

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 73 OF 2020

(Arising from Commercial Case No. 33 of 2020)

FREDRICK BASIL MRAMBA

T/A F.B.M. FASHION COMPANY.....1ST APPLICANT /DEFENDANT

LIGHTNESS FREDRICK MRAMBA.....2ND APPLICANT/DEFENDANT

VERSUS

BANK OF INDIA (TANZANIA) LIMITED..... RESPONDENT

RULING

B.K. PHILLIP, J

The applicants herein lodged this application under the provisions of Order XXXV Rule 3 (1) of the Civil Procedure Code, Cap 33, R.E.2019 (Henceforth "the CPC") praying for the following orders;

- i. That this honourable court may be pleased to grant leave to the Applicants/defendants to defend themselves in respect of the summary procedure case no. 33 of 2020 instituted before this honourable court by the Bank of India (Tanzania) Limited against both applicants/Defendants.
- ii. Costs of this application to be borne by the Respondent/plaintiff herein.

- iii. Any other order that the honourable court may deem fit and just to grant.

A brief background to this application is that the respondent herein lodged in this Court a suit against both applicants under "Summary Procedure" vide Commercial Case No.33 of 2020, (Herein after to be referred to as "the main case")

It is revealed in the plaint that the 1st defendant was granted a credit facility by the plaintiff to a tune of Tshs 128,000,000/= . The securities for the aforesaid credit facility were; A mortgage in respect of property located at Plot No 212, Block "A", with certificate of Title No.831111, Alimaua Kijitonyama Area, Kinondoni Municipality, Dar Es Salaam in the name of the 1st applicant/defendant and contract of guarantee and indemnity executed by 1st and 2nd defendants in their individual capacity.

At the hearing of this application the learned Advocate Victor Kweka appeared for the applicants, whereas the learned Advocate Boniface Woiso appeared for the respondent. The learned advocates filed their skeleton arguments pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules. 2012, (Henceforth "the Commercial Court Rules").

Submitting for the application, Mr. Kweka started his submission by adopting the contents of the affidavit in support of this application and the contents of the skeleton arguments he filed in Court on 1st February 2021, in which he raised the following arguments; Firstly, the respondent wrongly filed the main case under the "summary procedure" since the second applicant /defendant has been sued as the guarantor not as a mortgagee. Mr. kweka submitted that the 2nd defendant did not mortgage any property as a security for the loan at issue, but she was only a guarantor to the loan. She did not sign any mortgage deed. Thus, he maintained that the plaintiff's claim against the 2nd defendant did not arise out of a mortgage deed and the provisions of Order XXXV of the CPC are not applicable to the plaintiff's claim against the 2nd defendant.

Secondly, the 1st applicant had already informed the respondent that he was unable to continue with repayment of the loan amount as agreed due to the decline of his business.

Thirdly, the respondent has filed the main suit prematurely as he was supposed to exercise his right of sale of the mortgaged property after he had advertised in the newspaper the intended auction of the same. He contended that the respondent is riding two horses at the same time

contrary to the laws and acceptable practice, which amounts to abuse of the law processes. To bolster his argument, he cited the case of **Hector Sequiraa Vs Serengeti Breweries Limited , Civil Application No. 395/18 of 2019, (CA)** (unreported) and **Hamis Said Mkuki Vs Fatuma Ally , Civil appeal No.147 of 2017 (CA)** (unreported). Mr. Kweka insisted that the respondent has powers to auction the mortgaged property and the court cannot interfere with him. To cement his arguments, he cited the case of **National Bank of Commerce Vs Dar es Salaam Education and office stationery (1995) TLR 272 (CA)** (unreported).

Fourthly, the 1st applicant has not been served with any default notice which would have indicated the unpaid loan amount as required under the provisions of section 127 of the Land Act, Cap 113, R.E. 2019. He contended that the demand letter annexed to the plaint cannot suffice to be termed as a default notice.

