

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL APPLICATION NO. 121 OF 2020

(Arising from Commercial Case No.57 of 2020)

FRECO EQUIPMENT.....APPLICANT/DEFENDANT

VERSUS

SINO LOGISTICS CO.LTD.....RESPONDENT/PLAINTIFF

RULING

Date of Last Order: *13/10/2020*
Date of Judgement: *27/11/2020*

NANGELA, J.;

The Applicant, *Freco Equipment*, has brought this application under Order XXXV Rule 3 (1) (a) and (b) of the Civil Procedure Code, Cap.33 R.E.2019. The application is by way of a Chamber Summons and supported by an affidavit of

Frederick P. Mallya. The Applicant seeks for the following Orders of this Court:

1. That, this Court be pleased to grant leave to the defendant to appear and enter defence in the main cases, to wit, Commercial case No. 57 of 2020.
2. Costs to be borne by the Respondent.

When the application was called on for hearing on the 13th October 2020, the Applicant enjoyed the services of Mr. Yohana Ayall, learned Advocate while Mr Dismas Rafael and Mr Boniface Byamungu, learned Advocates appeared for the Respondent. The application was argued by way of oral submissions. I will, therefore, summarise the submissions of the learned counsel for the parties before I consider the appropriate verdict to this matter.

To begin with, Mr Ayall adopted, with the leave of the court, both the affidavit and the skeleton arguments filed in this Court, as forming part of his submissions in support of the Application. He submitted that, as the Applicant is seeking

leave to defend, the law requires that there should be facts that would deem sufficient to support the application.

Mr Ayall submitted that, the affidavit of Frederick Malima has disclosed such facts which prove consideration as required by the law. Referring to paragraph 5 of the affidavit, he submitted that, earlier on the parties to this application had agreed to set-off **TZS 67,249,840.00** which were to be paid directly by the Applicant debtor, as per Annexure FR1 attached to the Affidavit.

Mr Ayall contended that, since **TZS 67, 249, 840.00** had already been paid, the outstanding amount payable to the Respondent is **TZS 67,750,160/=**. He contended that, the amount is even below the jurisdiction of this Court, and that, if leave is granted that same issue will be argued before the Court. He submitted, therefore, that, in the interest of justice, it will be necessary to give audience to both parties and hear the matter on merit.

It was also Mr Ayall's submission that, the other reason upon which this application is pegged is the need to challenge

the legality of the *Memorandum of Understanding* (MoU) upon which the Respondent's main claim in the main suit is based for having a past consideration, a fact which is against the law of contract. He argued that, this is a triable legal issue which not only requires legal agreements to be given but also calls for evidence to be led, all of which are possible once leave is granted as the illegalities cannot be explained in this application. To buttress this point, Mr Ayall relied on the case of ***Mary Rwabizi t/a Amuga Enterprises, vs National Microfinance PLC Civil Application No.378/01 of 2019.***

Besides, it was argued that the applicant has disclosed triable issues sufficient to convince this Court to grant the application. He argued that, since that requirement is fulfilled, it has sufficiently met the requirements of the law and jurisprudence of this Court. He relied on the decision of this Court in the case of ***Rafiki Engineering & Pump Services Ltd & Another vs Mantrac Tanzania Ltd, Misc. Commercial Application No.17 of 2019.*** He argued that, in essence, the affidavit of the Applicant has not been

sufficiently countered and the application should, as such, be granted.

For his party, Mr Raphael, who appeared for the Respondent, resisted the application. Adopting the counter affidavit and the skeleton argument filed in this Court to challenge the application, he submitted that, the matter before this Court emanates from an agreement between the Applicant and the Respondent whereby the Applicant issued post-dated cheques to the Respondent as payment for the work done on behalf of the Applicant.

Mr Raphael noted, however, that, the post-dated cheques, which were to a tune of **TZS 130,000,000/=** were dishonoured and, hence, the Respondent had to file a summary suit under Order XXV of the Civil Procedure Act, Cap.33 R.E.2019. He submitted that, under Order 35 of the CPC, the Applicant can only be granted leave to defend must meet the conditions set out under that provision, which, according to the Respondent's learned counsel, the Applicant has failed to fulfil.

Mr Raphael contended that, the Applicant's attachment to the affidavit, **the FR-1**, is a letter unknown to the Respondent as it is instructing a third party to pay the Respondent. He contended that, this cannot be a triable issue to be determined by the Court because, nowhere is it stated in the affidavit, or even during the oral submission, has it be shown that the Respondent was involved anywhere whatsoever in such an arrangement.

It was further argued that, to date, the post-dated cheques have not been settled (paid) and still they stand dishonoured for reasons of insufficiency of funds. As regards the Applicant's submission that there is a need to challenge the legality of the Memorandum of Understanding (MoU) upon which the post-dated cheques where issue, the Respondent submitted that, such kind of submission is only meant to present a tactical delay meant to defeat the ends of justice. He submitted, therefore, that, had the Applicant been interested to challenge the MoU, he would have done so before the filing of the *Commercial case No. 57 of 2020*.

