

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 3 OF 2019**

**(Arising from Commercial Case No. 148 of 2018)**

**PRISTINE PROSPERITIES LIMITED ..... 1<sup>ST</sup> APPLICANT**

**MUSLIM SHIVJI KARIM .....2<sup>ND</sup> APPLICANT**

**GULAM MOHAMEDALI PUNJANI.....3<sup>RD</sup> APPLICANT**

**SABRI ALLY SAAD .....4<sup>TH</sup> APPLICANT**

**VERSUS**

**ECOBANK TANZANIA LIMITED.....RESPONDENT**

**RULING**

**B.K. PHILLIP, J**

The respondent herein lodged a summary suit against the applicants herein vide Commercial Case No. 48 of 2018. The respondent's claims against the applicants jointly and severally in the aforesaid Commercial Case No. 48 of 2018 are as follows:-

- i. For payment of an outstanding amount of Tanzania Shillings Five Billion Seven Hundred Sixty One Million Three Hundred Four Thousand Two Hundred Twenty Seven and Thirty Seven Cents*

- (TZS. 5,761,304,227.37) together with defaulting interest, penalties and charges thereon as it continues to accrue on daily basis being repayment of the term loan facilities as of the 30<sup>th</sup> September, 2018 extended to the 1<sup>st</sup> Defendant and guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.*
- ii. For payment of an outstanding amount of United States Dollars Three Hundred Thousand Three Hundred Ninety Seven and Thirty five Cents (USD 300,397.35) or its equivalent in Tanzanian shillings together with defaulting interest, penalties and charges thereon as it continues to accrue on daily basis being repayment of the term loan facilities as it continues to accrue on daily basis being repayment of the term loan facilities as of the 30<sup>th</sup> September, 2018 extended to the 1<sup>st</sup> defendant and guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.*
- iii. For payment of interest on the total outstanding amount as stipulated in (i) and (2), above at the rate of 19% and 8% per annum for credit facility 1 and credit facility 2 respectively, computed and accruing from the day the amount became due to the date of judgment.*
- iv. For payment of interest on the decretal amount mentioned under paragraphs (i) and (ii) herein above at the rate 12% per annum computed from the date of judgment to the date of payment in full.*
- v. upon failure to pay the amounts under paragraphs (1)(2)(3) and (4) herein above, for the sale of landed property identified as Plot*

*No. 2406/5 Sea View, Ilala Municipality Dar es Salaam, in the name of Pristine Properties Limited of P.O. Box 6595, Dar es Salaam with a total of 8 subtitle deeds as follows:- Certificate of Title No. 186045/74/5 in the name of Pristine Properties Limited, Certificate of Title No. 186045/74/9 in the name of Pristine Properties Limited, Certificate of Title No. 186045/74/11 in the name of Pristine Properties Limited, certificate of Title No. 186045/74/4/14 in the name of Pristine Properties Limited, Certificate of Title No. 186045/74/16 in the name of Pristine Properties Limited, Certificate of Title No. 186045/74/20 in the name of Pristine Properties Limited, Certificate of Title No. 186045/74/21 in the name of Pristine Properties Limited, Certificate of Title No. 186045/74/44 in the name of Pristine Properties Limited, mortgaged by the 1<sup>st</sup> Defendant and guaranteed by the 2<sup>nd</sup>, 3<sup>d</sup> and 4<sup>th</sup> Defendants to secure the credit Facilities in favor of the 1<sup>st</sup> Defendant.*

- vi. For payment of costs of this suit and any other orders or reliefs as the honourable Court may deem fit and just to grant.*

This ruling is in respect of the an application for leave to defend the aforementioned summary suit. it is made under order XXXV Rule 3(1)(c)(ii) of the Civil Procedure Code Cap 33 R.E. 2002 as amended by S.25 of the mortgage financing [special provisions] Act No. 17 of 2018 (hereafter to be referred to as the "CPC") . The application is supported by an affidavit affirmed by Gulam Muhamed Punjani. A counter affidavit sworn by Hope

Liana was filed in opposition to the application. I ordered the application to be disposed of by written submission. The learned advocate Ashiru Hussein Lugwisa appeared for the applicant while advocate Joseph Nuwamanya appeared for the respondent.

