

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

MISC. COMMERCIAL CASE NO. 35 OF 2015

(ORIGINAL COMMERCIAL CASE NO. 11 OF 2015)

MAZONGERAA BUILDING CONTRACTORS LTD..... 1ST APPLICANT/DEFENDANT
SALUM SULEIMAN ALE 2ND APPLICANT/DEFENDANT
SULEMAN SALUM 3RD APPLICANT/DEFENDANT
MASOUD SALUM 4TH APPLICANT/DEFENDANT
VERSUS

DIAMOND TRUST BANK (T) LTD. RESPONDENT/PLAINTIFF

RULING

Date of hearing : 25/3/2015
Date of the Ruling;17/4/2015

SONGORO, J

On the 2/2/2015, Diamond Trust Bank the Respondent instituted a summary suit under Order XXXV of the Civil Procedure Code Cap 33 [R.E 2002] against Mazongera Building Contractors Ltd, Salum Suleiman Ale, Suleiman Salum and Masoud Salum the Applicants claiming outstanding amount of shs 1,189,565,129.49 which includes a sum of 850,Million as principal sum of overdraft facility and interest advanced to the first Applicant.

The overdraft facility was guaranteed by the second, third and fourth Applicants, and overdraft facility elapsed on the 16/10/2013 and has not been renewed and paid by the first Applicant or his guarantors.

The respondent therefore in summary suit prays for summary judgment.

In response to the summary suit, Applicants filed an application for leave to defend the Commercial Case No. 11 of 2015 which was made under Order XXXV Rule 2(2) and Order XLIII Rule 2 of the Civil Procedure Code Act Cap 33 (R.E. 2002) and any other enabling provisions of the law.

In response to the application for leave to appear, and defend the suit, Respondent filed a counter affidavit sworn by Ives Mlawi, the company secretary of the Respondent's bank, and opposed the application that, it has no merit.

Further, Mr Kesaria, the Learned Advocate for Respondent filed an objection to the application for leave to appear, and defend suit, contesting that, the application has been made under the wrong provision of the law, and ought to be dismissed

In his objection, the Learned Advocate pointed out that, the correct provision of the law for filing such application is Order XXXV, Rule 3(1) (c) of the Civil Procedure Code, Cap 33 [R.E 2002]. It was his argument that, since the application is brought Rule 2(2) of Order XXXV of Civil Procedure Code, Cap 33 [R.E.2002] then it is made under the wrong provision of the law, and ought to be dismissed.

Thus, on the 25/3/2015, the application for leave to appear and defend the summary suit was set for hearing, and Mr. Thomas

Massawe, the Learned Advocate appeared for the Applicants, whereas Mr. Kesaria represented Respondent.

To start with Mr. Thomas Massawe, for the Applicant informed the court that, is adopting the contents of the affidavit of Salum Suleiman Ali and is also relying on his skeleton argument.

In addition to that, the Applicant`s counsel reiterated what is contained in his skeleton arguments, and the affidavit of Applicants.

On the application, the counsel pointed out that, the application for leave to appear and defend the summary suit is proper, and has cited proper provision of the law which is Rule 2(2) of Order XXXV and Order XLIII , Rule 2 of the Civil Procedure Code Cap 33 [R.E.2002].

Further, he insisted that, the relevant provisions of the law for the application for leave to appear and defend the summary suit are the ones which have been cited in the Chamber Summons being Order XXXV Rule 2(2) of and Order LII Rule 2 of the Civil Procedure Code, Cap 33 [R.E 2002]. While on this point , he prayed for the dismissal of the objection raised by the Respondent's counsel on the ground that, it has no merit.

On the merit of the application, Mr Massawe narrated to the court that, it is true the first Applicant was offered an over draft facility by Respondent's bank in August 2011 and other Applicants guaranteed the first Applicant. He then explained that, there was

change of status of the overdraft facility after it was converted into a long term loan. Further the Applicant counsel elaborated that, the first Applicant was paying the loan.

To substantiate his point the Counsel referred the court to Annexure P5- of the plaint which is a bank statement which shows payments were being made. He then explained in the payments made by the first Applicant to the Respondent's bank there was no separation of payment of overdraft facility, and long term loan.

Mr. Massawe then narrated that, Applicants wants to raise issues of payment of loan, and others in their defence. Finally, the counsel rested his submission by praying that, it will be just and fair if the court may allow Applicants to appear, and defend the suit.

In reply, and his submission, Mr Kesaria the Learned Advocate for the Respondent also adopted the contents of the Respondent's counter- affidavit, and his skeleton submission.

The Counsel then, reiterated his objection that, the application for leave to appear and defend the suit which has been made under Order XXXV Rule 2(2) of and Order LII Rule 2 of the Civil Procedure Code, Cap 33 [R.E 2002] has been made under the wrong provision of the law.

