

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 123 OF 2020**

**(Arising under Commercial Case No. 44 of 2020)**

**C.E. HOLDING LIMITED .....1<sup>ST</sup> APPLICANT**  
**MOHAMED MNZAVA .....2<sup>ND</sup> APPLICANT**  
**CONSOLATE RWE GASIRA .....3<sup>RD</sup> APPLICANT**  
**APSAM COMPANY LIMITED .....4<sup>TH</sup> APPLICANT**

**VERSUS**

**INTERNATIONAL COMMERCIAL BANK**  
**(TANZANIA) LIMITED ..... RESPONDENT**

**RULING**

**B.K. PHILLIP**

This ruling is in respect of an application for leave to defend a summary suit. It is made under the provisions of order XXXV rule 3 (1)(b) and (c) of the Civil Procedure Code Cap. 33 R.E. 2019 (Henceforth "the CPC") and supported by an affidavit sworn by Consolate Rwegasira who is the 3<sup>rd</sup> applicant herein and managing director of the 1<sup>st</sup> applicant. Mr. Vitalis Evarist Salim, the respondent's principal officer swore a counter affidavit in opposition to the application.

A brief background to this application is that, the respondent lodged a suit against the applicants under Order XXXV of the CPC ('Summary Procedure'), to wit Commercial Case No.44 of 2020 (Henceforth "the Suit")

,praying for the following orders among others, a declaration that the defendants defaulted in repayments of the overdraft facility, a declaration that applicants are liable jointly and severally to pay the respondent USD 183,897.72/= plus interests. Alternatively, an order for sale of the mortgaged properties with registration No. CT 186315/2 L.O No. 142151, Plot No. 2 Mikocheni Area, Kinondoni Municipality, Dar es Salaam city and CT NO. 85289 L.O No. 396940, Plot No. 702 & 703 Block 'M' Pugu Mwakanga Area, Ilala Municipality, Dar es Salaam to enable the respondent to recover the claimed amount (USD 183,897.72).

It is the respondent's case that the 1<sup>st</sup> applicant obtained an overdraft facility from the respondent to a tune of USD 100,000,000/- that was supposed to be repaid by 20/1/2006, but it failed to repay the same as agreed. Consequently, as on 6/5/2020 there was an outstanding amount to a tune of USD 183,897.72. The respondent further alleged that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants signed guarantee and indemnity agreements in respect of the overdraft facility granted to the 1<sup>st</sup> applicant. In addition to the guarantee and indemnity agreements, the 3<sup>rd</sup> and 4<sup>th</sup> applicant mortgaged their properties on Plot No. 2, C.T No. 186313/2 LO No. 142154, Mikocheni Area, Kinondoni Municipality Dar es Salaam and plot no.

702 & 703 Block "M" CT No. 85 289. L.O. No. 396940, Pugu Mwakanga Area, Ilala Municipality Dar es Salaam City, respectively as security for the overdraft facility.

At the hearing of this application, the learned advocates Adronicus Byamungu and Boniface Woiso appeared for the applicants and the respondent respectively. Pursuant to the provisions of Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 as amended, both advocates filed their skeleton arguments prior to the hearing date.

Submitting for the application, Mr. Byamungu started his submission by adopting the contents of his skeleton arguments and the affidavit in support of the application. He raised the following arguments which were also reflected in the affidavit in support of this application. First, that the 2<sup>nd</sup> and 3<sup>rd</sup> applicants are not mortgagors, thus he was of the view that they do not qualify to be sued under a summary procedure jointly with the mortgagor. He argued that the suit involves three causes of action namely; mortgage, contract of guarantee and loan agreement.

Secondly, that the suit is based on non-existing credit facility because the credit facility that was granted to the 1<sup>st</sup> applicant, which was to a tune of USD 100,000/=, secured by a third party mortgage on CT No. 186313/2

plot No. 2, Mikocheni Area, Kinondoni, Dar es Salaam and personal guarantees of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants, was varied by way of rescheduling it and new terms were outlined in the new facility letter dated 6<sup>th</sup> January 2017, which was later varied too. Mr. Byamungu contended that, there have been several variations of the credit facility agreements between the applicants and the respondent, in such a way that the 1<sup>st</sup> credit facility letter upon which the respondent's suit is based, is overtaken by events and is not into existence anymore. Mr. Byamungu contended that the scenario explained herein above raises triable issues worth the attention of this court and necessitates the unconditional leave to defend the suit to be granted to the applicants. Mr. Byamungu cited the case of **Kara Georgiadis V Marrooudis (1952) E.A.C.A 479** and **CRDB Bank Limited Vs. John Kagimbo Lwambagaza (2002) TLR 64**, to buttress his arguments. He insisted that the provisions of order XXXV Rule 3(1)(c) of the CPC have to be read together with order XXXV Rule 3(1)(b) of the CPC. He held a view that this is a fit case for this court to grant the applicants unconditional leave to defend the suit.

