

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

MISC. LAND APPLICATION NO. 2624 OF 2023

(Arising from Land Case No. 331 of 2023)

MARGRETH E. MOSI.....1ST APPLICANT

STEVEN KARUGILA.....2ND APPLICANT

VERSUS

NATIONAL CONSTRUCTION COUNCIL.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

ANNA LYIMO.....3RD RESPONDENT

JOACHIM J. KAVISHE.....4TH RESPONDENT

RULING

6TH to 15th March, 2024

E.B. LUVANDA, J

This application is made under the enabling provision of Order XXXV rule 3(1)(a), (b) of the Civil Procedure Code, Cap 33 R.E. 2019. Herein the Applicants are craving for leave to defend in Land Case No. 331/2023. In the affidavit in support of application, the Applicants grounded that the amount claimed in the plaint by the Respondents (a sum of Tsh 22,500,000 against the First Applicant; Tshs 22,530,000 against the Second Applicant as rent arrears are un imaginable and exorbitant, for reasons that: One, no amount remain un paid to date, as per correspondences annexure MSK-1 to the affidavit, alleged fully settled the rent bills; Two, no lease exist; Three they have incurred expenses and

costs for repairing the demise promises. They asserted that houses were unfit for settlement.

In the counter affidavit, the Respondents stated that the applicant's in annexure MSK -1 failed to show receipts of payments made by the Applicants up to 5/8/2022 when notice of payment of rent arrears was made to the Applicants. They stated that the Applicants have admitted a claim of being indebted by the Respondents and went further to make repairs of the rental house prior consent or approval from the Respondent or involvement of the quantity surveyor from the Respondent. They asserted that a sum of Tshs 23,500,000 for the First Applicant and Tshs 22,530,000 for the Second Applicant are genuine claims. They stated that annexure MSK-2 to the affidavit is normal correspondence between land lord and tenant. They stated that the Applicants are still living in the suit house alleged to be unfit for human habitation.

In a reply to the counter affidavit, the applicants asserted that annexure MSK1 and MSK3 include receipts signifying payments made by the Applicants during the lease term. They stated that no lease agreement existed during that period and no rent bill remained unpaid.

It is to be noted that the Respondents raised a preliminary objection that the application is untenable and bad in law for impleading a new party who is not a party in the main suit.

Mr Stephen Kimaro learned state Attorney for Respondents submitted that parties in the main suit Land Case No. 331 of 2023 are not the same who appears in the current application, for an argument that Steven Karugila is excluded and in lieu one Anna Lyimo who is not a party to the case is replaced.

In response, the Applicant submitted that the name of Steven Karugila who is the Second Defendant in the main suit, appear as the Second Applicant herein. They conceded to a fact that the name of Anna Lyimo was mistakenly impleaded as the Third Respondent.

Contextually, the omission to my opinion is not fatal, neither need a call for amending the chamber summons. Rather I hold a view that it is curable under the doctrine of overriding objective under section 3A of the Civil Procedure Code, Cap 33 R.E.2019 which meant to facilitate the just expeditious, proportionate and affordable resolution of civil disputes. Therefore, the name of Anna Lyimo appearing as the Third Respondent, being a stranger to the proceeding is discarded by way of striking out.

Arguing in support of the merit of application, the Applicants submitted that their application for leave to defend the suit are premised on the following grounds: One, the First Respondents claim against the Applicants is based on the amount already settled, arguing the applicants fulfilled their obligation of paying all arrears of rent before 31/8/2018, as

per annexure MSK-1 to the affidavit. Two, the claim by the First Respondent is erroneously and wrongly claimed, for an argument that it was claimed during the claimed period there was no lease agreement existed between them and the Respondents. They submitted that the lease agreement was terminated way back on 31/9/2018 when their lease was set to end and they expressed their intention of non-renewal.

