

TANZANIA / JUDGMENT

Misc

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IN THE HIGH COURT OF TANZANIA (IN THE DISTRICT REGISTRY OF SUMBAWANGA) AT
SUMBAWANGA MISC. CIVIL APPLICATION NO. 6275 OF 2024 (Originated from Civil Case No. 96
of 2024) FIRST ASSURANCE CO. LTD.....APPLICANT
VERSUS MPANDA MUNICIPAL COUNCIL..... 1st RESPONDENT THE
HON. ATTORNEY GENERAL..... 2nd RESPONDENT BLUECRYON
LIMITED.....3rd RESPONDENT

RULING

27th November & 19 December, 2024 MRISHA, J. This is an application for leave to appear and defend Civil Case No. 96 of 2024 which is pending before this Court. The application is brought by way of a chamber summons under Order XXXV, Rule 3 (1)(b) of the Civil Procedure Code, [Cap 33 R.E 2019] (henceforth “the CPC”). Together with the chamber 1 summons, the same is supported by an affidavit dully sworn by Mr. Dotto Madali, Principal Officer for the Applicant who is authorized to do so. However, the application was challenged by the 1st and 2nd respondents while the 3rd respondent did not challenge the said application. Briefly, the background to this application shows that on 5th day of May, 2014 the 1st and 3rd respondents entered a contract No.LGA.101/2013/2014/G/01/Lot1 for purchasing and supplying of a Motor vehicle for collection of waste products, which is one tipper truck make TATA 8 tones with skip loader machine and five skip buckets. The contract was signed and commenced on the 5th day of May, 2014 and was expected to end on the 11th day of August, 2014. In that contract, the applicant was a surety of the 3rd respondent, issued performance bond in the contract signed by the 1st Respondent. In his affidavit, the applicant averred that it is more than nine (9) years since the date parties signed the contract, the 1st respondent did not issue default notice to inform that the 3rd respondent has fulfilled his obligation. Based on the foregoing facts, the applicant is now calling on this Court to grant her leave so as to appear and defend the summary suit. 2 Hearing of this application proceeded by way of written submission. Both parties had legal representation. Ms. Veronica Mwanicheta, the learned counsel appeared for the applicant, whereas Mr. Fortunatus Mwandu, the learned State Attorney appeared for the 1st and 2nd respondents. Before the applicant’s counsel started her submission on merit, she adopt her affidavit for it to form part of her submission, then proceeded to state that the Respondents instituted a summary suit under Order XXXV of the CPC seeking this Court to order the applicant to refund them the advance payment of Tsh.92,750,000/=, general damages of Tsh. 200,000,000/= for breach of contract, interest of

