

TANZANIA / JUDGMENT

KOBIL

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB
REGISTRY) AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 24848 OF 2024 (Originating from
Civil Case No. 21819 of 2024.) KOBIL(T)LTD. APPLICANT AND WEIGHTS AND MEASURES
AGENCY RESPONDENT THE ATTORNEY GENERAL 2nd RESPONDENT

RULING

S.M. MAGHIMBI, J: The respondents have lodged a Summary Suit registered as Civil Case No. 21819 of 2024 pursuant to Order XXXV Rule 2 of the Civil Procedure Code, [Cap.33 R.E 2019] (the CPC); Section 19 of Weights and Measures Act, [Cap.340 R.E 2002]; Regulation 173 and Paragraph 11 of the 5th Schedule of Weights and Measures (General) Regulations, 2019. In the said suit, the respondents sued the appellant/defendant for payment of TZS. 244,136,610/= (Tanzanian Shillings Two Hundred Forty Four Million One Hundred Thirty Six Thousand Six Hundred and Ten Only) being fees for metrological supervision services at Ports Unit in Dar es salaam Region. The respondent further claimed for payments of TZS 24,413,661/= (Tanzanian Shillings Twenty Four Million Four Hundred and Thirteen Thousand Six Hundred Sixty One Only) being interest of 5% per month arising from 21st day June, 2024 when the defendant was issued a demand notice by the first plaintiff. When served with the plaint and per the requirements of the law that defending suits of this nature is not an automatic right, the applicant has moved the court under Order XXXV, Rule 3(1)(a) and (2) of the CPC seeking for unconditional leave to appear and defend Civil Case No. 21819 of 2024. The chamber application is supported by an affidavit of one Yuda Peniel Mosha, Principal Officer of the applicant. The respondents opposed the application by an affidavit of Oscar Anthony Ng'itu. A recapitulation of the application can be gleaned from the applicant's affidavit, respondents counter affidavit and the applicant's reply to the counter affidavit. It is on record that, since 27th September, 2011 to 13th September, 2018, the applicant and the 1st respondent were involved in business transaction of metrological supervision services at Ports Unit in Dar es salaam. The applicant alleges that she enjoyed the respondent's services when offloading about 244,136.610 litres of fuel from the ship tanker to the final receiving tank farms. She further stated that the said services were duly paid as evidenced via annexure KTL-3 In the affidavit among others applicant's bank statement issued by NMB. She qualified more that the total sum paid by her to the respondent stood to the tune of TZS. 192,807,528/= (Tanzanian Shillings One Hundred Ninety Two Million Eight Hundred and Seven Thousand Five Hundred Twenty Eight Only). To throw lights on, she elucidates that in the plaint, the principal debt owed

by the 1st respondent against her is the sum of TZS. 244,136,610/= (Tanzanian Shillings Two Hundred Fourty Four Million One Hundred Thirty Six Thousand Six Hundred and Ten Only) compare to the cumulative invoices amount of TZS. 102,641,445/= (Tanzanian Shillings One Hundred and Two Million Six Hundred Fourty One Thousand Four Hundred Fourty Five Only) as evinced in annexure OSG to the plaint. Conversely, the respondents averred that the applicant did effect the partial payment for the said services as per annexures OSGa to OSGh In their counter affidavit. The 1st respondent deponed that they billed the applicant a total of TZS. 827,565,096/= (Eight Hundred Twenty Seven Million Five Hundred Sixty Five Thousand and Ninety Six Only) whereby she paid only TZS. 583,428,486/= (Tanzanian Shillings Five Hundred Eighty Three Million Four Hundred Twenty Eight Thousand Four Hundred Eighty Six Only), hence, TZS. 244,136,610/= (Tanzanian Shillings Two Hundred Fourty Four Million One Hundred Thirty Six Thousand Six Hundred and Ten Only) remains due to date. Replying to the contents of the counter affidavit, the applicant maintains that annexures OSGa to OSGh referred in paragraphs 4.1 to 4.8 of the said counter affidavit, are the respondent's internal documents and they have not been shared to her. That their authenticity is questionable and cannot justify the claim put forth against her for want of proof of the alleged invoices and proof of the said payments. Further that the respondent has attached in the plaint the invoices whose amount do not tally with the principal sum claimed in the suit. She concluded that, the variations and uncertainties found in the respondents' pleadings and supporting documents thereto, suffice for this court to grant her leave to defend the said suit brought against her. When the matter was scheduled for hearing on 12th November, 2024, this court directed that the same be disposed of by way of written submissions. Up until the time of constructing this ruling, only the applicant through the legal services of Mr. Josia Noah Samwei complied with that order. Regarding respondents, the record is silent as to why they have failed to heed to the same and there is no extension of time sought to have the said schedule of the court complied with by the respondents. Therefore, save for the respondents' counter affidavit, they have no submission in place opposing the applicant's submissions. In sustenance of the application, Mr. Josiah submitted that, in terms of Order XXXV, Rule 3(1)(b) and (2) of the CPC stipulates that the court shall upon application by the defendant, give leave to appear and defend the suit, upon affidavits which disclose such facts as the court may deem sufficient to support the application. He added that, 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. To fortify his stance, he cited the case of Makungu Investment Company Ltd vs Petrosol (T) Limited (Civil Appeal No.23 of 2013) [2014] TZCA 279 (19 March, 2014) TanzLII whereby the Court observed that where there is a triable issue(s), leave to defend ought to be granted. Mr. Josiah submitted further that the applicant's defence/ triable issues in respect to the respondents' claim is expressed at paragraphs 6.1, 6.2 and 7 of the affidavit in support of the application and also paragraphs 5, 6 and 7 of the reply to the counter affidavit. He asseverated that upon his thoroughly reviewing of the respondents' counter affidavit, there is no any fact(s) that dispute(s) the payments honoured by the applicant to the 1st respondent. Moreover, it is his asseveration that, they have not disputed the validity of annexure KTL-3 as some of the said documents were issued by the respondent towards the applicant. Thus, the fact that the applicant settled the claim brought against her vide annexure KTL-3 presents

