

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC.COMMERCIAL APPLICATION NO. 73 OF 2023

(Arising from Commercial Case No. 39 of 2023)

BETWEEN

MONGATEKO MAKONGORO MONGATEKO..... APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD.....RESPONDENT

RULING

A.A. MBAGWA. J

This is an application for leave to appear and defend the suit namely, Commercial Case No. 30 of 2023. The applicant, Mongateko Makongoro Mongateko, instituted the instant application by chamber summons under the provisions of Order XXXV Rule 3 (1) (b) and Section 95 of the Civil Procedure Code, [Cap 33 R.E. 2019] against the above-named respondent praying for the following orders,

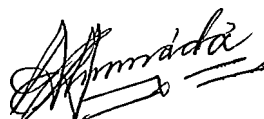
- a. That this Honourable Court may be pleased to grant leave to the applicant to defend himself in Commercial Case No. 39 of 2023 filed under summary procedure before this Court.



- b. Costs of the Application to be in the course.
- c. Any other order that the Honourable Court may deem fit and just to grant.

The chamber summons is accompanied by an affidavit of Mongateko Makongoro Mongateko stating the reasons in support of application. Upon service, the respondent contested the application through a counter affidavit sworn by Mr. Dickson Ikingura.

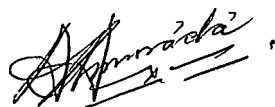
Briefly, the facts obtaining in this application are that; on 18th November, 2015 the respondent, National Bank of Commerce, at the applicant's request, approved a credit facility to a tune of TZS 200,000,000/= for the purpose of buying back applicant's mortgage loan from Azania Bank Limited. The aforesaid credit facility attracted interests and was secured by the first ranking legal mortgage in favour of the respondent on Plot No. 1073 Block "C" Mtoni Kijichi Area, Temeke Municipality in Dar es Salaam city with C.T. No. 8294 in the name of the applicant. The applicant was servicing the loan through monthly deductions from his salaries. Unfortunately, the applicant's employment was terminated by the respondent hence a default of loan repayment. Consequently, the outstanding amount stood at TZS 223,687,419.63 as of 20th March, 2020. After unsuccessful efforts to settle the matter amicably, the respondent



has instituted Commercial Case No. 30 of 2023 under summary procedure to recover the loan amount. It is against this background, the applicant has brought this application seeking leave to appear and defend his suit.

When this application was called on for hearing, Mr. Victor Kikwas, learned advocate appeared for the applicant whilst the respondent had the legal services of Beda Kapinga, learned advocate.

At the outset, Mr. Kikwasi prayed for adoption of the respondent's affidavit so as to form part of the submission. He further told the Court that, leave to defend can be granted upon satisfaction of the Court that there are triable issues and the defendant had tenable defence. He placed his reliance on the cases of **Strategic Business Solution Limited vs The Board of Trustee of the National Social Security Fund**, Misc, Civil Application No 476 of 2021 High court Dar es Salaam and **Chissels Limited vs Arusha International Conference & others**, Misc. Civil Application No 107 of 2022. Expounding on the two principles, Mr. Kikwas submitted that the claim by the respondent is vastly contested for being exaggerated. He added that the amount of TZS 223, 687,419.63 was wrongly calculated on the interest rates of 17% and 7% which was not agreed in the facility letter. According to Mr. Kikwasi, the exaggeration of



the amount and unagreed interest are sufficient reasons to warrant the applicant leave to appear and defend the suit against him.

In rebuttal, Mr. Kapinga, like his counterpart, prayed to adopt the contents of the counter affidavit and skeleton arguments to form part of his submission. It was Mr. Kapinga's submission that leave should be denied because the applicant has not demonstrated any triable issue. Expounding on why leave should be denied, Mr. Kapinga had it that the applicant has failed to address the Court on how the applicant complied with the requirements stipulated under order XXXV Rule 3(l)(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 at hand. Explaining more on this point, Mr. Kapinga submitted that for this Court to grant the leave to defend the suit, the applicant is supposed to prove that the loan was not taken or it was discharged or part of the loan amount has been paid.

In addition, Mr. Kapinga refuted the applicant's contention that the interest rate was not agreed. He contended that, clause 10 of the facility letter tells it all that parties agreed on the interest rate of 12.5%. He added that the interest rate of 17% and 7.5% are BOT rates which are charged in every commercial transaction and were not used by the respondent because they are interest rates to be charged by the Court in

A. Amrinda

the exercise of its discretion. To cement his arguments, he cited the case **of Camel Concrete (T) Ltd vs. Tanzania National Road Agency (TANROADS) & Another**, Misc. Civil Application No. 675 of 2020. Submitting further Mr. Kapinga added that the issue of applicant being terminated from employment cannot be a ground for leave to defend because the mortgage deed does not cover matters of employment. Moreso, Mr. Kapinga argued that the respondent's proposition to offset the loan amount by the award issued in labour case is impossible because the award is not final as the respondent is determined to challenge it in the Court of Appeal. According to Mr. Kapinga, the applicant's affidavit does not contain any paragraph which states that the applicant has paid a portion or full of the outstanding amount nor does he dispute taking loan from the respondent. Mr. Kapinga opined that the applicant failed to satisfy the statutory requirement under order XXXV Rule 3 (1) (c) of the Civil Procedure Code. The respondent's counsel cited the case of **Felix Gamaliel Mosha & Another vs. Exim Bank (T) Ltd**, Misc. Commercial Cause No. 273 of 2015 HC (Commercial Division) Dar -es salaam **(unreported)** where the Court denied leave to defend the suit on the ground that the applicant's affidavit did not demonstrate whether he had paid loan or part of it.

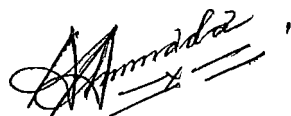


Having canvassed the parties' depositions and their rival arguments, the pivotal issue for determination is whether the applicant has established triable issue. In the case of **Mohamed Enterprises (T) Limited vs Biashara Consumer Services Ltd** [2002] TLR 159, this court held;

"In the application of this nature, the court is not required to involve its lengthy arguments but, rather to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue fit to go for trial. The applicant is only required to show a fair and reasonable defence".

The applicant's contest is on the amount claimed as outstanding loan. The applicant contends that the rates at which the interest has been calculated was not agreed upon. On the other hand, the respondent insists that the interest rates were agreed upon as per the facility letter.

Upon critical appraisal of the rival arguments, I am convinced that there is a material dispute on the interest rates which this Court has to make findings based on the evidence of both parties. Thus, cognisant to the fundamental principle of the right to be heard, it is my considered opinion that the applicant has demonstrated a triable issue sufficient to warrant him leave to appear and defend the case against him in Commercial Case No. 30 of 2023.

A handwritten signature in black ink, appearing to read 'A. Amadi', with several horizontal lines drawn underneath it.

Consequently, the applicant is ordered to file written statement of defence within twenty-one (21) days from the date of this order and serve the same to the plaintiff. No order as to costs.

It is so ordered.

The right of appeal is explained.




A.A. Mbagwa

JUDGE

06/09/2023