In his written submission in support of the application Mr. Lugwisa pointed out that the major reasons advanced by the applicants in the affidavit in support of the application is that there was a misrepresentation of the terms of the loan agreement on part of the respondent because, the loan money was supposed to be disbursed in US Dollars, however, in execution of the loan agreement the respondent disbursed the loan money in Tanzania shillings instead of US Dollars as agreed during the bargaining stage of the loan. Mr. Lugwisa submitted further that, the applicants alleged that, the failure to disburse the loan money in US Dollars adversely affected 1<sup>st</sup> applicant (the company) as its commitment letter of credit was not honored and their deposits with the suppliers were forfeited, consequently caused a lot of costs/expenses falling unto the applicants, thus they were unable to settle the loan. In addition to the above Mr. Lugwisa submitted that, in 2017, the applicants in their efforts to pursue their rights following the breach by the terms of the loan agreement by the respondent, filed a case against the respondent at the High court of Tanzania, Dar es Salaam registry vide Civil Case No. 161 of 2017 which is pending for hearing be Hon. Luvanda, J. A copy of the plaint in respect of that case was attached to the applicants' affidavit in support of this application.

Mr. Lugwisa contended that in this case there are triable issues fit to go for trial since, firstly the bank promised to disburse the loan in US Dollars currency, and relying on that representation of fact, the 1<sup>st</sup> applicant signed not only the facility letter but also security documents, only to realize later that the respondent (the bank) did not have capacity to disburse the loan in US Dollars currency. Secondly, there is a pending case in the High Court of Tanzania Dar es Salaam Registry in which the applicants are challenging the validity of the loan agreement. Mr. Lugwisa invited this court to grant the applicants unconditional leave to defend the case. Moreover, Mr. Lugwisa referred this court to the case of **Telecommunications Company Limited vrs Timoth Luoga (2002) TLR 150**, in which the court said that a defendant is entitled for leave to appear and defend a summary suit if there are triable issues. Another case referred to this court by Mr. Lugwisa is a case of **Mohamed Enterprises (T) Ltd vrs Biashara Consumer Services Ltd (2002) TLR 150** in which the court held that;

*"..... leave to defend should be granted if;*

- i. The defendant's affidavit satisfies the court that there are merits and triable issues.*
- ii. The defendant's affidavit indicates that he has a fair or a bonafide or reasonable defence, although not a positively good one.*
- iii. The defendant discloses such acts as may be deemed sufficient to entitle him to defend or that he shows such state of affairs that*

*lead to the inference that a trial of action, he may be able to establish a defence to the plaintiff's claim."*

Mr. Lugwisa also submitted that, he is alive of the requirements stipulated in order XXXV Rule 3(1) (c)(ii) of the CPC, that there are only two stipulated reasons that can move the court to grant leave to defend to wit; the applicant must demonstrate that he/she either never took the loan or that the loan or part of it was taken and duly paid. He referred this court to the case of **National Bank of Commerce vrs Matt Hotel Limited Commercial Case No. 121 of 2012** (unreported), in which this court speaking through Hon. Bukuku, J as she then was, said;

*"It is thus my considered opinion, that, the way rule 3 (1)(c) of order XXXV (as amended) has been couched, it leaves no room for the defendant to advance any defence at all, even if he (the defendant) has a concrete case for defence which raises a triable issue. In my view, the restricted meaning sought to be attached to the rule in question would make it a bad rule which can easily be abused by a plaintiff against the defendant. **In a matter of interpretation the object of the legislation has to be taken into account, I think the proposed interpretation would be contrary to the object of the rule as it might result in depriving a defendant of his right to defend"**.*

*(Emphasis is mine)*

Mr. Lugwisa invited this court to adopt the views explained in the case of **National Bank of Commerce** (supra) and allow the applicants to appear and defend the suit.

On the other side, Mr. Nuwamanya submitting against the application, contended that, no sufficient reasons have been advanced by the applicants to move this court to grant unconditional leave to defend. Mr. Nuwamanya submitted that the applicants have admitted that they did secure the loan/credit facility from the respondent which stands unpaid to date. That the alleged fraudulent representation on part of the bank is not true. The loan was requested in Tanzania shillings at the value of USD 3,000,000/= and the facility letter dated 13<sup>th</sup> October, 2015 gave the borrower under clause 14(a) irrevocable undertakes to channel all contracts/sales proceeds into the Tanzania Shillings collection account and USD account. Mr. Nuwamanya contended that, there have never been any agreement or understanding between the parties on currency conversion, but the applicant made a request for currency conversion which the respondent undertook to consider upon the 1<sup>st</sup> applicant making payments. Mr. Nuwamanya referred this court to the case of **Zola and another vrs Ralli Brothers Limited and another (1969) IEA 691 (CAN)**, in which the court made a finding that where the defendant merely states the presence of a innovative arrangement allegedly exonerating the defendant from liability with no particulars as to the parties, the date the circumstances and the reason for the new agreement such statement, would not suffice to raise triable issues.