commercial Bank rate of 23%, interest at the court rate of 12% from the date of Judgment to the date of full satisfaction and costs of the suit. In the course of making her submission, the learned counsel for the applicant referred the provisions of Order XXXV, Rule of the CPC and argued that the main consideration for this court to grant or not grant leave to appear and defend his case, is that the applicant must demonstrate that there is a triable issue and reasonable defence to make against the summary suit; she linked her submission with paragraph 5, 6 and 9 of the applicant's affidavit. 3 In supporting her argumentation, she relied on the cases of Prosper Paul Massawe and two others v. Access Bank Tanzania LTD, Civil Appeal No. 39 of 2014, Makungu Investment Company LTD v. Petrosol (T) LTD, Civil Appeal No. 23 of 2013 and Thesen Stahlunion Expatriate v. Kibo Wire Industries [1973] LRT No. 54, then, she concluded by imploring this Court to grant her client leave to appear and defend her case because she has shown good defence against the summary suit. In reply, the learned State Attorney for the respondents commenced by adopting the respondents' joint counter affidavit as well in order to form part of his submission in chief. The learned State Attorney then contested the application to the effect that the applicant failed to raise a triable issue for him to be accorded leave to appear and defend her case. In addition Mr. Mwandu submitted another point of consideration that the applicant must show merits on leave to appear and defend the suit by taking into account what has been sworn in the affidavit which should disclose facts which would make it incumbent on the holder to prove consideration where the suit is promissory note or otherwise, and such facts as the Court may deem sufficient to support the application. He cited the case of CRDB Bank LTD v. John 4 Kagimbo Lwambogaza (2002) TLR, to emphasis on the purpose of summary suit. More so, he argued that the applicant as a surety of the 3rd Respondent, had a duty of ensuring that the said respondent perform his obligation as agreed. In the end, the learned counsel relied on the submission that the applicant is liable to pay all accrued loss to the 1st Respondent which arose from the breach of contract entered between the parties to the contract. He further added that there is no serious paint of law which needs the applicant to be granted leave to appear and defend the suit, and also there is no any danger of prejudicing the applicant's interest when the case is heard under summary suit. In rejoinder, the applicant's counsel reiterated what was submitted in her submission in chief. She further added that the application complies with Order XXX, Rule 3 (1) (b) of the CPC, thus there are triable issues for the court to determine, as stated in paragraph 5, 6 and 9 of the applicant's affidavit. To add more, the learned counsel distinguished the case of CRDB Bank LTD v. John Kagimbo Lwambagaza (supra) with the matter at hand arguing that the said case entails overall objective of the summary suit. 5 It is a common ground among the parties to this application that Civil Case No.96 OF 2024 was brought by way of summary suit as per Order XXXV, Rule 1 and 2 (1) of the CPC. In the said suit the 1st and 2nd respondents are suing the applicant for refund of an advance payment of Tshs. 92,750,000/=, general damages of Tshs. 200,000,000/= for breach of contract, plus accumulative commercial and Court rate interests. Again, it is the position of the law that in summary suit filed under Order XXXV of the CPC, the defendant has no automatic right to enter appearance and defend his case before he/she first apply for a leave to do so under Order XXXV, Rule 2(1) of the CPC which provides that:- "2 (1) Suit to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform the defendant that unless he obtains leave from the

Court to defend the suit, a decision may be given against him and shall also inform him of the manner in which application may be made for leave to defend (Emphasis is mine). 6 The requirement under order XXXV, Rule 2(1) of the CPC has been stated in a number of cases. (See: Tanzania Tele Communication Company Ltd v. Timothy Luoga (2002) TLR 15, and M/S Roko Investment Co. Ltd v. Tanzania Electric Supply Co. Ltd (Civil Appeal No. 327 of 2019) (2022) TZCA 693 Tanzlii. To ascertain that the application for leave to appear and defend the case has met the required threshold, the underlying factor for the Court to grant that leave, is existence of triable issues to be litigated or existence of a good and plausible defence which has been demonstrated in the applicant's affidavit. It can therefore be said that, the leave to appear and defend the suit depends on the factual disposition in the affidavit. This position was affirmed by the Court of Appeal in the case of Prosper Paulo Massawe and two others v. Access Bank Tanzania Ltd (supra) to the effect that: "The next point for a determination is whether the trial Court rightly dismissed the applicant's application for leave to appear and defend the suit. It is common ground that the underlying factor for grant of that leave is existence of triable issue, a matter of fact which has to be demonstrated by the 7 applicant. The Court's determination on whether or not there are triable issues has to be based on the affidavit, obviously because as of that stage, there is yet a statement of defence from the defendant" In his submission, the applicant argued that the affidavit filed in support of the application at paragraph 5, 6 and 9 raised triable issues which worthy of litigation. Hence, she prayed this application to be granted. In reply, the learned State Attorney disputed the prayer and argued that the applicant did not raise any triable issue and no reasonable defence was made by the applicant in order to be granted leave to appear and defend her case. In conjunction to the above stated facts, to my view they suggest that there is a triable issue. In that regard, I differ with the proposition of the learned State Attorney for the first and second respondents who has argued that that the Applicant has failed to raise triable issue in her affidavit, for this Court to grant her leave to appear and defend the summary suit. For the foregoing reasons, I will allow the application. I accordingly grant the applicant leave to appear and defend Civil Case No. 96 of 2024 on the 8 condition that she should file her defence within 21 days from the date of this Ruling. I make no order as to costs. It is so ordered. A.A. MRISHA JUDGE 19.12.2024 DATED at SUMBAWANGA this 19th day of December, 2024. 9

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