

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC.COMMERCIAL APPLICATION NO. 76 OF 2021**

(Arising from Commercial Case No.35 of 2020)

<b>MBEZI FRESH MARKET LIMITED.....</b>	<b>1<sup>st</sup> APPLICANT</b>
<b>KHALIFA SALUM ALLY.....</b>	<b>2<sup>nd</sup> APPLICANT</b>
<b>FIRDAUS ISMAIL KHAMIS.....</b>	<b>3<sup>rd</sup> APPLICANT</b>


**VERSUS**

<b>INTERNATIONAL COMMERCIAL BANK (TANZANIA) LIMITED.....</b>	<b>RESPONDENT</b>
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**RULING OF THE COURT**

**K. T. R. Mteule, J**

**02<sup>nd</sup> August 2021 & 06<sup>th</sup> September 2021**

This Ruling is in respect of application for leave to appear and defend in Summary Suit filed by the applicants herein namely **MBEZI FRESH MARKET LIMITED (1<sup>st</sup> Applicant), KHALIFA SALUM ALLY (2<sup>nd</sup> Applicant) and FIRDAUS ISMAIL KHAMIS (3<sup>rd</sup> Applicant)** who are the defendants in Commercial Case No. 35 of 2020. This suit was filed in this court on 12<sup>th</sup> May 2020 by the respondent herein, **International Commercial Bank (Tanzania) Limited** (the Plaintiff in the suit) seeking for among other reliefs, the recovery of amount of money arising from an overdraft facility offered to the Respondents. 

Upon being served with the Plaint the Defendants who are the applicants herein, filed the present application under the provisions of **Order XXXV Rule 3 (1)(a)(b) & (c) and Order XLIII RULE 2 of the Civil Procedure Code Act Chapter 33 R.E 2019 (The CPC)** seeking for "Leave to Defend the Summary Suit"

The application is supported by a joint affidavit deponed by one **Khalifa Salum Ally** and **Firdaus Ismail Khamis** who are the Second and Third Applicants respectively, who presented facts trying to establish triable issues in subject matter of this case including the statement that the applicants have been servicing the loan. The joint affidavit further disputes the amount advanced in the overdraft facility and the fact that they failed to pay. The contents of the applicant's affidavit were contested by the Respondent through a Counter affidavit sworn by **Marie Mangenya** who is the Respondent Principal Officer working as Head of legal department and Company Secretary, which challenged the correctness of the facts deponed in the affidavit.

The application was argued by a way of written submissions where the applicant was represented by **Charles Leonard Lotamu Advocate** while the Respondent was represented by **Juventus Katikilo Advocate**.

In their submissions the Applicants adopted the contents of their joint Affidavit. The counsel for the applicants stated that under the provisions of **Order XXXV Rule 3(1) of the CPC** this court is empowered to grant leave to appear and defend a lawsuit filed under summary procedure. He submitted further that the accompanying affidavit filed in support of the application discloses the grounds to justify leave as



provided under Paragraph a, b, and c of the provision of **Order XXXV Rule 3(1) of the CPC.**

According to the applicant's counsel, the summary suit which is intended to be defended arises from a Mortgage and this being the case, under paragraph **(c) (i)** of the provision of **Order XXXV Rule 1 of the CPC,** the important test to which the court has to apply is "**whether the loan or portion of the loan has been discharged.**"

The applicants reiterated what is stated in the accompanying affidavit at paragraph 7 that they have been servicing the loan by having paid several installments which entitles them a leave to defend the Respondents claim. To support their argument, the applicants cited the case of **Tanzania Telecommunication Company Ltd. Vs. Timothy Lwoga Civil Case No. 61 of 1999 (2002) T.L.R 150,** where the court referred the case of **Kundanlal Restaurant vs. Devshi and company 1995)19 E.A.C.A** which set conditions for granting the defendant leave to appear and Defend a summary suit thus:

*".....If there is one triable issue contained in the affidavit supporting the application for Leave to Appear and defend then the appellant (defendant) is entitled to have Leave to Appear and Defend Unconditionally....."*

It is the applicant's submission that there are triable issues in the suit such as **whether the applicants were granted both the overdraft facility of TZS 800,000,000.00 and a loan facility amounting to Tsh. 1,150,000,000.00 and whether the applicants herein have been servicing the said loan or not.** According to the applicants,



these are among serious triable issues which have to be determined basing on evidence of both parties, failure of which the applicant's rights will be jeopardized in their absence. The applicants therefore pray for leave to appear and defend the Commercial Case No. 35 of 2020.