Mr Raphael distinguished the cases relied upon by the Applicant. In particular, it was argued, as regards the case of ***Mary Rwabizi (supra)***, that, the case is irrelevant and distinguishable because it is a case on matters regarding application for extension of time and not the leave to defend a summary suit. He argued as well, that, the Applicant has not been able to meet conditions set out in the case of *Rafiki Engineering & Pump Services Ltd & Another vs Mantrac Tanzania Ltd, Misc. Commercial Application No.17 of 2019*. He concluded, therefore, that, the application should be dismissed since, as a prudent citizen, having noted that the cheques issued had bounced, the Applicant ought to have paid the monies or find out an alternative means.

By way of rejoinder submission, Mr Ayall submitted that, the document which this Court is called upon to consider (i.e., the Mou) does not form part of the affidavit and relying on such document would be to determine the main suit which the applicant is seeking the leave to contend it. He further submitted that, the Respondent submission is made outside

the ambit of the counter affidavit filed in this Court and, hence, the same constitutes mere statements made from the bar.

Besides, it was Mr Ayall's rejoinder submission that, the Respondent's assertion that the Applicant ought to have raised the issues it is currently raising before the filing of the case, is baseless because the law of limitation allows for claims based on contract to be brought within six (6) years and that, the law of procedure allows for the filing of counter-claims. He concluded, therefore, that, the submission made by the Respondent is baseless because what is required of the Applicant is a demonstration of the fact that there are triable issues which warrants the Court to look at in the main suit.

I have dispassionately examined the rival submissions. According to Order XXXV rule 3 (1) (a) and (b) the law provides as follows:

3. (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-

- (a) disclose such facts as would make it incumbent on the holder to prove consideration, where the suit is on a bill of exchange or promissory note;
- (b) disclose such facts as the court may deem sufficient to support the application; or

As the above provision indicates, for an application under the rule 3 (1) (a) and (b) of Order 35 of to CPC to succeed, there must be facts that demonstrate triable issues. That being said, the issue which I am called upon to determine, therefore, is *whether the Applicant has disclosed facts which manifest a prima facie defence or triable issues*. This is the position of the law. See for instance the case of ***Nararisa Enterprise Co. Ltd & 3 Others v Diamond Trust Bank Tanzania Ltd; Misc. Comm. Case No.2020 of 2015; or Rafiki Engineering & Pump Services Ltd & Another vs Mantrac Tanzania Ltd, Misc. Commercial Application No.17 of 2019.***

In this instant case, the Applicant has not denied that there is a debt which still remains outstanding. It is stated, however, that, the parties have had an arrangement to set-off the debt and has paid in-cash part of that debt. Paragraphs 3, 5 and 6 of the affidavit have disclosed all such information. The Applicant argues, therefore, that, what should be the lawful claim by or outstanding debt payable to the Respondent, is **TZS 67,750,160/=**. The Applicant stated in paragraph 7 and 8 of the affidavit, that, the outstanding debt is even below the jurisdiction of this Court. However this line of thinking was not expounded further and I will not comment on it as for now.

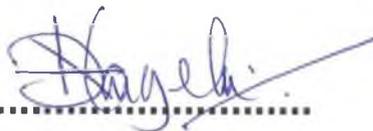
As I stated earlier, what this Court needs to be convinced about is whether there are triable issues disclosed in the affidavit to warrant the granting of the prayers sought. Paragraph 10 discloses that there is an issue of illegality which needs to be looked at by the Court, and which cannot be looked at in this application. In my view, it is clear that, when an issue of illegality is raised, even in other applications made

to the Court, such as application for extension of time, Courts are urged to grant opportunity to the parties to be heard. See for instance, the decision of the Court of Appeal in the case ***VIP Engineering and Marketing Limited and Three Others v Citibank Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (Unreported)***.

From such an analogy, I find that the Applicant has demonstrated existence of triable issues, including the amount claimed by the Respondent and the issue of illegality and /or regularity of the MoU alleged to be entered between the parties as disclosed in paragraph 10 of the affidavit. These issues can only be considered if the Applicant is granted opportunity to defend.

For such reasons, I hereby grant the application. Costs shall be in the cause.

Order accordingly.



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DEO JOHN NANGELA

JUDGE,

**High Court of the United Republic of Tanzania
(Commercial Division)**

27 / 11 / 2020



Ruling delivered on this 27th day of August 2020, in the presence of Mr Ayall, Advocate for the Applicant and Mr. Benson Mpaso, Advocate for the Respondent.



A handwritten signature in blue ink, appearing to read "H.S. Mushi".

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**HON.H.S.MUSHI,
DEPUTY REGISTRAR
High Court of the United Republic of Tanzania
(Commercial Division)
27 / 11 / 2020**