

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

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

MISC.COMMERCIAL APPLICATION NO. 31 OF 2023

KAHAMA OIL MILLS LIMITEDAPPLICANT

VERSUS

BANCA MONTE DEI PASCHI DI SIENA S.P.A....RESPONDENT

RULING

Last Order: 09/05/2023
Date of Ruling 23/06/ 2023

NANGELA, J.:

By way of a chamber summons made under Order XXV rule 3 (1) (a) and (b) and Order XLII Rule 2 of the Civil Procedure Code, Cap.33 R.E 2019 The Applicant herein has approached the Court seeking for the following orders, that:

1. Leave be granted to the Applicant to defend the suit (Commercial Case No.121 of 2022) filed by the Respondent by way of "**Summary Procedure**", on 8th November 2022.
2. Costs of the Application be in the cause.

3. Any other order(s) or relief(s) as the Honourable Court shall deem fit and just to grant.

The brief facts of this application are that some time in February 2018, the Applicant inked a contract for purchase and installation of bottling lines and blending section of spirits production with Ave Technologies S.L.R-Spinea (VE), a supplier. Under the contract, it was agreed that the Applicant would pay a total of Euro (€) 4,200,000 for the supply and installation of the two bottling lines and a blending section for spirits production, Glass Line suitable for filling spirits into 200ml glass bottles at a production speed of 12000bph.

On the other hand, the Applicant was to pay 15% of the total consideration (i.e., Euro 630,000) to allow the supplier to perform her part of the consideration under the contract, same being the delivery and installation of the respective lines and blending section as agreed. The Applicant did comply and fulfilled her part, and the equipment were delivered for installations.

As part of finalizing the remaining 85% payments obligation, the Applicant issued promissory notes in favour

of the supplier who later transferred them to the Respondent sometime in May 2019. The Respondent as a lawful holder in due course presented them to KCB Bank (T) Ltd but they were not fully honoured, hence, the filing of Commercial Case No.121 of 2022 which the Applicant seeks leave to defend given that the case was filed under **Order XXV- "SUMMARY PROCEDURE"**.

On the 10th day of May 2023, the parties appeared in Court for the hearing of this application. On the material date, Ms. Janeth Njombe, learned advocate appeared for the Applicant while Ms. Miriam Bachuba, learned advocate too, appeared for the Respondent.

Ms. Njombe adopted the contents of the Applicant's affidavit and the affidavit in reply to the counter affidavit and made a very brief submission urging this Court to grant the prayers sought by the Applicant.

Relying on the case of **Makungu Investment Co. Ltd vs. Petrosol (T) Ltd**, Civil Appeal No.23 of 2013 (CAT) (unreported), she submitted, that, the role of a Court in an application like the one before this Court, is to decide whether or not there is a factual dispute to resolve and the

Applicant must only show that she has a good defence against the summary suit.

Ms Njombe submitted that, the facts disclosed in the Applicant's affidavit do sufficiently meet that requirement. Ms Njombe contended that, as per paragraphs 5, 10 and 11 of the supporting affidavit, the Applicant paid 15% of the total consideration agreed between the parties. However, the problem that emerged later was that, despite the contract being clear, the installation works were not performed to date and, the Applicant has raised concerns arguing that the contract did as well cover for not only supply but also installation.

In view of the above, she argued that there is a triable dispute between the parties and granting the orders sought is necessary. On the other hand, Ms. Bachuba has counteracted such a submission made by Ms. Njombe. Relying on the case of **FB General Contractors and Another vs. Bank of Baroda Tanzania Ltd**, Misc. Commercial Case No.18 of 2019, she argued that the Applicant has not demonstrated any triable issue as required by the law.

The issue which I need to consider is whether the Applicant has met the requirements of the law to warrant this Court to grant the prayers sought. Essentially, the two cases cited here above do share a common thing, that is, the Applicant must have a triable issue and must demonstrate facts which shows a *prima facie* defence.

Order XXXV Rule 3(1) of the CPC. Cap.33 R.E 2019 provides, and I quote:

"3-(1) The Court shall, upon an application by the Defendant, give leave to appear and to defend the suit, upon affidavit 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..."

In this application before me, having gone through the rival submissions made by the parties and looked at the affidavits filed by the Applicant, I do not hesitate to hold that, the same have disclosed that, there is a triable issue which necessitates the granting of the orders sought. Essentially, whether the issue of installation of the

equipment was part and parcel of the consideration as per the agreement between the parties, is a question or a factual dispute that requires attention.

I am contented, therefore, that, there is a prima facie defence which would warrant a full hearing of both parties, a fact which warrant that the Applicant be granted this application. In the upshot of the above conclusion, this Court settles for the following Orders:

- (a) That, this application is hereby granted.
- (b) The Applicant is to file her written statement of defence to the Commercial Case No.121 of 2022 within 21 days from the date of this ruling.
- (c) Costs shall be in the main cause.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 23rd DAY OF
JUNE 2023**



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DEO JOHN NANGELA
JUDGE