In rebuttal the Respondent adopted the contents of the Counter Affidavit. It is the respondent's submission that the applicants are not entitled to the requested leave because the respondents made efforts to recover the loan including issuing a notice of default to the applicants on 6<sup>th</sup> March 2019 which was responded by the applicants on 21<sup>st</sup> November 2019 by requesting to repay the outstanding balance under instalments. That despite all efforts and notices of defaults served to the Applicants, the said amount has never been paid in any installment until the date of filing the summary suit where the outstanding balance had already accumulated to the tune of Tanzanian Shillings One Billion and Eight Million and Sixty-Five Thousand Two Hundred Forty-Three and Nine Cents only [TZS. 1,008,065,243.09].

It is the respondent's further submission that the applicants have not deponed any fact with triable issues to warrant this court to grant their prayer to appear and defend in Commercial Case No.35 of 2020 as required under the provision of **Order XXXV Rule(3)(c)(i)&(ii) of the CPC**. He further cited the cases of **Miscellaneous Commercial Cause No. 202 of 2015 between Nararisa Enterprises Company Limited and 3 others versus Diamond Trust Bank Tanzania Limited (unreported)** at page 5 and **Miscellaneous Commercial Case No. 18 of 2019 between FB General Contractors and Felix Rwebangira Versus Bank of Baroda Tanzania Limited**



**(unreported ) at page 9**, which both cemented prerequisite of establishing triable issues as a condition to obtain leave to appear and defend in a summary suit, the condition which the respondent contends to have never been met by the applicants.

The respondent therefore prayed that this application for Leave to Appear and Defend in Commercial Case No. 35 of 2020 be dismissed.

Having read and analyzed the submissions by both parties what I gather is that there is a financial relationship between the applicants herein and the respondent vide a loan agreement secured by a mortgage over the commercial residential building on **C.T no. 46224 L.O.123333 PLOT NO. 583 BLOCK J MBEZI BEACH AREA (annexure MFML – 2 to the Chamber Summons)**. That the relationship has turned to be a dispute which led to the filling of the summary suit by the instant respondent. It is a settled law that appearance of a defendant in a summary suit is only enabled by obtaining leave to appear and defend. It is also a settled principle of law that for an application for leave to appear and defend in summary suit arising out of mortgage, applicant must demonstrate or satisfy the court that either the loan or portion of the loan has been paid or the loan has not been taken at all. This position is in accordance with **Order XXXV Rule(3)(c)(i) & (ii) of the Civil Procedure Code Chapter 33 Revised Edition 2019** which provides:

*"3(1) The court shall, upon Application by the Defendant, give Leave to Appear and to Defend the Suit, upon Affidavit which: -*


*(c) In suit arising out of Mortgages, where the Mortgagor Demonstrates that: -*



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

*(ii) Loan was actually not taken."*

This application is seeking for leave to appear and defend the filed summary suit in Commercial Case No. 35 of 2020. It is not in dispute that the suit sought to be defended arose out of a loan facility secured by a mortgage. The existence of mortgage in loan agreement conforms with the provision of **Order XXXV Rule(3)(c) (ii) of the CPC**. In paragraph 7, 8 and 9 of the Joint Affidavit of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants it is stated that this loan has been serviced until when differences occurred between the 2<sup>nd</sup> and 3<sup>rd</sup> applicants after what the 2<sup>nd</sup> applicant alleged as TZS 2,000,000,000.00 loan taken by the 3<sup>rd</sup> applicant using the 2<sup>nd</sup> Applicant's Securities without his knowledge. This fact is disputed by the counsel for the respondent. The applicants' allegation and the counter argument by the respondent indicate existence of controversy which the court need to investigate by a way of trial to determine among other issues as to whether the loan or portion of the loan has been discharged and which amount of loan was taken by the applicants. The cases cited by the applicant **Tanzania Telecommunication Company Ltd. Vs. Timoth Lwoga Civil Case No. 61 of 1999 (2002) T.L.R 150** and **Kundanlal Restaurant vs. Devshi and company 1995)19 E.A.C.A** are relevant to support this view. This statement in my view established triable issues.

Consequently, I find that the applicants herein have managed to convince this court that there are triable issues in **Commercial Case No. 35 of 2020** and that it is appropriate for leave to appear and defend the suit to be granted to the applicants. 

The application is therefore allowed and leave to appear and defend in Commercial Case No. 35 of 2020 filed under summary procedure is accordingly granted to the applicants. It is so ordered.

Dated at Dar Es Salaam this 06<sup>th</sup> day of September 2021.



**K. T. REVOCATI MTEULE**

**JUDGE**

**Court:** Ruling delivered in Court this 6<sup>th</sup> day of September, 2021 in the presence of Charles Leonard Yotham Advocate for the Applicants and Mohamed Muya Advocate for the Respondent.

**K. T. REVOCATI MTEULE**

**JUDGE**