

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 14 OF 2018

(Originating from Commercial Case No. 3 of 2017)

HI BROS – CANVAS & TENTS LIMITED 1ST APPLICANT

PARVEZ ABDULHUSSEIN HIRJI 2ND APPLICANT

VERSUS

I & M BANK (T) LIMITED RESPONDENT

RULING:

MRUMA, J:

Before me is an application for leave to appear and defend Commercial Case No. 3 of 2018. The Applicants Hi Bros Canvas Limited and Parvez Abdulhusein Hirji have been sued in summary suit No. 3 of 2018 in which the Respondent herein, who is the Plaintiff in that case is claiming for Tshs 2,590,240,074.08 being the outstanding sum on account of a term loan facility (Tshs 1,000,000,000.00) and overdraft facility (Tshs 1,500,000.00) plus interest.

The application is pegged under Rule 2(2), 3(1) (b) and 3 (c) (i) of Order XXXV of the Civil Procedure Code (Cap 33 RE 2002) and as is

the practice it is supported by affidavit and the supporting affidavit is sworn by Parvez Abdulhuessein Hirji who is the 2nd Applicant and the Managing Director of the 1st Applicant.

The Applicants have deposed that they have been repaying the loan as per agreed terms and that their account has been freezed by the Respondent as a result of which they have suffered financial losses which have incapacitated them economically.

Another ground relied upon by the Applicant in their quest for leave to appear and defend is the existence of Civil Case No. 144 of 2017 in the High Court of Tanzania (Dar es Salaam registry) in which the 1st Applicant is challenging the Respondent's intention to dispose of collaterals which were mortgaged by the Applicants. The Applicants contend that the two suits are similar and that under the law only one suit should be allowed to proceed.

The application is strongly opposed and the Respondent filed a counter affidavit sworn by Clement John Kagoye, Senior Relationship Manager of the Respondent's bank. The Respondent contends that leave should be denied because the Applicants have not shown any good cause or disclosed any facts to show or demonstrate that the loans and mortgages were discharged.

I have carefully read the affidavit and counter affidavit filed in respect of this application. I have also internalized the submissions made for and against the application and I find that this is a fit case for court to grant leave to appear and defend.

Rule 3(1)(c)(i) of Order XXXV of the Code requires that leave to appear and defend the suit can be granted upon affidavits which

demonstrate that loan or portion of the loan claimed is indeed discharged.

In their supporting affidavit the applicants have annexed a bank statement suggesting that they have been repaying the loan. This submission has been challenged by the Respondent's counsel who has submitted that Rule 3(1)(b)(c) and 3 (sic) of Order XXXV requires the Applicants to prove that the facilities granted to them have been fully paid.

I have read the provisions of Rule 3(1)(b) and (c) of Order XXXV of the Civil Procedure Code and with due respect to the learned counsel for the Respondent, the law does not require the Applicant(s) to prove that the facilities granted to him has been fully repaid. Rule 3(1)(b) requires the Applicant(s) to disclose such facts as the court may deem sufficient to support the application while Rule 3(1)(c)(i) requires the Applicant(s) to demonstrate that loan or the portion of the loan claimed is indeed discharged. The words used by the law are:-

(i) to disclose

(ii) to demonstrate

The word "disclose" is defined by Oxford Advanced Learners Dictionary 7th Edition by Sally Wehmeier to mean to give information about something which was previously secret. In other words to disclose some facts entails revealing of facts about something. This is not the same thing as "prove" which entails showing that something is true or giving facts, or evidence to show that something is true. The Law under Rule 3(1)(b) does not require the Applicant to give evidence of any fact but to disclose such fact that court may deem sufficient to

support the application. Several facts have been disclosed which I find sufficient to support the application among them a disclosure that the Applicants have been repaying the loan as alleged in annex H-1 to the supporting affidavit, the existence of Civil Case No. 144 of 2017 in the High Court (Dar es Salaam Registry) allegedly on the same issue and the allegation that the Respondent is using the money from the Applicant's loan account to conduct this very case.

In my view those are facts which have been disclose (or revealed) by the Applicants, I find that they are sufficient to support the application.

Under Rule 3(1) (c) (i) of Order XXXV, the Applicant is required to "demonstrate" that either the entire loan or a portion of the loan has been discharged. To demonstrate is to show clearly by giving proof of the alleged facts. In this respect the Applicant annexed to their supporting affidavit a statement of account for the period of 1/1/2017 to 23/10/2017 (annex H-1) showing that they have been repaying the loan. It is unfortunate that in the counter affidavit no evidence was produced to counter the applicant's evidence (i.e annex H-1) that they have been repaying the loan and instead the Respondent called for strick proof of the facts. I find this to be an unfortunate approach by the Respondent because it is now settled law that affidavit is a written evidence on oath. A party opposing an affidavit (i.e a written evidence on oath) is not expected to call for a strict proof of his opponent evidence, but she is expected to produce counter evidence to disapprove the opponent's depositions. Once a party has given his/her evidence on oath, whether viva voce or by affidavit, he/she has shifted the burden of proof to the other party to disapprove that what is deposed in the affidavit or viva voce evidence as not being true. The

practice of requiring the deponent of an affidavit to strictly prove what he/she had deposed without offering any counter evidence does not revert the burden to the deponent.

Thus, in view of the facts disclosed and demonstrated in the Applicants affidavit, I find that there are sufficient facts to support the Applicant's application for leave to appear and defend Commercial Case No. 3 of 2018. Accordingly the application is granted. Costs will be in the cause. The Applicant's shall file their written statement of defence within seven (7) days from the date of this ruling.



A handwritten signature in blue ink, appearing to read "A. R. Mruma".

A. R. Mruma,

Judge

20th June, 2018