In rebuttal Mr. Woiso submitted that, the respondent's suit is based on mortgage of which Order XXXV of the CPC allows the same to be brought

under summary procedure. He contended that Mr. Byamungu did not cite any law which bars a party to a suit to sue the borrower, the guarantor and the Mortgagor together in a suit based on mortgage. Mr. Woiso argued that Mr. Byamungu failed to address the court on how the applicant complied with the requirements stipulated under order XXXV Rule 3(1)(c) of the CPC, which stipulates the conditions under which this court can grant a leave to defend a suit based on mortgage like the case in hand.

Expounding more on this point, Mr. Woiso submitted that for this court to grant the leave to defend the suit, the applicants are supposed to prove that the loan was not taken or it was discharged or part of the loan amount has been paid. To cement his arguments, he cited the case of **Nararisa Enterprises Company Limited and three others Vs diamond Trust Bank Tanzania Limited, Misc. Commercial Cause No. 202 of 2015** (unreported) in which Hon Mwambegele J, as he then was said the following;-

*'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 Finance 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 to be applied, 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.'*

In addition to the above, Mr. Woiso refuted Mr. Byamungu's contention that the credit facility letter on the which the respondent's suit is based is not into existence. He contended that the credit facility letters in respect of the respondent's suit are into existence and legally valid. However, he conceded that there are some discrepancies in the facility letters attached to the plaint in support of the suit as one of the facility letters was mistakenly not attached.

In rejoinder, Mr. Byamungu submitted that in order to file a summary suit under order XXXV of the CPC, the defendant must be a mortgagor since order XXXV Rule 3(1)(c) of the CPC provides that a mortgagor can apply

to defend a summary suit, so impliedly, it provides that it is only a mortgagor who can be sued under a summary suit and not otherwise.

Also, Mr. Byamungu insisted that, in the suit in question, the respondent attached the old credit facility letters which have been overtaken by events and superseded by the most recent credit facility letter which was attached to the affidavit in support of this application. He maintained that there are triable issues which need to be determined once the applicants are granted leave to defend the suit. He reiterated his prayers in the application.

Having analyzed the rival arguments raised by the learned Advocates, first of all I wish to state from the outset that, Mr. Byamungu's contention that a suit filed under summary procedure, under Order XXXV of the CPC must be between the mortgagee and mortgagors only is misconceived. As correctly submitted by Mr. Woiso, the law does not provide so and Mr. Byamungu failed to refer this court to any statute or case law so support his aforesaid contention. The provisions of Order XXXV Rule 1 (c) of the CPC which provides for the filing of a Summary suit on matters arising from mortgages does not support Mr. Byamungu's contention stated herein above. For clarification let me reproduce the provisions of order XXXV Rule 1(c) of the CPC hereunder.

Order XXXV Rule 1 (c)

*'1. This order shall where the plaintiff desires to proceed in accordance with the Order, apply to-*

*(a) Not applicable*

*(b) Not applicable*

*(c) **Suits arising out of mortgages, whether legal or equitable, for-***

***(i) Payment of monies secured by mortgage***

*(ii) delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property.*

*(iii) redemption or*

*(iv) retransfer or discharge.'*

*( emphasis is added)*

Furthermore, Order XXXV rule 1 (a) to (g) inclusive, of the CPC provides the circumstances under which a plaintiff has right to file a suit under summary procedure. Order XXXV Rule 1 of the CPC has nothing to do with

the qualifications or types of defendants in a suit filed under a summary procedure and does not give any restrictions that the defendant has to be a mortgagor.

However, I am in agreement with Mr. Byamungu that, the applicants have raised some triable issues, in particular the issue pertaining to the credit facility agreement under which the suit is based on. As I have pointed out earlier in this ruling, the applicants are alleging that, the credit facility agreement attached in the plaint is non-existence as it was superseded by subsequent credit facility letters following the variations agreements signed by the parties. Since in his response Mr. Woiso pointed out that there are discrepancies in respect of the letter of offer attached to the plaint, therefore on face of the pleadings there is something not in order regarding the credit facility letters on which the suit is based. In my opinion, such circumstances entitle the applicants to be granted leave to defend the suit, so as to address the court on the concern on the existence/ non- existence of the credit facility on which the suit is based.

I am in agreement with Mr. Woiso that the applicants have not complied with the requirements stipulated under order XXXV rule 3(1)(c)(i)(ii) of the CPC as nowhere in affidavit in support of this application is stated that the

overdraft facility at issue was either paid or part of it was paid or that the overdraft facility was actually not taken. However, it has to be noted that each case has to be decided on its own merits. Since there is a triable issue concerning the credit facility letters on which the respondent's claim is based as explained herein above which in my considered opinion, goes to the root of the suit itself, the same necessitates both sides to be heard. In fact the application of the provisions of Order XXXV Rule 3 (1) (c) of the CPC presupposes that the pleadings in the summary suit are proper and there are all necessary supporting documents for the respondent's suit to stand. Under the circumstances of this case the strict application of Order XXXV rule 3 (1) (c) is not possible as the advocate for the respondent has conceded on the discrepancies in the supporting documents for the respondent's claims.

In the upshot, I hereby grant the applicants unconditional leave to defend the suit. The applicants are ordered to file their defence within twenty one (21) days from the date of this order.

Dated at Dar es Salaam this 20<sup>th</sup> day of November 2020.



  
**B.K.PHILLIP**  
**JUDGE**