itself a triable issue worthing grant of leave to defend the suit. In strengthen his submission, he pointed out that annexures OSGa to OSGh to the counter affidavit raises some arguable issues as the total bill allegedly issued by the respondent to the applicant is TZS. 1,098,188,196/= (Tanzanian Shillings One Billion Ninety Eight Million One Hundred Eighty Eight Thousand One Hundred Ninety Six Only) and not TZS. 827,565,096/= (Tanzanian Shillings Eight Hundred Twenty-Seven Million Five Hundred Sixty Five Thousand and Ninety Six Only) as averred by the respondents. He further elaborated that, as per the said annexures, the sum paid by the applicant to the 1st respondent is TZS. 583,428,486/= (Tanzanian Shillings Five Hundred Eighty Three Million Four Hundred Twenty Eight Thousand Four Hundred Eighty Six Only), so, the total outstanding amount, if existing (the fact which is denied), would have been TZS. 514,759,710/= (Tanzanian Shillings Five Hundred Fourteen Million Seven Hundred Fifty Nine Thousand Seven Hundred and Ten Only) and not TZS. 244,136,610/= (Tanzanian Shillings Two Hundred Fourty Four Million One Hundred Thirty Six Thousand Six Hundred and Ten Only) as intimated by the respondents. He rounded off by stating that variations and uncertainties found in the respondents' pleadings and supporting documents thereto, suffices for this court to grant the applicant's leave to defend the suit. Having considered the application at hand by carefully reviewing the grounds in the chamber summons, the applicant's affidavit, the respondents' counter affidavit, the applicant's reply to the counter affidavit and the applicant's submissions in chief; the issue is whether the applicant has demonstrated triable issue for leave sought to be granted? For avoidance of unnecessary repetitions of the provision of Order XXXV, Rule 3(1) (b) and 2 of the CPC, its substances are noted. According to paragraphs 6.1, 6.2 and 7 of the affidavit in support of the application and also paragraphs 5, 6 and 7 of the reply to the counter affidavit, there is no doubt that the applicant has established a prima facie case against the respondents in relation to the services rendered and the amount claimed thereof. The applicant asserts that the 1st respondent invoices for the service procured were duly paid as indicated in annexure KTL-3 including copies of the payment slips, the cheques, exchequer receipts issued by the 1st respondent to the applicant and the applicant's bank statement issued by NMB. The respondents alleges that the applicant effected the partial payment for the said services and not the full amount. The applicant's rejoined that annexures OSGa to OSGh referred In paragraphs 4.1 to 4.8 of the said counter affidavit, are the 1st respondent internal documents and they have not been shared to her, thus their authenticity is questionable and cannot justify the claim put forward against her for want of proof of the alleged invoices and proof of the said payments. As alluded to above, the dispute of fact presents itself as a triable issue by any definition. It required each party to be heard on their business transaction, so to speak, metrological supervision services at Ports Unit in Dar es salaam, and the method of payment, if any. See; Makungu Investment Company Ltd vs Petrosol(T) Limited (Civil Appeal No.23 of 2013) [2014] TZCA 279 (19 March, 2014) TanzLII. To that end, I am of the firm view that, as concisely argued by the applicant's counsel, in absence of any refutation from the respondents on the amount paid by the applicant by dint of annexure KTL-3, the fact that applicant is still in debt by the 1st respondent, by itself raises triable issues worth grant of leave to defend the said suit. In the final analysis and for the above reasons, I am inclined that a triable issue has been established in the instant application. The application is hereby granted. The applicant is granted leave to appear and

defend the summary suit In Civil Case No. 21819 of 2024 by filing a Written Statement of Defence within twenty-one (21) days from the date of this Ruling. Costs shall follow cause in the outcome of the suit. Dated at Dar es salaam this 10th day of February, 2025. v\^0^ o fS.M.TIAGHIMBI \- JUDGE ■-vv A J. -r

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