

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

**MISC.COMMERCIAL APPLICATION NO.17 OF 2020  
(Arising from Commercial Case No.149 of 2019)**

**RAFIKI ENG. & PUMP SERVICES LTD.....1<sup>st</sup> APPLICANT  
FRANKLINE ELIAS KILEO.....2<sup>nd</sup> APPLICANT  
v  
MANTRAC TANZANIA LTD.....RESPONDENT**

**RULING**

*09/03/2020 & 27/03/2020*

**NANGELA, J.:**

This is an application which was filed by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants. The Application arises from **Commercial case No. 149 of 2020**, which was filed as a "**Summary Suit**" by the Respondent, on 18<sup>th</sup> December 2019. In essence, since the Suit was filed as a "summary suit", the Defendants (who are applicants herein) are barred from entering an appearance to fend for their rights, if any, unless they are granted, upon an application, permission to do so by the Court.

In view of the above, when the suit was called on 5<sup>th</sup> February, 2020, for necessary orders, Mr. Munale, who appeared

for the Plaintiff/Respondent informed this Court, that, the Defendants were duly served with the Plaint, and, that, the Plaintiff has not been served with any document indicating that they have applied to the Court to be allowed to defend the suit.

On the material date, (05/02/2020), however, the 2<sup>nd</sup> Applicant was in Court. He prayed for the case to be adjourned for another date, owing to the fact that, the Defendants/Applicants were interested to enter defence and, for that matter, he was in the process of engaging a lawyer. Mr. Munale did not object to the prayer.

It is on such a brief background, that, the Applicants filed this application. The filing was by way of a Chamber Summons, made under Order XXXV rule 2 (2), rule 3 (1) (a) and (b) of the Civil Procedure Code, Cap. 33 R.E. 2002 (and any other enabling provision).

The Chamber Summons was supported by an affidavit of the 2<sup>nd</sup> Applicant, Frank Elias Kileo. In short, the Applicants are seeking for the following orders:

- 1. This Court be pleased to grant leave to the Applicants to defend the suit.*

- 2. Costs of the Application be provided for.*
- 3. Any other orders that this Court shall deem fit to grant in favour of the Applicants.*

On 27<sup>th</sup> February 2020, the Respondent filed a counter affidavit opposing the application. The counter affidavit was filed following the orders of this Court which were issued on 14<sup>th</sup> February 2020. The Applicants did not file any rejoinder, and, the application proceeded to its hearing stage, which was fixed to be held on 9<sup>th</sup> March 2020, at 9.00 am.

On 9<sup>th</sup> March, 2020, when the matter came up in Court for the hearing of the oral submissions of the parties, the Applicants were represented by My. Frank Ringo, learned advocate, while the Respondent was represented by Mr. Fraterin Munale. At the hearing, both counsels made brief submissions in line with the requirements of Rule 65 (1) of this Court's Rules of Procedure, which ascribes 20 minutes for each party's submission.

For his part, apart from restating the provisions under which the application was based, and, the fact that the Applicants do not have an automatic right to defend the main suit, Mr. Ringo

implored this Court, on the basis of the affidavit of the 2<sup>nd</sup> Applicant, to grant the application.

Mr. Ringo submitted that, there are triable issues that call for the Appellant's appearance and defence in the summary suit which was filed by the Respondent. He stated that, according to the affidavit filed by the 2<sup>nd</sup> Applicant in this Court, it is not denied that there was a credit sale agreement entered between the 1<sup>st</sup> Applicant and the Respondent.

Mr. Ringo submitted to the effect that, the subject matter of such credit sale was an excavator which was to be delivered to the 2<sup>nd</sup> Applicant on 1<sup>st</sup> November 2014, but due to the delay occasioned by the Respondent, the same was delivered belatedly. He averred that, due to that fact, the 1<sup>st</sup> Applicant was made to suffer losses, as some of the contracts it had concluded with its clients, with a hope that the delivery would be made timely, got cancelled.

To support his averments, Mr. Ringo referred this Court to two letters attached to the affidavit of the 2<sup>nd</sup> Respondent as Annexures REP-2. The first letter is addressed to the 1<sup>st</sup> Applicant

by SUMMERTEC LTD, in relation to termination of a contract. The letter is dated 15<sup>th</sup> December 2014.

