

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

MISC COMMERCIAL CAUSE NO 273 OF 2015
(Arising from Commercial case No 71 OF 2015)

BETWEEN

FELIX GAMALIEL MOSHA -----1ST APPLICANT
ANNA FELIX MOSHA -----2ND APPLICANT

VERSUS

EXIM BANK (T) LIMITED -----RESPONDENT

RULING

Dates :16/2/2016 /15/5/2016

SONGORO, J

Exim Bank Tanzania Limited, the Respondent filed a summary suit under Order XXXV of the Civil Procedure Code, Cap 33 R.E 2002 claiming against Felix Gamalieli Mosha, and Anna Felix Mosha for payment of USD 144,122.30 being principal loan, and interests advanced to the 1st Applicant. The 2nd Respondent guaranteed the 1st Applicant on the loan which was granted.

In response to the Summary suit, the two Applicants relying under Order XXXV Rule 3 of the Civil Procedure Code, [Cap 33 R.E 2002] filed the instant application for leave to appear and defend the suit. Applicant's application was supported by an affidavit sworn by Felix Gamalieli Mosha, the 1st Applicant.

Thus in view of the Applicants application for leave to appear and defend the suit, the Court to the 10/12/2015 allowed the parties to

pursue the Application by a way of written submissions. Both Counsels filed their submissions pursuant to the Court Order.

Pursuing Applicants application for leave to appear and defend the suit, Mr. Nyange and Mr. Ngalo in their written submission first pointed out that Applicants secured loan facility of USD 160,000 for the purposes of liquidating an outstanding loan of Mavuno Stores Limited from the Respondent's bank. They then indicated that the outstanding loan of Mavuno Stores Limited which was supposed to be paid from the secured loan which its total sum was not agreed upon by the Applicant and Respondent. Therefore, it is difficult to say if the entire loan of USD 160,000 was used to liquidate the said loan.

The Counsel then pointed out that, although the amount of USD 160,000 was initially deposited into the 1st Applicant's bank Account, but it is the bank which has the control over the money, and the bank utilized the money as it deems necessary.

Then relying on the affidavit of Felix Mosha, Applicant's Counsel indicated that there are triable issue in the suit, like what was the outstanding loan of Mavuno stores Limited at the time the credit facility of USD 160,000 was extended to the Applicants, and what amount from the loan of USD 160,000 was utilized to pay the debt, and the remaining amount. Then relying on the decision in the case of Mohammed Enterprises (T) Ltd Versus Biashara Consumers

Services LTD [2002] TLR 159 where it was held that if an affidavit in support of the Application for leave to defend the suit discloses triable issues, then the court will grant leave.

In the same decision, the court stated that triable issues, are the ones which are being contested, and for interest of justice ought to be canvassed further by evidence. Finally Applicants prayed that the leave to appear and defend the suit be granted

On his part, Mr. Mnyele for Respondent bank submitted that it is true Applicants were involved in two loans. The first loan was taken by an entity known as Mavuno Stores Limited. But it is a second loan which was taken in the name of Felix Gamalieli Mosha and guaranteed by Mama Anna Felix Mosha which is subject of this Commercial Suit and the Application. So the loan which Applicants took and is un paid. The Counsel then indicated that the Mavuno loan has nothing to do with the loan taken by Felix Mosha.

The Counsel then pointed out that Order XXXV (3) (2) of the Civil Procedure Code, Cap 33 [R.E 2002] has put limitation in granting leave to appear and defend summary suit. It was the views of Mr. Mnyele that in summary suit involving bank loan leave to appear and defend the suit may be granted where there is a proof the loan has been fully paid, or part of it has been paid. He then indicated that in the present application there is no proof if the loan has been fully

paid or part of the loan has been paid. In view of the above, the Respondent's Counsel explained that the application has no merit and ought to be dismissed for lack of merit.

In rejoinder to the submissions of Respondent, Applicant's Counsel submitted that the two loans may not be separated and that is why the letter of offer has an explanation of Mavuno Stores Limited and it was accepted by the Respondent bank. He then indicated that Mavuno loan is still subject of discussion, and there is no any decision which has been reached between the parties.

The Counsel then indicated that even if you go with amended Order XXXV of the Civil Procedure Code, Cap 33 R.E 2002 still leave may be granted because they have demonstrated that a portion of the loan has been paid. The Counsel then insisted that there are issues to be tried and the interest of justice demands Applicants be granted leave to appear and defend the suit.

The court has carefully considered the Applicant application for leave to appear and defend the suit, the Respondent's objection to the Application and find the Respondent summary suit is based on letter of credit for short term loan facility of USD 160,000 granted to Felix Gamalieli Mosha mentioned as the borrower. Admittedly the purposes of the loan were to liquidate outstanding loan amount of M/S Mavuno Stores Limited.