Fifthly, the applicants paid part of the loan amount, thus pursuant to the provisions of Order XXXV Rule 3 (1) (c) of the CPC, the applicant deserves to be granted the leave to defend the suit. He insisted that the amount of Tshs. 128,000,000/= claimed by the respondent is not correct. He referred this court to the case of **Nararisa Enterprises**

Company Limited & 3 others Vs Diamond Trust Bank Tanzania Limited , Misc Commercial Cause NO.77 of 2015 , (unreported) and **Ahaco Oil Limited and Hadija Abdul Faraji Vs Apel Petroleum Limited , Misc Commercial Application No. 45 of 2015,** (unreported).

In rebuttal Mr. Woiso submitted that this case arises out of mortgage and the 2nd applicant /defendant is properly joined in the case as she consented to the mortgage of their premises and is a guarantor to the loan granted to the 1st applicant / defendant by virtue of the deed of guarantee and indemnity. Furthermore, Mr. Woiso submitted that both applicants were served with notice of default. The respondent has a right to exercise any of the remedies of a mortgagee.

In addition to the above, Mr. Woiso submitted that the amount of money claimed by the respondent (Tshs 128,000,000/=) is correct. Relying on the case of **Nararisa Enterprises Company and three others**, (supra), Mr. Woiso contended that the applicant has failed to raise any triable issues.

Having analyzed the rival arguments raised by the learned advocates appearing herein and perused the affidavit in support of this application, the counter affidavit in opposition to this application and the plaint in

respect of the main case, I hasten to say that this application has merits as I will elaborate hereunder.

It is clearly stated in the plaint that the 2nd applicant/defendant was a guarantor to the loan granted to the 1st applicant /defendant by virtue of the deed of guarantee and indemnity. The mere fact that she also consented to the mortgage of their landed property Plot No. 2121, Block 'A', with certificate of title No. 83111, Land office No. 351010, situated at Alimaua Kijitonyama Area, Kinondoni Municipality, cannot turn her into a mortgagor as the mortgaged property is not in her name. What she did was only giving her consent to the mortgage of that property. Therefore, she is not a Mortgagor. Thus, it goes without saying that the provision of the law pertaining to filing of cases under "summary procedure" cannot be applicable to the 2nd defendant as the cause of action in respect of the 2nd defendant does not emanate from a Mortgage. The provisions of Order XXXV Rule 1 of the CPC stipulates clearly the circumstances under which a party can file a suit under "summary Procedure". The cause of action arising out of deed of guarantee and indemnity is not among such circumstances under which a party can invoke the provisions of Order Rule XXXV of the CPC. In the

case of **Jomo Kenyatta Traders Limited**, (supra) cited by Mr. Kweka the Court of Appeal held as follows;

'It seems to us to be clear from the foregoing, as submitted by MR. Mkali, the suit was largely founded on commercial transactions between the respondent and the first appellant. In the first place, in so far as is related to recovery of the outstanding loan amount under the relevant agreements, it fell outside the ambit of Order XXXV of the CPC. On the other hand, an examination of the plaint and the annexures thereto, it is plain that out of the five defendants (appellants), it is only the third and fifth defendants who had executed legal mortgages for unspecified amounts as shown in the relevant mortgage deeds forming part of annexure NBC (2) (a) to the plaint. That being the case, suit against the first, second, fourth and sixth appellants was not properly instituted under summary procedure thereby denying them their automatic right to appear and defend it.

There will be no doubt by now that in so far as the suit was for the recovery of mortgaged debts, the respondent could have only proceeded under summary procedure as against the third and the fifth appellants who has executed mortgaged deeds. she had no right to institute a summary suit against first, second, fourth and sixth appellants who had not executed any mortgage deeds to secure the first appellant's debts.'

In the upshot, it is the finding of this court that the main case has been wrongly filed under "summary procedure". Therefore, I hereby grant the applicants leave to defend the main case. Costs will be in course.

Dated at Dar es Salaam this 16th day of April 2021.



A handwritten signature in blue ink, appearing to read "B.K. Phillip", is written over a horizontal line.

B.K. PHILLIP

JUDGE