As regards the pending civil case no. 161 of 2017, at the High Court of Tanzania Dar es Salaam Registry, Mr. Nuwamanya submitted that, the said case is irrelevant to instant application and the summary suit.

Furthermore, Mr. Nuwamanya made an alternative prayer to the effect that, if this court finds that the applicant has raised trial issues warranting granting of the leave to defend the suit, then the applicant should not be granted unconditional leave to defend the suit. Also, Mr. Nuwamanya, distinguished the case of **Mohamed Enterprises (T) Ltd** (supra) from this application on the ground that, in the instant application the applicants have not provided any evidence whatsoever of the defence against the respondent and the reasons provided for the leave to be granted are not bonafide.

In conclusion Mr. Nuwamanya, prayed for the dismissal of the application with costs and decree be entered in favour of the respondent for the prayers made in the plaint. In the alternative, Mr. Nuwamanya prayed that, if this court finds that there are triable issues, then the applicants be granted conditional leave to defend the suit on matters regarding computation of interests only and decree on the principal amount claimed in the suit be entered against the applicants.

In his rejoinder to his submission Mr. Lugwisa insisted that there are triable issues worthy warranting unconditional leave to defend the suit to be

granted. He contended that the respondent's reply to his submission have confirmed the existence of trial issues in the case. Mr. Lugwisa was of a view that the controversy on the agreement on currency conversion is one of the triable issues which can be resolved by according opportunity to the parties to adduce their evidences before the court. As regards the civil case No. 161 of 2017 (supra) Mr. Lugwisa submitted that the said case was lodged on 16/8/2017, before the summary suit was lodged on 12/11/2018. Furthermore Mr. Lugwisa submitted that the case of **Zola** (supra) is distinguishable from the instant case since the main complaint in this case is fraudulent misrepresentation. He also insisted that the case of **Mohamed Enterprises** (supra) and **National Bank of Commerce** (supra) are relevant in the instant application.

I have subjected the rival submissions of the learned counsels appearing herein to a critical analysis and noted that, there is no dispute on the existence of the loan facility and civil case no. 161 of 2017 at the High Court of Tanzania, Dar es Salaam Registry. The allegations that the applicants have not repaid the loan amount is not in dispute too. As correctly submitted by both counsels, the provision of order XXXV rule 3(1)(c)(ii) of the CPC provides specifically that, for suits arising out of mortgage the court can grant a leave to defend if the mortgagor demonstrate that either the loan or the portion of the loan claimed is indeed discharged or the loan was actually not taken.

In this application the applicant has not met any of the two conditions, however, I have noted that there are triable issues such as, what were the terms of the loan facility agreement and whether there was a breach of the terms of the loan facility agreement by either of the parties. Under the circumstances, I am inclined to agree with the view held by Hon. Bukuku, J as she then was, in the case of **National Bank of Commerce** (supra), that strict application of the provisions of order XXXV rule 3(1)(c)(ii) of the CPC may lead to deprivation of the defendant's rights to defend the suit. If there serious and bonafide triable issues established which goes to the modality of the execution of the terms and conditions of the loan agreement, as it is in the instant application the court has to consider granting the application for leave to defend be it conditional or unconditional depending on the circumstances of the case.

Also, in my considered view, the conditions in XXXV rule 3(1)(c)(ii) of the CPC as amended are applicable in a situation where there are no disputes on the execution of the loan agreement itself, that is, the applicant admits that the loan amount was disbursed in accordance with the agreed terms.

I have taken into consideration the alternative prayer made by Mr. Nuwamanya and I am of a considered view that entering a decree for the principal amount and granting a conditional leave to the applicants to address the court on the matter regarding computation of interests only will lead to pre-empting the applicants' complaints on the compliance of terms of the loan agreement. Not only that, if leave to defend the suit is

granted on the triable issues that have been raised by Mr. Lugwisa, entering a decree for the principal sum will be tantamount to condemning the applicants unheard.

In the circumstances, I hereby grant to the applicant unconditional leave to defend the suit. I give no order as to costs.

Dated at Dar es Salaam this 4<sup>th</sup> day of April, 2019.



A handwritten signature in blue ink, appearing to read "B.K. PHILLIP".

**B.K. PHILLIP**

**JUDGE**