In reply, the learned State Attorney for respondents submitted that the Applicants have never denied being tenants of the First Respondent nor continued living on the same premises todate. He submitted that annexure MSK1 shows up to 22/11/2022 the tenants were still living in the rented house. He submitted that a letter has ever been substitute of receipts of the rental fees. He submitted that a letter dated 28/11/2022 in annexure MSK -1 admitted a charge of Tsh 1,920,000/= indebted for conducting un approved repair. He submitted that since there is no proof of receipts for repair and the First Respondent did not approve, argued a claimed of Tshs 23,500,000 and 22,530,000 to the First and Second Respondent, respectively remain intact.

On rejoinder, the Applicants submitted that there is no dispute that the Applicants were Respondent's tenants and are still living in that rented house todate, arguing the issue is whether the amount claimed have been paid or not. They submitted that annexure MSK-1 are letters which were

used by the Applicants explaining to the Respondents on payments made during existence of a lease agreement.

Essentially, the Applicants are making self defecting argument, at first dispelled existence of a lease agreement at the same time making concession of a fact that they are still living in the demise premises. Be as it may, to my view the issue of payment of rent is a point of contention. The Applicants are alleging to have settled it as per the elaboration in annexure MSK-1, meanwhile the Respondents are disputing for an argument that letters are not substitute of receipts. Arguably a letter by the tenant can hardly be a proof for payment of rent, unless the land lord acknowledge the same in writing. In annexure MSK-3 there are two receipts dated 9/8/2018 for an amount of Tshs 600,000 and 12/10/2018 for an amount of Tshs 1,300,000 both for the Second Respondent.

That being the case and in view of the allegation by the Applicants that they embarked on some renovations, although the Respondent dispute it having been done without her consent or approval, I hold the view that there is an arguable case. My undertakings are grounded on a fact that in the plaint which was presented to the Court under summary procedure, the Plaintiff (Respondent herein) apart from a claim of rent a sum of 23,500,000 and 22,530,000 against the First and Second Applicants, respectively, but also the Plaintiffs (Respondents herein) pleaded loss of

Tsh. 1,000,000.00 and general damages 30,000,000.00. No facts were pleaded as to whether the liability of the Defendants to the suit (claim) is jointly and severally or apportioned by shares.

In the affidavit specifically annexure MSK-3 there are two receipts dated 9/8/2018 for an amount of Tshs 600,000 and 12/10/2018 for an amount of Tshs 1,300,000 both for the Second Respondent. The Applicants also pleaded to had incurred costs for renovation.

In the conjunction of these facts, to my view suggest there is a triable issue. In that regards I differ with a proposition of learned State Attorney who opined that the Applicant's affidavit failed to disclose sufficient facts to support the application.

The author **Mulla**, The Code of Civil Procedure Sixteen Edition at page 3653 to 3654 cited the case of **Michalec Engg & Mfg Vs. Bank Equirement Corpn**, AIR 1977 SC 577, where the supreme court (India) laid down the following principles about granting leave to defend, I quote,

- (i) *If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.*
- (ii) *If the defendant raises a triable issue indicating that he has a fair or bonafide, or reasonable defence, although not possibly good defence,*

the defendant is entitled to unconditional leave to defend.

- (iii) If the defendant discloses such facts as may be deemed sufficient to enable him to defend, that is if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose condition sat the time of granting leave to defend the conditions being as to the time of trial or mode of trial but as to payment into court or furnishing security.*
- (iv) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.*
- (v) If the defendant has no defence or the defence is illusory or sham, or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff by imposing the condition that the amount claimed should be paid into court or otherwise secured'*

In view of the above, I hold a view that the Applicants managed to meet the minimum threshold by indicating that he has a reasonable defence to the Respondent's claim.

I therefore grant the Applicants unconditional leave to defend the suit by presenting his written statement of defence within twenty-one days, counting from the date hereof.

The Application is granted. No order as to costs.



E. B. LUVANDA
JUDGE
15/03/2024

Ruling delivered virtually attended by the First and Second Applicant and in absence of the learned State Attorney for Respondents.



E. B. LUVANDA
JUDGE
15/03/2024