

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

MISC. LAND APPLICATION NO. 81 OF 2023

[c/f Land case No. 27 of 2023, High Court at Arusha]

TOBIAS SILVESTER MWANYIKA.....1ST APPLICANT

BENEDICT TOBIAS MWANYIKA.....2ND APPLICANT

VERSUS

THE BOARD OF TRUSTEE OF AGRICULTURAL INPUTS

TRUST FUND.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

5/03/2024 & 23/04/2024

NDUMBARO, J

The applicant has brought this application and moved this court under the provision of Order XXXV Rule 2(2)3(1)(a)(b), Section 68(e) and Section 95 of the Civil Procedure Code Cap 33 R.E 2019. The application

was made under chamber summons supported with an affidavit sworn by the first applicant Tobias Silvester Mwanyika who is first applicant in this application, seeking leave to defend the summary suit in Land case No. 27 of 2023, High Court at Arusha instituted by respondent.

The affidavit narrated reasons for this application that the applicant was affected by natural calamities which is an Act of God and hence failed to honour the loan agreement. The applicant and respondent agreed to reschedule the agreement but to their surprise, the respondents instituted a summary suit. It is their believe that, there are triable issues to argue in the main case hence this application.

In the main case under the summary suit, the plaintiff claimed breach of loan agreement acquired for irrigation purposes, which amounted to 61,174,978 being principal, interest and penalty due on 4 April 2023, arose from the principal sum of TZS 49,555,000 made on 13 September 2017 between the 2nd defendant and 1st plaintiff. The said loan was to be repaid in 12 instalments amounting to TZS 4,996,291.67 for each instalment within three years with interest of 7% per annum. The loan was secured by legal mortgage property No. 661 Block HH, belonging to 1st Defendant, located at Themis Area registered under certificate of title

No. 10537 situated at Arusha City. The respondent defaulted on the payment on the scheduled loan facility and only paid TZS 4,000,000 on 16th June 2022. The plaintiff instituted the summary suit and prayed for a declaration that the respondent breached the loan agreement and that an order for the sale of mortgage property be granted before this court.

Reasons adduced by the applicant in this application as to be considered by this court to defend the summary suit is that they encountered natural calamities which were considered as acts of God hence failure to discharge contractual obligation. Claiming that the said failure was communicated to the respondents in this application and agreed to reschedule the agreement.

The respondent opposed the application by a counter affidavit sworn by Christabella Madembwe State Attorney that, the applicant did not provide sufficient reasons to warrant this court to grant leave to defend the summary suit and no proof as to the fact that there was rescheduled loan agreement.

Parties agreed to argue their case by way of written submission. the applicant's submission was drawn by Advocate Gabriel Rwahira and the respondent enjoyed the service of State Attorney Christabella Madembwe.

Mr Rwahira on his submission prayed that the affidavit of the applicant be adopted and form part of the submission. He went on to submit that, the applicants are defendants in Land Case No. 27 of 2023 which was brought under summary suit by respondents claiming TZS 61,174,978 for breach of loan agreement made on 13th September 2017 between 2nd defendant and 1st plaintiff secured by legal mortgage property No. 661 Block HH, located at Themis Area registered under certificate of title No. 10537 situated at Arusha City, belongs to 1st Defendant. The loan was for irrigation and was scheduled to be paid within 3 years with an interest of 7% per annum. Due to failure to pay the said loan, the defendant intends to sell the mortgaged property block No. 661 HH Themis Area to recover the loan. Because the applicant has no automatic right to file a defence in summary suit hence this application.

The applicants did not dispute that on 2017 the 2nd applicant entered into a loan agreement with the 1st respondent to the tune of TZS 49,550,000/= for an irrigation project which was guaranteed by the 1st applicant. The applicants intend to defend this suit due to the fact that, the project failed due to heavy rain (el nino) in river Kijenge in 2018, which is considered an act of God. In the same year a group of Masai vandalized

the project with local weapons and in 2019, COVID-19 caused a high cost of agricultural inputs and in 2020, heavy wind demolished greenhouses and crops. All were communicated to the respondent and the applicant requested the respondent to reschedule the loan agreement, the first respondent agreed. Despite the scheduling agreement, the respondents filed a case before this court.

Applicant argued, that there is a triable issue that needs to be argued in Land Case No. 27 of 2023, in support of their argument cited the case of **Chissels Limited Vs Arusha International Conference Centre and Attorney General** Misc. Civil Application No. 107 of 2022 HC. and **Strategic Business Solutions Limited Vs the Board of Trustee of National Social Security Fund** Misc. Civil Application No. 476 of 2021. The applicants therefore prayed that this this application be granted with cost and any other relief this court deems fit to grant.

