

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

MISC LAND APPLICATION NO. 54 OF 2022

(Arising from Land Case No. 141 of 2021)

PRIME PROPERTIES LIMITED.....APPLICANT/DEFENDANT

VERSUS

**NATIONAL HOUSING
CORPORATION.....RESPONDENT/PLAINTIFF**

Date of Last Order: 02.09.2022

Date of Ruling: 03.10.2022

RULING

V.L. MAKANI, J

This application is for leave to appear and defend the suit namely Land Case No. 141 of 2021. The application is by PRIME PROPERTIES LIMITED and is made under Order XXXV Rule 3(1) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**). The application is supported by the affidavit of Ally Kachra, Senior Officer of the Applicant.

The application proceeded orally, and Mr. Wagobu, Advocate for the Applicant, adopted the contents of the affidavit of Ally Kachra. He said

Order XXXV Rule 3(1)(b) of the CPC gives power to this court for the applicant to appear and defend the suit if the said applicant discloses facts which are sufficient to support the application. He said according to the case of **TTCL vs. Timothy Luoga [2002] TLR 150** the defendant is entitled to appear and defend the suit if there is a triable issue. He said the affidavit of Ally Kachra in paragraphs 5, 6 and 7 shows that there is a triable issue on whether frustration in the Lease Agreement released the defendant from the obligation of payment of rent. Mr Wagobu said it is shown in the affidavit that the leased properties were inhabitable thus the Lease Agreements were frustrated. He said if leave is granted it will be demonstrated in the Written Statement of Defence (the **WSD**) that where there is frustration of the lease there is no need of payment of rent. He said paragraph 10 of the affidavit demonstrates that if leave is granted it will be shown in the WSD that this court has no pecuniary jurisdiction to determine this matter. He prayed for the application to be granted so that the defendant gets leave to defend the suit.

In response, Mr. Mwakajanga adopted the contents of the counter-affidavit. he said the applicant is a joint venture partner in the building located at Plot No. 108, Block 00, Kitonga Street, Ilala Municipality

(the **suit house**). He said the applicant owns 75% while the respondent owns 25% and the building was constructed by the applicant. he said the apartments in question as per paragraph 4 of the affidavit are owned by the respondent under the 25%. After construction the applicants applied to be tenants in the said apartments which are 12 in 12/03/2015. He said according to the affidavit after three years the apartments became inhabitable. He said the applicant is not in real estate business and the other apartments owned at 75% by the applicant are in good condition. Mr. Mwajanga said the applicant wrote several letters to admit the claim, but it is the same applicant who is in court disputing the claim. He said the issue of frustration of the lease is not stated in the affidavit and payment of rent is a contractual obligation and an express one. He said the fact that the applicant continued to occupy the premises which they claim inhabitable they are obligated to pay the rent arrears. What the respondent is claiming is the rent arrears prior to the handing over of the apartments to the respondent. He said the fact that the applicant occupied the apartments for all this time meant that they were habitable.

Mr. Mwakajanga pointed out that leave to defend can be given with conditions of payment to court of the amount claimed as arrears in rent or security. He relied on the case of **Nalalisa Company Limited & 3 Others vs. Dimond Trust (T) Limited, Misc. Commercial Case No.202 of 2015 (HC-Commercial Division)** (unreported) and **Paul Massawe vs. Access Bank (T) Limited, Civil Appeal No. 39 of 2014** (unreported) which cases also emphasized that there must be a triable issue. He said the contents of the affidavit shows that there is nothing triable because the applicant is admitting that they are in arrears, and they were in occupation of the said apartments. He said this demonstrates that there was a contractual default. He said the purpose of summary suit is to expediate matters, and since there is admission of rent arrears there is no need to go to the main suit. He said there is a question of jurisdiction of this court but according to section 37 of the Land Disputes Courts Act and section 6 of the Government Proceedings Act a parastatal or a government department demands that suits by or against the government should be placed before the High Court.

In rejoinder Mr. Wagubo admitted that the principle of leave to defend is well reflected in the case of **Prosper Paul Massawe** (supra). He

said conditions for leave to defend are triable issues and these are reflected in the affidavit especially on the issue of jurisdiction. He said if the applicant is granted leave to defend, he will show how the sections on jurisdiction are erroneous. He reiterated his main submissions on the frustration of the contract, and he pointed out that in paragraph 8 the applicant did not admit being in arrears of rent and since the respondent says it is admitted then there is a triable issue. He said the court has been moved under Order XXXV Rule 3(2) of the CPC to grant conditional leave and the case of **Nalalalisa** (supra) did not deal with conditional grant of leave. The court was guided by the case of **TTCL** (supra). He prayed to be granted leave unconditionally to defend the suit. He further said the court is at discretion on the amount to be deposited as security and not the amount in arrears. He prayed for the court to grant leave to defend and do so unconditionally.

Summary procedure is governed by Order XXXV of the CPC. When such suits are filed the facts stated in the plaint are deemed to have been admitted and the plaintiff is entitled to a decree unless the defendant satisfies the court that he has a tenable defence, and the court is pleased to grant leave to defend unconditionally or on

conditions as it may deem fit for the court. The rationale behind summary procedure, is as said by Mr. Wagubo, to expediate matters which are in court.

The material portions of Order XXXV Rule 2 of the CPC in respect of this matter are as follows:

2(1) Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform the defendant that unless he obtains leave from the court to defend the suit, a decision may be given against him and shall also inform him of the manner in which application may be made for leave to defend.

3(1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which 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, disclose such facts as the court may deem sufficient to support the application.

3(2) Leave to defend may be given unconditionally or subject to such terms as to payment into court, giving security, framing, and recording issues or otherwise as the court thinks fit.

It is common ground that under Order XXXV of the CPC the main factor for grant of leave to defend is existence of triable issues and/or prima facie case which has to be demonstrated by the applicant. The

court has to base its decision on whether or not there is a triable issue on the affidavit by the applicant. So, the role of the court is to look at the affidavit filed by the applicant in order to decide as to whether there is a triable issue fit to permit the applicant to file a defence in the main suit (see the case of **Prosper Paul Massawe & Others** (supra) which quoted with approval the case of **Mohamed Enterprises (T) Limited vs. Biashara Consumer Services Limited [2002] TLR 149 (HC)**).

I have gone through the affidavit in support of the application for leave to defend. I agree with Mr. Wagobu that the affidavit raises triable issues. There are contentious issues on the non-payment of rent because the apartments were alleged as not habitable. There are issues that the applicant prayed to be given time to renovate, but no consent was given by the respondent. The fact that the applicant denies the liability of payment of rent arrears is in itself a triable issue. The applicant has also raised the issue of jurisdiction (see paragraph 10 of the affidavit) which in my view needs to be dealt with in the main suit. In summary the affidavit reflects triable issues, and the applicant has demonstrated that they have an arguable defence entitling them leave to defend the suit.

In that regard, the application has merit. The applicant is granted leave to file her defence in the main suit. Costs to be in the cause.

It is so ordered.



V.L. Makani

**V.L. MAKANI
JUDGE
03/10/2020**