The second letter, dated 17<sup>th</sup> December, 2014, was addressed to the Respondent. It is about the 1<sup>st</sup> Applicant's request to defer the intended monthly instalment for the equipment purchased on credit, which was due for payment on 20<sup>th</sup> December 2014. The deferment was being sought because the delivery of the machine was yet to be made, and, already, the 1<sup>st</sup> Applicant had lost a contract with a potential client as a result of the delayed delivery.

Mr. Ringo further submitted that, the Respondents are also concerned that they have made several payments so far, as evidenced by a statement of account attached as Annexure "**REP 3**" to the affidavit of the 2<sup>nd</sup> Respondent. He averred that, the Applicants have payed more than what is being claimed.

Mr. Ringo concluded that, according to Order 35 rule 2 (2) and rule 3 of the Civil Procedure Code, Cap.33 [R.E.2002], this Court is obliged to grant leave to defend upon submission of an

affidavit that discloses that there are triable issues in the case before it.

In his view, Mr. Ringo submitted that, the triable issues include the fact that the claimed amount by the Respondent is incorrect because it is lesser than what is being claimed, and, that, there was negligence on the part of the Respondent to deliver the equipment to the Applicant, as per their agreement, which negligence made the Applicant suffer irreparable losses under the contract. For those reasons, he prayed that the application be granted with costs.

For his part, Mr. Munale, appearing for the Respondent, submitted that, the Applicants' supporting affidavit does not disclose any fact to disapprove consideration and the issuing of a dishonoured cheque to the Respondent. He submitted that, in the first place, the Applicants are not denying the existence of the credit sale agreement entered on the 17<sup>th</sup> November 2014. Under the contract, the Respondent was supposed to deliver an excavator machine under the terms of the agreement.

Besides, Mr. Munale submitted that, under Clause 3.1 of the agreement, the delivery of the equipment was to be made subject to the customer having met the required payments under Clause 2 of the agreement, and providing such security as required under Clause 4. The equipment's delivery was to be accompanied with a delivery note, attached to the Respondent's affidavit, as Annexures "MTL 1."

Consequently, Mr. Munale, submitted that, the Excavator Machine was delivered on time, on 15<sup>th</sup> November 2014. He, therefore, disputed the annexed letters marked "**REP-2**", which were submitted and relied upon by the Applicants, concerning their alleged delayed delivery of the equipment.

On his second point, Mr. Munale submitted that, the Applicants' so-called triable issues are not at all triable, because the machine was delivered on time. He stated that even for what is said to amount to a triable issue, based on the payments made by the Applicants, all such payments were captured in **Annexure MTL-2** attached to the counter affidavit.

In Mr. Munale's views, and, more so, the Applicants have admitted liability in their Paragraph 6 of their affidavit, and their attached **Annexure REP-5**, which they claimed to have paid USD 93,600/=. He submitted that, the Applicants are just playing delay tactics.

Referring to Order 35 rule 1 (1) and 3 (1) and (2) of the CPC, Cap.33. [R.E.2002], Mr. Munale submitted that, as required under those rules, the Applicants have not disclosed sufficient facts that are triable to the extent that their application should be granted.

On the other hand, he submitted that, should the Court find that they have, then the Court should order that they provide security to the Court, in the form of depositing the amount they have admitted in their affidavit.

In a quick rejoinder, Mr. Ringo reiterated what he submitted in chief, stressing that, the letter dated 17<sup>th</sup> December 2014 was clear that, the Respondent, delayed in delivering the excavating machine. He submitted that, the issuing of the delivery note and the actual handover were done separately.



Mr. Ringo further stated that, the delivery note, was meant to satisfy the requirement of the contract, and the initial deposit made by the 1<sup>st</sup> Applicant. He stressed that, the actual handover was done on 20<sup>th</sup> December 2014, and by that time the Applicants had lost their earlier concluded contract.

As regards the triability of the issue regarding the amount claimed, Mr. Ringo argued that, the crux of the matter lies in the differences and inconsistencies regarding what is alleged to have been paid. He argued that, that will be a matter of evidence. He argued further that, it was sufficient, that, Annexure **REP-6** has shown that, the Applicants have made payments to the Respondent.

Finally, Mr. Ringo submitted, as regards the issue of providing security to the Court, in the form of a deposit of the amount they have admitted in their affidavit, that, Order 35 rule 3 (2) of the CPC is not mandatory.

Moreover, Mr. Ringo argued that, the need to give such security will be futile, because, the arrangement for payments of the monies claimed was based on monthly instalments, and, hence,

there was no specific amount but variable payments. He therefore prayed that, the prayers sought under the Chamber summons be granted as the applicants have disclosed that, there are triable issues.

