

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

MISC. APPLICATION NO. 107 OF 2020

**DATACOM CONSULT GROUP LIMITED.....1st APPLICANT
LEOPOLD MUTAKYAWA RWEYEMAMU.....2nd APPLICANT
RABIA NASSORO HEMED3rd APPLICANT**

VERSUS

**INTERNATIONAL COMMERCIAL
BANK TANZANIA LIMITED.....RESPONDENT**

RULING

Date of Last order: 25/11/2020

Delivery of Ruling: 04/02/2021

NANGELA, J:.,

On 3rd July 2020, the Applicants herein filed an application in this Court by way of a Chamber Summons supported by a single affidavit of the 2nd Applicant, Leopold Mutakyawa Rweyemamu.

The application, which was brought under Order XXXV rule 2 (2) and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019 was for the following orders of the Court:

- 1. That, this Court be pleased to grant leave for the applicants to file a written statement of defence in Commercial Case No.43 of 2020 brought under Summary Procedure.*
- 2. That, the costs of this application to follow event and,*
- 3. For any other order(s) as this Honourable Court may deem fit and just to grant.*

On 15th October 2020, the parties entered appearance before me. On that date, Mr Yudathadei Paul, learned advocate, represented the Applicants, while Mr Shukrani Mzikila, learned Advocate appeared for the Respondent. By consent, the parties agreed to dispose of the matter by way of written submissions, a prayer I granted.

The Applicants were ordered to have their submissions filed in Court on or before 29th October 2020 while reply to their submissions was to be filed on or before 12th of November

2020 and rejoinder, if any was to be filed on or before 19th November 2020. This Court fixed the matter for a mention date, which was 25th November 2020 for necessary orders.

On the material date, i.e., 25th November 2020, when the parties appeared before me, it was brought to the attention of the Court that, the Applicants could not file their submissions as per the order of the Court and the reasons were given regarding their failure to do so. Time was therefore sought to effect the filing out of time. This Court granted the prayer and the parties have now duly filed their respective submissions.

In their submissions, the Applicants have argued that, according to their records, the 1st Applicant, who was granted an overdraft loan facility by the Respondent Bank on 16th March 2016, has been servicing it in line with the terms and conditions applicable to the parties.

It was submitted that, on the 5th of June 2020 the Respondent filed Commercial case No.43 of 2020 and the Applicants were served with the Plaint. However, the Applicants

contend that, the Claims against them do not reflect a true record of their re-payments. It is a further claim that, the interest agreed is on different rate or scales which are on the higher side. For such reasons, the learned counsel for the Applicants submitted that, since the main suit is a summary suit, the only option for the Applicants to defend it is by way of this application.

In a brief reply submission, the learned counsel for the Respondent submitted that, the Applicants are first and foremost, supposed to demonstrate that they meet the conditions set out by the law regarding defending a suit arising from a Mortgage Transaction. It was the Respondent's submission that the applicants have not met the requisite conditions set out by Order XXXV Rule 3(1) (c) and (3) of the Civil Procedure Code, Cap.33 R.E.2019.

To support its position, the Respondent Bank relied on the decision of this Court in the case of **Nararisa Enterprises Company Limited & Ors v Diamond Trust Bank Tanzania**

**Limited (Misc Commercial Cause No. 202 of 2015)
[2016] [TANZILII TZHCComD 23; (16 June 2016)].**

The Respondent submitted that, since the Applicants have not been able to satisfy the conditions set out by the law, they have no triable issues in their application and the same should be dismissed with costs.

I have examined the rival submissions. The issue which I am called upon to resolve is whether the Applicants are entitled to be granted the prayers sought in the Chamber Summons.

As it might have been noted, the Applicants are seeking to be allowed to appear and enter defence against a suit filed in this Court as Commercial Case No.43 of 2020. The Case was filed under Order XXXV rule 1 of the Civil Procedure Code, R.E. 2019, which provides for summary suits.

Ordinarily, in a summary suit, the defendant has no audience in Court unless he/she is permitted to do so by an order of the Court following an application to that effect. This

application by the Applicants is therefore meant to open a door for them to enter and defend the case.

However, it has been opposed vehemently by the Respondent on the ground that the Applicants have not met the conditions set out under Order XXXV rule 3(1) (c) and (3) of the CPC, Cap.33 R.E.2019. This Order provides as follows:

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

(a) ..

(b) ..

(c) in suits arising out of mortgages, where the mortgagor demonstrate that- (i) loan or the portion of the loan claimed is indeed discharged; or (ii) loan was actually not taken.

(2) ...

(3) For the purpose of paragraph (c) of sub-rule (1), a mortgagor or an applicant acting on that behalf shall be deemed to have complied with or discharged his responsibility if upon a bank account through which loan was given it is shown that loan is fully paid.

As stated herein earlier, the Applicants are of the view that, they have been servicing their loan and, to that end, they attached a Statement of their Account Annexed as Annexure DIC-1 to their supporting affidavit. It was further submitted that, what seems to be claimed from them by the Plaintiff does not reflect a true picture of the amount which ought to have been claimed as part of it has been paid. They have as well challenged the interests claimed arguing that such have been made contrary to the facility agreement.

It is therefore averred in the affidavit in support of the application that, if Applicants are not allowed to defend the suit, they will suffer loss owing to the incorrect computations and the figure upon which the Respondent has based its claims.

Although the Respondent has argued that the Applicants have not fulfilled the requirements under Order XXXV rule 3(1) (c) and (3) of the CPC, Cap.33 R.E. 2019, upon looking at the Applicants submissions and the documents attached to the

affidavit, there is no dispute that part of the loan seem to have been paid.

Secondly, there is also a letter which evidence that there was an agreed conversion of the overdraft facility to a Term Loan Facility. This means that, if what is being charged as interest is based not on the term loan facility but on the overdraft facility, there will be issues here that will entitle the Defendant to enter appearance and defend their position. Since I cannot adjudge such an issue here, the only way is to allow the defendants to contest the case by way of filing a defence.

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.

In fact, in the case of **Nararisa Enterprises Company Limited (supra)**, it was made clear that, as alternative grounds for what Order XXXV rule 3 (I) (c) of the CPC provided, an Applicant must satisfy the Court that, either he/she has a good defence to the claims on merit, there are good triable issues, or has disclosed such facts as may be deemed sufficient to entitle them to defend. See also the case of **INCAR T. Ltd & Others vs Standard Chatered Bank T. Ltd (Misc. Commercial Appl. No.72 of 2019), [2020] TZHCComD 1989; TANZILII (12 August 2020)**].

In view of the above, and having looked at the affidavit in support of the Application, in particular its paragraphs 2.0 and 3.0, it is my findings that the affidavit in support of the application, discloses facts that bring about triable issues which will necessitate the filing of a defence by the Applicants.

In the upshot, leave is hereby granted to the Applicants to defend the summary suit. Costs will follow the cause in the

main suit. The Applicants should file their Written Statement of Defence within 21 days from the date of this ruling.

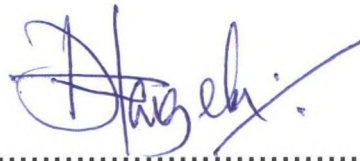
It is so ordered.

DATED at DAR-ES-SALAAM this 04th February, 2021.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
04 / 02 / 2021

Ruling delivered on this 04th *day of February 2021*, in the presence of Mr Yudathadei Paul Advocate for the Applicant, as well holding the briefs of Mr Woiso, Advocate for the Respondent.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
04 / 02 / 2021