

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

MISC. COMMERCIAL APPLICATION NO. 256 OF 2018

(ARISING FROM COMMERCIAL CASE NO. 142 OF 2018)

CHRISTOPHER PAUL CHALE1ST APPLICANT.

**FREDA UFOONENY CHALE (ADMINISTRIX OF
THE ESTATE THE LATE FAUSTINE STANSLAUS CHALE..... 2ND APPLICANT.**

FREDA URASSA CHALE3RD APPLICANT.

VERSUS

COMMERCIAL BANK OF AFRICA (T) LIMITED RESPONDENT.

Date of Last Order: 21/08/2019

Date of Ruling:20/09/2019

RULING.

MAGOIGA, J.

The applicants, CHRISTOPHER PAUL CHALE, FREDA UFOONENY CHALE(ADMINISTRIX OF ESTATE OF LATE FAUSTINE STANSLAUS CHALE) AND FREDA URASSA CHALE jointly instituted the instant application by chamber summons under the provisions of Order XXXV Rule 3 (1) (b) of the Civil Procedure Code, [Cap 33 R.E. 2002] and any enabling provision of the law

against the above named respondents praying for the following orders, to wit:

1. That this honourable Court may be pleased to grant leave to the applicants to appear and defend in Commercial Case no. 142 of 2018 instituted against them by the respondent.
2. Any other order as the Court may deem fit and just to grant.

The chamber summons is accompanied by the supportive affidavit of Christopher Paul Chale and a joint affidavit of the late Faustine Stanslaus Chale and Freda Urassa Chale all in their totality stating the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and the respective supportive affidavits of the applicants, the respondent through Ms. Frida Shirima deposed two counter affidavits in reply to the affidavits of the applicants stating the reasons why this application should not be granted.

The facts pertaining to this application are that the parties hereinabove entered into credit facilities on 3rd September, 2010 of USD 60,000/=. On 16th June, 2011 the said credit facility was amended and a top up of USD 50,000/ was advanced to the 1st applicant and lastly on 17th December,

2013, the 1st applicant was granted as additional credit facility of USD. 165,966.46. The facts go that the aforesaid credit facilities were attracting interests and were secured by the personal guarantees by the 2nd and 3rd applicants and the first ranking legal mortgage in favour of the respondent on plot no. 439 Block "G" Mbezi area, Kinondoni Municipality in Dar es Salaam city with C.T. no. 115828 in the name of the 2st and 3rd applicants. All the credit facilities were intended to facilitate the construction of house at plot no. 439 Block "G" Mbezi.

The facts further go that the 1st applicant failed to adhere to the terms and conditions of the agreement and was in breach of the clear terms of the contract by failure to make good payment of installments as agreed, resulting to unpaid principal amount plus interest at the tune of USD. 156,955.42. The respondent has instituted Commercial Case no 142 of 2018 under summary procedure as recovery procedure to be paid the unpaid money, hence the instant application seeking this Court's leave to defend.

When this application was called for hearing the applicants were jointly enjoying the legal services of Edward Peter Chuwa, learned advocate from Dar es Salaam city based legal clinic of Chuwa and Co. Advocates. On the other hand, the respondent was enjoying the legal services of Ms. Miriam

Bachuba, learned advocate from Dar es Salaam and Mwanza cities based legal clinic of IMMMA Advocates.

The respective learned advocates for parties filed written skeleton arguments for and against the grant of the leave. Mr. Chuwa strongly submitted that under the Tanzania jurisprudence, leave to defend can be granted upon satisfaction of the Court that there are triable issues and the defendant had tenable defence. Expounding further the two principles on grant of leave to defend, Mr. Chuwa submitted on the issue of misrepresentation, payment of all credit and existence of Civil Case no.157 of 2017 in the High Court of Tanzania (Dar es Salaam registry) and the issue of frozen account, if it was operating without the instructions of the applicant calls for defence in this suit.

The respondent strongly opposed and submitted that leave should be denied because the applicant has not attached any document to show that they have paid the loan or to demonstrate that the loan and mortgage were discharged as required under Order XXXV Rule 3 (1) (c) of the Civil Procedure Code as amended by section 25 (b) of the Mortgages Financial (Special Provisions) Act, no. 17 of 2008.

This Court has dutifully traversed the affidavits in support and counter affidavits against this application; and has carefully read the skeleton arguments in support and against the application and all cited case laws by the respective counsel's stance. I have equally read and considered the provisions of Rule 3 (1) (b) and (c) of Order XXXV of the CPC with a serious legal eye in the light of the opposing arguments of the learned counsel for parties. This Court has noted that it is true the learned counsel for applicant did not cite the provision of Rule 3 (1) (c) in his chamber summons but notwithstanding that but he has demonstrated that in his account before it was frozen had enough money to discharge the whole loan but same has been used without his instructions. This is a serious allegation on the part of the respondent that can only be answered by allowing defence in the circumstances of this suit.

Therefore, in the totality of all dully considered, it is the considered opinion of this Court that there are triable issues worth granting the prayer sought. Mr. Chuwa demonstrated an of issues of misrepresentation, payment of all credit and another issue is whether a frozen account can be operated by the respondent during frozen period-all these to my considered opinion raises serious triable issues that this Court cannot withhold the leave

sought. The only way the issue of misrepresentation and payment of the credit facility taken in the circumstances of this application can be resolved is by granting leave to defend so that the applicants can have an opportunity to prove their allegations which, if proved, can have big impact on the respondent's case. This is one of the legal requirements stated under section 3(1) (b) of the Order XXXV of the CPC.

The learned counsel for respondent did not provided any material facts in the counter affidavit to counter the above allegations of the misrepresentation and operation of the frozen account without the 1st applicant authority but instead the respondent called the applicants into strict prove of the facts. Truly I find this to be unfortunate approach by the respondent learned counsel because it is now a settled law that an affidavit is a written evidence on oath/affirmation. Therefore, a party opposing an affidavit is not expected to call strict proof of his opponent's evidence, but is expected to produce counter evidence to disprove the opponent's depositions. It is the considered opinion of this Court that once a party has given his/her evidence by affidavit that shifts the burden to the opposing party to offer another evidence to disprove what he deposed in the affidavit as not being true. The practice of requiring deponent of an affidavit to

strictly prove of what he has deposed without offering any counter evidence do not revert the burden to the deponent.

It is for the above reasons and guided by the case laws of my learned friends Judges (as they were) on what should be looked at when granting leave in each situation, that has set my legal eyes to see that the grant of the leave in the circumstances of this application is imperative than rejecting it.

That said and done, leave is hereby granted as prayed and the applicants are given 21 days from today to file their respective written statement of defence and serve the plaintiff's counsel, who if he wishes, is given seven days leave from the date of service to file a reply to written statement of defence. No order as to costs.

It is so ordered.

Dated in Dar es Salaam this 20th day of September, 2019.




S. M. MAGOIGA
JUDGE
20/09/2019