I have given careful considerations to the rival submissions of the two learned counsel for the parties herein. To start with, Order 35 rule 3 (1) and (2) of the CPC. Cap.33 [R.E.2002], provides as here below:

- "3.-**(1) 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 leave 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.
- (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."

As it may be noted in the above quoted provisions, the law has set out the conditions which must be met by an applicant who intends to be given an audience to defend a case filed under Order 35 rule 1 of the CPC. His affidavit must disclose facts which indicate

that there is a *prima facie* defense. In other words, the applicant's affidavit is required to show that there are triable issues.

The above settled position, was reiterated by this Court, in the case of **Nararisa Enterprises Company Limited and 3 Others v Diamond Trust Bank Tanzania Limited**; Misc Commercial Case No. 202 of 2015 (unreported).

In that decision, the Court held that, before granting leave to defend a summary suit, the court should look upon the affidavit filed in support of the application, to see whether the deposed facts have demonstrated triable issues, fit to go to trial. The applicant is only required to show a fair and reasonable defence.

I have looked at the affidavit of the Applicants. In principle they do not deny that there was a credit sale agreement for the supply of one unit of Caterpillar Excavator, for USD 120,000. What they hold as a contrary view is that, they have been servicing the agreement and have so far paid USD 93,600 to the Respondent. They, however, challenge the claim for USD 31,000 which they consider exaggerated and does not take into account payment of USD 5,200, a payment which was made by the Applicants.

In a fairly similar situation, in the case of **AHACO Oil Limited and Another v APEL Petroleum Ltd**, Misc. Commercial Case No.5 of 2015, (Unreported), this Court, granted leave to applicants who, facing a similar situation, had sought to defend a summary suit. In that case, **Mansoor J**, had the following to say:

"I have read the affidavit...The law requires that, the Applicant has to satisfy the conditions given in the law. The Applicants have to either deny that they have not taken the loan, or they have to show that they have paid either all or part of the loan. The Applicants in the present case admits (sic) to have taken the loan, and, also, have pleaded, in their affidavit that, they have paid a portion of the loan. The Applicants have demonstrated that they have an arguable defense entitling them to defend the summary suit...."

In view of the above cases and taking into account the disclosures made by the 2<sup>nd</sup> Applicant in his affidavit, I am satisfied, that, the Applicants have demonstrated what is required of them under the law. They have an arguable defence entitling them to be granted leave to defend the summary suit.

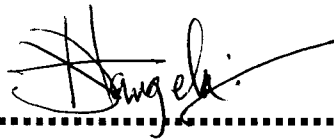
As correctly stated by Mr. Ringo, the their entitlement is based on the fact that, triability of the issues regarding the amount claimed lies, as the crux of the matter, in the differences and

inconsistencies regarding what is alleged to have been paid, *vis-a-vis* what the Respondent is claiming from the Applicants. To me, this is a sufficient triable issue.

In view of the above considerations, since the Applicants have satisfied the requirements of Order 35 rule 3 (1) (b) of the CPC, leave is hereby granted to the Applicants to defend the summary suit.

In the upshot, the application is allowed. Costs will follow the cause in the main suit.

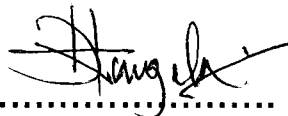
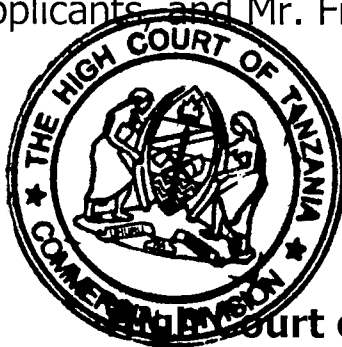
**It is so ordered.**



.....  
**DEO JOHN NANGELA**  
**JUDGE,**

**High Court of Tanzania (Commercial Division)**  
**27 / 03 / 2020**

Ruling delivered on this 27<sup>th</sup> day of March 2020, in the presence of the Mr. Mathias Mhina and Veronic Louis, Advocates for the Applicants, and Mr. Fraterin Munale, Advocate for the Respondent.



.....  
**DEO JOHN NANGELA**  
**JUDGE,**

**High Court of Tanzania (Commercial Division)**  
**27 / 03 / 2020**