He then insisted that, the correct provision of the law for filing such application is Order XXXV, Rule 3(1) (c) of the Civil Procedure Code, Cap 33 [R.E 2002]. It was his submission that, since the

application is brought under the wrong provision of the law, then it has to be dismissed.

On the merit of the application, Mr Kesaria informed the court that, under Section 25(b) of the Mortgage Financing (Special Provisions) Act, 2008 the Applicant is entitled to appear, and defend the suit if he demonstrates to the court that, the loan has been paid, or the loan was never taken.

To support his assertion, he referred the court to the decision in the which it was acknowledged that, the law relating to Mortgage Financing has changed and the effect of Section 25 (b) of Act No 17 of 2008 is to allow the Applicant to defend the suit once he produced a bank statement showing payments have been made.

Respondent's counsel briefed the court that, in the present application the Applicant did not demonstrate if payments on loan were made to enable the court to allow, and order the Applicant to appear and defend the summary suit. In the light of submission, he prayed to the court, to struck out the application for citing wrong provision of the law, or in the alternative to dismiss the application for lack of merit.

I have carefully considered the Applicant`s application, the objection raised, and submission of both parties on the objection raised and merit of the application, and find in my view there are two key issues for determination in the application.

First, is if the application for leave to appear, and defend the summary suit is made under the correct provision of the law.

Secondly, is if Applicants has assigned sufficient reason to enable the court to grant them leave to appear and defend the suit.

For convenience purpose , I will consider the first issue, on the respondent's objection of, if the application for leave to appear and defend the summary suit made under of Rule 2(2) of Order XXXV and Order LIII of the Civil Procedure Code , Cap 33 [R.E 2002] was not made under correct provision of the law.

In addressing the above the objection I revisited Rule 2(2) of Order XXXV of the Civil Procedure Code, which an application is made, and find it states as follows;

*In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend **the suit unless he obtains leave from the judge or magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance** and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted....."*

Going by the wording of Rule 2 (2) cited above, it seems to me that, the rule 2(1) alert and guide the defendant to obtain a leave of a Judge or Magistrate to appear and defend the summary suit. If he don't secure a leave to appear and defend the suit, the allegations in the plaint shall be deemed to have been admitted.

Turning to Rule 3(1) of Order XXXV of the Civil Procedure Code Cap 33, as amended by Mortgage Financing (Special Provisions) Act No

17 of 2008 cited above, I find that, the Rule is enabling provision which statutory permits the court to determine application for leave, to appear, and defend the suit.

On, a summary suit is based on Mortgage, it is my view, that Rule 3(1)(c) of Cap 33, enables the court to determining application for leave to appear and defend the summary suit based on the criteria stated in the said Rule. Indeed Rule 3(1) of Order XXXV states as follows;

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; or*
- b) disclose such facts as the court may deem sufficient to support the application.*
- c) In a suit arising out of mortgages where the Mortgagor demonstrates that, ;*
 - (i) loan or portion of the loan claim is indeed discharged*
 - (ii) the loan was not actually taken*

Thus going by the wording contained in Rule 3 (1) of Order XXXV of Cap 33 referred by the Respondent Counsel, I find that the Rule does not statutorily states that, the application for leave to appear, and defend the summary suit has to be brought under the said Rule. But the legal point remains to be that, the referred Rule 3 cited above is the enabling provisions which allows the court to

determining the application for leave to appear and defend the summary suit. It is also my view based on the statutory instruction contained in the Rule 3 cited above that, the court has to rely on it in determining the application for leave to appear, and defend the summary suit.

It is my view based on the wording and statutory instruction in cited Rule, that, in order to move and enable the court to determine the application for leave to appear, and defend the summary suit, a party seeking leave has to cite Rule 3 of Order XXXV of the Civil Procedure Code, Cap 33 [R.E 2002] as enabling provision in order to move the court to consider and determine the application. It is not enough for a party to cite the provision of the law under which the application is made. It is my view that it is important to cite in the application the enabling provision of the law, which enables the court to entertain, and determine the relevant application, and grant the orders applied for in the Chamber Summons.

Reverting back to the application, I find since Applicants in their application for leave to appear, and defend the summary suit they did not cite Rule 3 (1) of Order XXXV of the Civil Procedure Code, Cap 33 , which is the enabling provision, then the court has not been moved to determine the application at hand, therefore the application is incompetent before the court.

With that, court finding, I find no plausible reasons to go into the second point on merit of the application. Consequently, I hereby

struck out the application for leave to appear, and defend the suit on the ground that, it did not cite the enabling provision of the law which I have said is Rule 3 (1) of Order XXXV of the Civil Procedure Code, Cap 33.

On the costs, Applicants are hereby ordered to pay half of the respondent's costs incurred in pursuing the application. It is so ordered.

Dated at Dar es Salaam this 17th day of April , 2015


H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 17th day of April , 2015


H.T.SONGORO
JUDGE


The ruling was delivered in the presence of Mr. Massawe, Learned Advocate for the Applicant, and absence of the Respondent.