

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

MISC. LAND APPLICATION NO. 27060 OF 2023

(Arising from Land Case No. 331 of 2023)

JOACHIM A. KAVISHE.....APPLICANT

VERSUS

NATIONAL CONSTRUCTION COUNCIL.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

29/2/2024 to 15/3/2024

E.B. LUVANDA, J

This is an application for leave to defend Land Case No. 331 of 2023, filed under summary procedure. In the affidavit in support of a chamber summons the Applicant above pleaded that he incurred costs a sum of Tsh. 3,576,000/= in renovating the demised premises for which the Respondents claim under summary procedure payment of Tsh. 29,390,000/= purported to be accumulated rent. He dispelled a fact that he failed to pay rent, arguing the demise premises was unfit for human settlement. The deponent asserted that there was no agreement.

In a joint counter affidavit, the Respondents stated that the Applicant never informed the Respondents of any renovations to be made, arguing it was without the consent or approval of the Respondent. He stated that there is no notice, letter or any document annexed to the Applicant affidavit showing that the disputed house was unfit for human habitation, argued the Applicant proceeded to live on the same premises to date where accrued rental Tsh. 29,390,000/-. He stated that the Applicant failed to show receipts of payment made to the First Respondent up to 5/08/2022 when a notice to pay rent was issued to him, arguing the Applicant also admitted the fact of being indebted in a letter dated 19/02/2021 annexure NCC1 to the counter affidavit.

The Applicant in his written argument, cited Article 107 A (2) (e) of the constitution of the United Republic of Tanzania, 1997, for proposition that this Court should avoid technicalities and comply to the premises of natural justice that no person should be condemned unheard, citing **Zuberi Mussa Vs Shinyanga Town Council**, Civil Application No. 100/2004.

In reply Mr. Urso Luoga learned State Attorney for the Respondents, submitted that in granting leave the court must look an affidavit to see whether the deposed facts have demonstrated triable issues, citing **Naraisa**

Enterprises Company Limited & 3 Others Vs Diamond Trust Bank

Tanzania Limited, Misc. Commercial Case No. 202/2015. He submitted that skipping the proof of payment negates the principle of granting leave to appear and defend the summary suit, citing Order XXXV rule 3(1) (b) of the Civil Procedure Code Cap 33 RE. 2019. He submitted that the Applicant allege to has no lease agreement with the First Respondent and yet in annexure A1 at paragraph five of affidavit shows receipts that he claims he has done renovation and he need refunds on the same house which he claims he has no lease agreement. He submitted that the Applicant issued a report that a house is unfit for house settlement, arguing there is no proof in his affidavit and no report was attached to support his claims. He cited the case of

Tanzania Telecommunication Company Limited Vs Timothy Luoga

(2002) TLR 15, for proposition that the Defendant is entitled to leave to defend summary suit if is shown that there is a triable issue. He submitted that the Applicant failed to disclose such facts sufficient to support the application. He submitted that the authority of court to dispense justice is not absolute, argued is enjoyed with certain limits prescribe by law.

According to a plaint presented to the court under summary procedure, the Plaintiff (Respondent herein) claim against the Applicant a sum of Tsh.

29,390,000.00 and general damages a sum of Tsh. 30,000,000.00. In the attachments pleaded as annexure NCC1, specifically a letter Ref. No. A.D. 02/180/07/23 dated 3/02/2021, depict an arrears of rent a sum of Tsh. 13,390,000.00, meaning there is a difference of an unexplained sum of Tsh. 10,110,000.00. Also the Plaintiff 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, the Applicant asserted that a sum of Tsh. 29,390,000/- was not stated as to have accrued from when. The Applicant 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 Applicant managed to meet the minimum threshold by indicating that he has a reasonable defence to the Respondent's claim.

I therefore grant the Applicant 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 Applicant and in absence of the learned State Attorney for Respondents.



E. B. LUVANDA
JUDGE
15/03/2024