

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

**Misc. Commercial Appl. No. 99 of 2020**  
*(Arising from Commercial Case No.34 of 2020)*

**DAVID SIMON MZENA.....1<sup>st</sup> APPLICANT**

**GODFREY SIMON MZENA.....2<sup>nd</sup> APPLICANT**

**Versus**

**BANK OF INDIA (T) LTD..... RESPONDENT**

**RULING**

Date of Last Order: 15/04/2021

Date of Ruling: 11/05/2021

**NANGELA, J:.**

The two Applicants herein have applied for orders from this Court granting them the following prayers:

1. That this Honorable Court be pleased to grant leave to the Applicants to appear and defend the suit.
2. Costs of the Application to be in the cause.

3. Any other reliefs this Honourable Court may deem fit and just to grant.

The application was made by way of a chamber summons supported, as required by the law, by an affidavit which was jointly deposed to by the Applicants. On 16<sup>th</sup> August, 2020, the Respondent Bank filed a Counter Affidavit opposing the application. The matter was then set for hearing.

On 18<sup>th</sup> November 2020, a date fixed for the hearing, Mr Shukrani Mzikila, learned advocate appeared, holding the briefs of Mr Peter Aloyce, learned advocate for the Applicants. The same advocate Mzikila appeared for the Respondent and prayed for adjournment of the Application to another date since, the learned counsel for the Applicants was engaged in a criminal session cases. Indeed a letter informing the Court of the absence of Mr Peter Aloyce was evident to that fact and had been filed in Court.

Although the matter was fixed for hearing on 11<sup>th</sup> February 2021 it could not proceed till

9<sup>th</sup> of March 2021. On the particular date, Mr Faraja Kajuni, learned advocate appeared for the Applicants while Mr Shukran Elliot Mzikila, Advocate, appeared and represented the Respondent still.

Mr Mzikila prayed that the matter be disposed of by way of written submissions. I granted the prayer and provided for a schedule of filing which has been adhered to by the learned counsel for the parties. I will thus summarize their written submissions.

In his submission, Mr Peter Aloyce, learned advocate for the Applicants has urged this Court to grant the prayers sought in the Chamber Summons based on the facts disclosed in the joint affidavit of the Applicants and allow the Applicants to defend themselves against the claims made by the Respondent (Plaintiff) in the Commercial case No.34 of 2020.

In his submission, Mr Peter does not dispute the fact that the Applicants borrowed money from the Respondent Bank. What he contends is that the Applicants have been

servicing their loan with the Respondent and have so far repaid over 40% thereof.

Secondly, the Applicants have further contested the interest calculations arguing that the same are based on a different rate (19%) instead of 17% as agreed by the parties. As such, they dispute the amount stated in the Plaintiff.

It was averred in the supporting affidavit that, the second Applicant has neither covenanted with the Respondent for guarantee of stocks in favour of the Respondent nor guaranteed or indemnified the discharge of the 1<sup>st</sup> Applicant's obligations.

Relying on Order 35 Rule 3(1)(b) and (c) of the Civil Procedure Code, Cap.33 RE 2019, Mr Peter contended that leave should be granted to the Applicants since they have disclosed facts in their supporting affidavit which are reasonably sufficient to support their application.

Reliance was placed on the case of **TTCL v Timothy Lwoga [2002] TLR 150**. In that case, the Court held that a defendant sued in a

summary suit is entitled to enter defence if it is shown that there are triable issues warranting that he be allowed to contest them in Court.

Mr Peter contended that, as stated in the joint affidavit of the Applicants, the Applicants are contesting the amount claimed on the basis that it was calculated based on a wrong premises. He argued further, that, the Applicants have been repaying the loan.

To that end, reliance was placed on the cases of **Nararisa Enterprises Co. Ltd and 3 Others v Diamond Trust Bank Limited, Misc. Commercial Cause No.202 of 2015 (unreported)** and **FB General Contractors' and Another v Bank of Baroda Tanzania Ltd, Misc. Commercial Appl.No.18 of 2019 (unreported)**, and the Court was urged to grant the application.