In reply, Ms Christabella Madembwe State Attorney prayed to adopt a counter affidavit to form part of this submission. She further argued that Order XXXV Rule 3(1)(b) and (c), of the Civil Procedure Code Cap 33 R.E 2019 provides conditions which the applicants should prove in order to be granted leave to appear and defend a summary suit that; -

3.- (1) *The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-*

(a)

(b) disclose such facts as the court may deem sufficient to support the application; or

(c) in suits arising out of mortgages, where the mortgagor demonstrates that-

(i) loan or the portion of the loan claimed is indeed discharged, or

(ii) loan was actually not taken.

Ms. Cristabella argued that the applicant's affidavit did not demonstrate a triable issue sufficient to warrant this court to grant leave to defend the suit as per Order XXXV Rule 3(1)(b) and (c), of the Civil Procedure Code Cap 33 R.E 2019, in support of the argument cited the case of **Nararisa Enterprises Company Limited and 3 others Vs Diamond Trust Tanzania Limited** Misc. Commercial Case No. 202 of 2015 HC Commercial Division Dar Es Salaam. Further argued, the affidavit filed does not demonstrate a triable issue to go for trial, that there is a fair and reasonable defence. Moreover, the applicant failed to show whether the loan was partly discharged or not taken, rather showing that they failed to perform due to an act of God. Mis.Madembwe went on to state that the applicants failed to demonstrate conditions set under Order XXXV Rule

3(1)(b) and (c), of the Civil Procedure Code Cap 33 R.E 2019. The applicant did not show proof as to rescheduling of the loan facility agreement as argued, there was no such agreement, applicant failed to discharge the loan agreement. She finally made a prayer that this court dismiss the application with cost.

In rejoinder the applicant reiterated what was stated in the submission in chief that the applicant was affected by natural calamities and the same was communicated to the 1st respondent, further in countering the respondent counter affidavit argued, the respondent admitted having received part payment to the tune of Tshs.4,000,000/= and thus prays this application to be granted.

Considering the affidavit and counter affidavit of the applicants and the respondent respectively and considering the rival arguments in the written submission of both counsel of the applicant and respondents, I am convinced, that for the court to grant leave to the applicant the condition set under Order XXXV Rule 3(1)(b) and (c), of the Civil Procedure Code Cap 33 R.E 2019, should be satisfied, that there must be ;

- a) Triable issues and
- b) Reasonable defence

This position receives support in the case of **Classic Professional Caterer Vs. The Board of Trustees of The Public Service Social Security Fund** Misc. Civil Application No. 250 of 2019 where the court observed that, for leave to be granted the applicant must present an arguable case.

In the suit arising out of the mortgage, the conditions are well articulated under Order XXXV Rule 3(1)(c) of CPC (supra) that-

- (i) loan or the portion of the loan claimed is indeed discharged; or
- (ii) (ii) loan was actually not taken.

This position also receives support in the case of **Datacom Consult Group Limited, Leopold Mutakyawa Rweyemamu and Rabia Nassoro Hemed Vs International Commercial Bank Tanzania Limited** Misc. Application No. 107 of 2020 where my learned brother Nangela, J had the following to say;

"In view of the above, while I fully agree with the learned counsel for the Respondent that the suit is one touching a Mortgaged property and that Order XXXV rule 3(1) (c) and (3) of the CPC applies to such suits, it is also true that, where there are issues which need to be resolved in the main case

as between the parties, leave to defend can as well be granted, lest the defendant be condemned unheard."

The applicant's affidavit demonstrated that there was an unforeseen event which was an act of God preventing him from performing the loan agreement, and made an effort to inform the respondents of the failure and requested to reschedule the agreement. In the rejoinder, the applicant argued the said loan was partly paid to the tune of Tshs. 4,000,000/=. On the side, the respondent's counter affidavit disputed that there was no rescheduling loan agreement, the applicant did not provide any proof of the same, however, the respondents did not dispute the fact that there was an act of God. In paragraphs 3,4,5,6,7 and 8 plaintiffs' (respondents herein) plaint demonstrated that the applicants (herein) failed to honour the loan payment schedule, but in paragraph 9 of the said plaint demonstrated that on 5th April 2023, paid only Tshs. 4,000,000/= and made the amount due Tshs. 61,174,978/=

Considering the above analysis, it is my view that, the applicants in this case have demonstrated the existence of the three conditions enshrined under order XXXV of CPC (supra) that, there is a triable issue;

there is reasonable defence and the loan was partly paid. In that regard, I find the application grantable.

The applicants are given leave to appear and defend the summary suit in Land case No. 27 of 2023, before this court. The applicants are required to file their Written Statement of Defence within 21 days from the date of pronouncing this ruling.

Costs of this application shall follow the determination of the main suit.

It is so ordered.



A handwritten signature in black ink, appearing to read "D. D. Ndumbaro".

D. D. NDUMBARO

JUDGE

23 /04/2024