit in support of the application, he submitted. Claiming that the applicants are playing delaying tactics, he beckoned this court to dismiss the application with costs. He relied on ***National Bank of Commerce Vs Edward Epimack Laswai t/a Laswai Truck & 2 others***, Commercial Case No. 115 of 2011; an unreported decision of this court, for this proposition.

In a short rejoinder, Mr. Rwebangira reiterated his arguments in his submissions-in-chief and stressed that the amount claimed should be separated from the principal sum. He added that the cases cited are relevant because they gave principles to be followed in cases of leave to defend a summary suit. The ***Makungu*** case was about bounced cheques and the court proceeded to grant leave to defend that suit and in the ***Mohamed Enterprises*** case leave to defend the summary suit was granted because the amount claimed was different from the amount due. He argued further that if the applicants are not given leave to defend this suit, the court will enter judgment in favour of the respondent on the amount claimed which course will be to the detriment of the guarantors of the Tshs. 850,000,000/= as they did not guarantee any amount above the said Tshs. 850,000,000/=. The

learned counsel stated that the **Laswai** case is distinguishable as the suit was on the money clearly stated in the mortgage deed.

I have subjected the rival arguments of both learned counsel for the parties to sufficient scrutiny they deserve. The ball is now in my court to decide. As was held by my brother at the Bench Nyangarika, J. in **Mwanauta & Company Hunting Safaris (T) Limited & 2 others Vs National Bank of Commerce**, Commercial Case No. 3 of 2014 (unreported) and **Mohamed Enterprises** [supra -- Bwana, J. (as he then was)], a case cited to me by Mr. Rwebangira, in applications of this nature, the court is not required to involve itself in lengthy arguments but, rather, to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue fit to go to trial. The applicant is only required to show a fair and reasonable defence. I am in full agreement with their Lordships on this basic principle and I shall apply it in the determination of the present matter.

As rightly stated by Mr. Rwebangira, learned counsel for the applicants, the provisions of the Mortgage Financing (Special Provisions) Act, 2008 amended, inter alia, Order XXXV of the CPC. The amendment was in respect of rule 3 of Order XXXV by adding after paragraph (b) of sub-rule (1) the following paragraph:

- "(c) in suits arising out of mortgages, where the mortgagor demonstrate[s] that-
- (i) loan or the portion of the loan claimed is indeed discharged; or
- (ii) loan was actually not taken".

The applicants have stated in the affidavit supporting the application, the skeleton arguments and in their arguments at the oral hearing that they have satisfied the loan in full. The application is therefore within the realm intended by the provisions of Order XXXV rule 3 (1) (c) (i) of the CPC as amended by the Mortgage Financing Act, 2008.

And for the same reason, I think the applicants are entitled to be granted leave to defend this summary suit. Mr. Rwebangira has stated that if they are given leave to defend the suit, the applicants will show that the credit facility, whose monies were disbursed to the 1<sup>st</sup> applicant and guaranteed by the rest of the applicants, has been paid in full and that there is a balance thereof. This averment raises a triable issue which can only be proved if the applicants are granted leave to appear and offer a defence thereof. As was held in ***Tanzania Telecommunications Company Limited Vs Timothy Lwoga*** [2002] TLR 150 a defendant is entitled to leave to appear and defend a summary suit if it is shown that there is a triable issue in the case.

The decision of the Indian Court in the ***M/S Mechaiec Engineers*** case cited by Mr Rwebangira, learned counsel for the applicants, is also very relevant to the applications of this nature. It is not disputed by any lawyer that our CPC was imported from India. That case discussed Order XXXVII of the Indian Civil Procedure Code which is *in pari materia* with our Order XXXV of the CPC. It is an elementary canon of statutory interpretation that similar statutes must be interpreted similarly. That is, statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject – see: **Black's Law Dictionary** (Abridged 17<sup>th</sup> Edition at page 633). In the ***M/S Mechaiec***

**Engineers** case, the following principles to be followed when considering the question of granting leave to defend a summary suit were laid:

- (i) The defendant must satisfy the court that he/she has a good defence to the claim on its merits;
- (ii) If the defendant raises triable issue indicating that he has a fair or bonifide or reasonable defence although not a positively good defence;
- (iii) If the defendant discloses such facts as may be deemed sufficient to entitle him/her to defend. That is to say although the affidavit does not positively and immediately make it clear that he/she has a defence yet shows that such a state of facts as leads to the inference that at the trial of the action he/she may be able to establish a defence to the plaintiff's claim;
- (iv) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the defendant is not entitled to leave to defend;
- (v) If the defendant has no defence or the defence is illusory or sham or practically moonshine the defendant may be denied leave. Alternatively the court can allow the defendant to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such conditions.

[As elaborated by this court in ***African Banking Corporation Tanzania Ltd Vs Lake Transport Ltd & two others***, Commercial Case No. 291 of 2002 (unreported)].

The principles enunciated in the ***M/S Mechalec Engineers*** case provide a very useful guide to any court that deals with an application for leave to appear and defend as summary suit. However, that notwithstanding, I wish

to state here that when applying it in this jurisdiction, the principles must be applied subject to the amendments injected to Order XXXV of the CPC by the Mortgage Financing Act, 2008 discussed above. That is to say, it must be applied after the court has satisfied itself that the applicant has first satisfied the amendments provided by the Mortgage Financing Act to Order XXXV of the CPC. Or put differently, in order for the principles set out in the ***M/S Mechalec Engineers*** case, the applicant must first satisfy the court that he did not take the loan or, if he did, he has paid it in full or a portion thereof.

On the points discussed above, I am of the considered view that the applicants have demonstrated sufficient reasons to my satisfaction that they are entitled to be granted leave to appear and defend the summary suit filed by the respondent. I would therefore allow this application.

In the final analysis, this application is allowed. The applicants are granted unconditional leave to appear and defend the summary suit filed by the respondent. They are to file their written statement of defence to the respondent's plaint within twenty-one (21) days from the date hereof. Costs shall be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 16<sup>th</sup> day of June, 2016.

**J. C. M. MWAMBEGELE**  
**JUDGE**