Next the court find the loan which Respondent is pursuing to recover in the Commercial Case No 71 of 2015 which is subject of this Misc Commercial Cause No 273 of 2015 is the one mentioned in Annexure Exim 1 of the Plaintiff.

And as correctly pointed by Mr. Mnyele that Section 25(b)the Mortgage and Finance Act , 2008 amended Order XXXV, Rule 3 of Civil Procedure Code, Cap 33 [R.E.2002] by introducing item (C) which now states that a party in a summary suit is entitled to appear and defend the suit on suits involving mortgage if he demonstrates that the loan has been fully or partly paid , or the loan was never taken. Indeed Rule 3(1) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] states as follows;

The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which

- a) 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; or*
- b) disclose such facts as the court may deem sufficient to support the application.*
- c) In a suit arising out of mortgages where the Mortgagor demonstrates that;*
 - (i) loan or portion of the loan claim is indeed discharged*
 - (ii) the loan was not actually taken*

Guided by the Provisions of Rule 3(1) (c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] I revisited the Plaintiff`s claim and ask whether or not the suit originates from mortgage; and find in clause 8.1 of the Annexure Exim 1 at page 3 there is a Legal

Mortgage which was created by Facility Credit Letter in the sense that landed property was pledged as security for un paid loan.

In view of that mortgage, the court is persuaded that the Plaintiff suit arises involves mortgage and relevant and enabling provisions which governs the granting of leave to appear and defend the suit involving mortgage is Rule 3 (1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002]

Next, the Court went a step further and examines Applicant reasons for leave to appear and defend the suit and find is based facts that when loan was issued to the Applicant it is the bank which control over the money, utilized it to pay Mavuno Loan.

Secondly the Applicant's Counsel argued that from affidavit of Felix Mosha, there are triable issues for determination such as what was outstanding loan of Mavuno stores Limited by the moment the loan was advanced to the Applicant and what amount was paid from the credit facility of USD 160,000 into the loan of Mavuno stores Limited and what is balance. Also there was the Applicant claim that some monies were paid to the Respondents Counsel.

I have carefully considered the reasons advanced by the Applicant in seeking leave to appear and defend the summary suit, and find it is

true that the loan was advanced for the purposes of paying loan of Mavuno Stores Limited.

Furthermore, the Court examined Applicants affidavit to ascertain if there was any payment of loan paid to the Respondent's bank and find in the Applicant affidavit there is no any paragraph which stated or suggested if the loan of USD 160,000 has been paid or part of it has been paid to the Respondent's bank.

Bearing in mind that the loan or part of it has not been paid to the Respondent's bank, the key issue for determination is whether reasons advanced by the Applicants that there are triable issues in the pending suit for determination or payments were made to the Advocate of Respondent's bank are sufficient enough to grant the application for leave to appear and defend the suit.

I have considered reasons advanced by Applicant in line with provisions of Rule 3 (1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] and find in normal summary suit leave to appear and defend the suit is granted once there are triable issues.

But in the summary suit where the claim involves mortgage like the present one the law has set statutory criteria which statutorily guides the court, in determining whether or not the applicant should be granted leave to appear and defend the suit.

The statutory criteria set by Rule 3 (1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] states that leave to appear and defend the suit is granted when it is established either (1)the loan was not taken (2) the loan has been paid (3) part of the loan has been paid. It seems payment envisaged under the above mentioned Rule is payment done for the purpose of liquidating the loan to the bank.

Since in the Applicant affidavit , there is no proof if he has paid the loan or part of it, I find the reasons advanced by the Applicant for leave to appear and defend the suit, with great respect did not met the statutory criteria stated under Rule 3 (1)(c) of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] under which the court may exercise its powers and grant the application.

It seems to me, the Applicant application and reasons advanced by for leave to appear and defend the suit; may have been relevant if the summary suit was not involving mortgage which was created in the Credit facility letter.

On the foregoing reasons, I find the Applicant Application leave to appear and defend the suit fails because it did not met the statutory criteria stated Rule 3 (1)(c) of Order XXXV of the Civil Procedure

Code, Cap 33 [R.E 2002] and is hereby dismissed for lack of merit with costs in favour of the Respondent's bank

Dated at Dar es Salaam this 12th day of May , 2016


H.T, SONGORO
JUDGE

Delivered at Dar es Salaam this 12th May 2016


H.T, SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Timothy Mwakisambwe, Learned Advocate holding a brief of Mr. Colman Ngalo, Learned Advocate and Ms Jackline Mwingwa , Learned Advocate for Respondent.