

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE No 114 of 2009.

OASIS ENERGY CO LLC.....PLAINTIFF

Versus

AMRAN MOHAMMED TALIB.....1<sup>st</sup> DEFENDANT

MPS OIL (T) LTD.....2<sup>nd</sup> DEFFENDANT

RULING

MRUMA J.

This is an application for leave to appear and defend the suit. The Applicants in this suit Amran Mohammed Talib and MPS Oil (T) Ltd, have been jointly and severally summarily sued by the plaintiff Oasis Energy Co LLC for payment of \$ 476, 135/= being the outstanding balance of the sale proceeds of gas oil products which the plaintiff had supplied to the 1<sup>st</sup> and 2<sup>nd</sup> defendant in October 2009.

The application is brought under the provisions of Order XXXV Rule 2(1) and 3 (1), section 95 and Order XLIII Rule 2 of the Civil Procedure Code Cap 33 R. E. 2002.

As stated above the amount of USD 476, 135.00 is alleged to be a balance unpaid from a gas oil cargo worth USD 1, 752, 950/= delivered by M. T. Bebera, to the defendants.

From what is stated in the plaint, sometimes in July, 2009 the plaintiff and the second defendant through the 1<sup>st</sup> defendant entered into a partnership agreement through which the plaintiff would supply the defendants with gasoline products.

It is averred in the plaint that the said partnership agreement continued smoothly until mid of October, 2009 when misunderstanding between the parties ensued and thus making the parties bilaterally terminate their partnership upon terms and conditions spelt out and agreed by them. Among the agreed terms of the termination of their contract was that the defendants shall issue on the date of signing the said agreement an irrevocable post dated cheque in favour of the plaintiff to guarantee payment of USD 476, 135. 00 on 10<sup>th</sup> November, 2009. The defendant also agreed to release the effective risk and effective ownership of the 6019 metric tonnes of oil which was in their control and ownership and give back to the plaintiff,

The plaintiff on the other hand agreed to release and to return to the defendants the said five cheques as clearance of any indebtedness.

By virtue of the defendants' letter dated 28<sup>th</sup> October 2009, the defendants released control and ownership of the said cargo as agreed upon and also issued a post dated cheque No 933684 for the sum of USD 476, 135/= .

On 13<sup>th</sup> November, 2009 the plaintiff deposited the cheque but it was dishonoured by the bank on the ground that the defendants have instructed their banker to stop payment.

Though the said cheques were to be released after the USD 476, 135/= had been paid, the plaintiff did on 11<sup>th</sup> December 2009 hand over the said cheques to the defendants and requested them to authorize payments. The plaintiff banked the cheque on 16<sup>th</sup> December 2009 but it was once again dishonoured on the ground that the drawer had stopped payment. The plaintiff is complaining that the defendant's failure to honour the plaintiff's payment even after they had received their cheques is clear breach of the termination of partnership and separation agreement and is now claiming for the payment of USD 476,135.00

The defendants are seeking leave to defend the suit on ground that they do not owe the plaintiff's company the sum stated in the plaint. This ground is traceable in the affidavit of Amrani Mohammed Talib, the 1<sup>st</sup> applicant. It is stated by the applicant that the cheques issued were not for immediate payment as they were post dated cheques. It is submitted that this arrangement gave an opportunity to the applicant to reconcile his accounts whereupon he realised that he does not owe the plaintiff the amount stated in the cheques. It is on this ground that he stopped payment.

In reply Mr Laizer counsel for the respondent submitted that the right to appear and defend a summary suit is not automatic. The counsel contended that such leave must be granted only on affidavit detailing among other thing triable issues worth defending. He said that in the case at hand the applicant has failed to show to the court that there are any triable issues. The counsel submitted that the respondent had once invited the applicant produce invoices relating to the price but they failed to do so. The counsel contended that failure by the applicant to file a reply to their counter affidavit to counter what is alleged therein leaves the allegation not contested therefore admitted. The learned counsel cited to this court its own decision in the case of **EURO PRODUCTS TANZANIA LIMITED Versus JUNACO (T) Limited & Another Commercial Case No 103 of 2005** (Kimaro J), as she then was held that before leave to appear and defend could be granted the following conditions should be satisfied:

- (i) The defendant has a good defence to the claim on merits
- (ii) That the defendant has raised a triable issue (s) on merits indicating that he has a fair or reasonable defence although not positively good defence
- (iii) That the defendant discloses such facts as may be deemed sufficient to entitle him to defend and;
- (iv) The defence must not be sham or illusory or practically moonshine.

I agree that those are conditions which need to be satisfied before leave to appear and defend could be granted. The question that follows is whether applying the conditions elucidated in **Junacao's case** to the facts of the present



application, the applicant can be said to have satisfied the court that there is triable issues to warrant it to give leave to appear and defend.

In my view there is triable issue capable of warranting this court to grant leave to the applicant to appear and defend the suit. The applicant avers in his affidavit that he does not owe the defendant the amount stated in the plaint. He says that the essence of issuing post dated cheques was to enable him to have time to reconcile his accounts and that after he reconciled them he realized that he does not owe the plaintiff the amount indicated in the cheque. The respondent on the other and at least by implication concedes that the applicant is disputing the amount claimed. It is averred that the applicant was invited to produce invoices to substantiate their allegations but they refused. To me I think that is what is to be tried by this court during the trial. Where the plaintiff alleges that he is claiming a certain amount from the defendant and the defendant disputes the amount claimed there is a triable issue and the triable issue there is; how much does the defendant owe the plaintiff? Unlike in the **Junaco's case (supra)**, where the defendant made admission of the amount claimed in a fax sent to the plaintiff, the defendant in the present case did not admit the amount claimed anywhere. All the cheques which were issued to the plaintiff were post dated cheques and they were actually not dishonoured when presented for encashment on the ground of no sufficient fund in the defendant's account but payment were stopped by the defendant. When sued on stop payment cheques I do think that the defendant has the right to appear before the court and explain why in the first place he stopped payment.

In summary therefore I grant the application. Leave is hereby granted to the applicant to file their written statement of defence within seven days from the date of this ruling. There will be no orders as to the costs.

A. R. MRUMA

JUDGE

11/11/2010