Responding to the Applicants submission, and, in support of his submission, Mr Mzikila, requested this Court to taken on board the counter affidavit filed. He contended that, as a matter of law, the Applicants have no an

automatic right of audience once the case against them is filed under **Order 35- "Summary Procedure"**.

He submitted that, the Applicants filed to meet the conditions set out by the law when an applicant like them wants to appear and defend a suit arising from a mortgage transaction. Referring to the letters of offer dated 10<sup>th</sup> May 2013, the leaned counsel for the Respondent contended that, the principal sum extended to the Applicants was to be subjected to a 19% interest rate per annum and not 17% as argued by the Applicants.

On the other hand, it was the Respondent's submission that the Applicants' submission that they have repaid up to 40% of the loan is unsubstantiated assertion since the Respondent has no such records in its custody.

The Respondent relied on Order XXXV rule 3(1) (c) and (3) of the Civil Procedure Code, Cap.33 RE, 2019 and contended that the provision relied upon by the Applicants, i.e., Order XXXV rule 3(1) (b) of the Civil Procedure

Code, Cap.33 RE, 2019, is inapplicable in the circumstances of this case.

In a brief rejoinder, the Applicants reiterated their submission in chief and reliance on Order XXXV rule 3(1) (b) of the Civil Procedure Code, Cap.33 RE, 2019.

I have given careful consideration to the submission made by the learned counsel for the both parties. The main contention in this application is whether the Applicants have met the conditions which are set out by the law to warrant granting them opportunity to appear and defence the main suit.

As it may be noted, the main suit is based on a claim of non-repayment of a loan advanced to the 1<sup>st</sup> Applicant and secured by a duly registered Mortgage. According to Order XXXV Rule 3 of the Civil Procedure Code, Cap.33 RE 2019 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) 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;

(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 **demonstrate** that-

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

(ii) loan was actually not taken.

(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.

(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."

From the above provision, it is clear that there are a number of factors which need to be



looked at before an Applicant seeking leave to defend is availed with such an opportunity. While I find that the Applicants have not been able to demonstrate by evidence that they have repaid a portion of the loan, as per the requirement of Order XXXV Rule 3 (1) (c) (i) would require that they should, I have had an opportunity as well to look at the cases referred to by the parties.

In the case of **Nararisa Enterprises Company Limited (supra)**, it was made clear that, as alternative grounds for what Order XXXV rule 3 (1) (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.

That position was also reiterated by this Court in the **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 the instant application, I am of the view that there are issues that are triable before the court and which will necessitate that a defence be filed in court. In particular, the issue of agreed interest between the parties was not convincingly cleared by the Respondent in its submission to the extent of rendering it a non-starter.

If it is indeed true that the interest charged is over and above that which was agreed, and if the Applicants have paid a portion of the loan, it would mean that what is claimed is not the appropriate amount. That uncertainty cannot be resolved here as it will warrant seeing the defence which the Applicants are to put forth against such claims.

Secondly, there is also an issue regarding whether the 2<sup>nd</sup> Applicant covenanted with the Respondent for a guarantee of stocks in favour of the Respondent. This will call for further evidence which can only be availed if the Applicants are granted opportunity to file their defence in Court.

In view of all that, I am of the view that, the Applicants are entitled to make an

appearance in Court and file their defence to the suit. In the upshot, I hereby grant the prayers and make the following orders:

- (i) That, the Applicants are to file their Written Statement of Defence within 21 days from the date of this ruling and serve the Respondent (Plaintiff) on the day of filing in Court.
- (ii) That, costs of this application shall be in the cause.

**It is so ordered.**

DATED at DAR-ES-SALAAM, this 11<sup>th</sup> May 2021



  
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**HON. DEO JOHN NANGELA**  
**JUDGE**