

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAM DISTRICT REGISTRY)  
AT DAR ES SALAM**

**MISC. CIVIL APPLICATION NO. 250 OF 2019**  
(Arising from Civil Case No. 61 Of 2019)

**CLASSIC PROFESSIONAL CATERER..... APPLICANT**

**THE BOARD OF TRUSTEES OF THE  
PUBLIC SERVICE SOCIAL SECURITY FUND** } .....**RESPONDENT**

**RULING**

**MASABO, J.:**

The ruling is in respect of an application for leave to appear and defend Civil Case No. 61 of 2019 filed by the Respondent under the summary procedure. The brief background of the application is the Applicant's uncontested default in remitting social security contribution in respect of its employees. In total, the Respondents is claiming from the applicant a sum of Tshs 717,189,993.333 comprising of Tshs 93, 530,000/= being outstanding contribution for 81 months and penalty at a tune of Tshs 623, 659,993,44. The applicant does not contest his responsibility to remit the dues. He is however forcefully contesting the amount claimed and the interest thereto. In the affidavit filed in support of Application which is deposed by Douglas Semu who is identified as principal officer of the Applicant, it is averred that when the respondent closed its operation in 2017, the outstanding principal balance was Tshs 73,350,000/= as opposed to Tshs 93, 530,000/= claimed by the respondent. It is further averred that the Applicant has always been

and he is still willing to settle the matter amicably but the respondent has been elusive. In its party, the respondent partly admitted the assertion to the extent that in deed there was an error in computation of the unremitted sum and that the same has been rectified through an amended plaint in which the outstanding contribution and penalty has been reduced to Tshs 73,700,000/= and Tshs 414,725,782.25, respectively hence there is no arguable case.

The Application was argued in writing. In support of the Application, Mr. Johnson Kagirwa, counsel for the Applicant submitted that, under the general rule, leave to defend a summary suit should be granted to the Applicant unless there is a good ground for thinking that the defence put forward are merely sham. He cited the case of **Kundanlal Restaurant vs Devshi & Co.** (1952) EACA 77 and **Tanzania Telecommunication Company Limited v Timothy Lwoga** [2002] T.L.R 150 in support of his argument. Based on the later case he argued that where there is a triable issue, leave to defend should be granted. He continued to argue that in the instant case there is triable issue, namely whether the applicant is capable of the being sued on its own name and whether the claimed sum and penalty there to are correctly calculated. He further cited the case of **Nararisa Enterprises Compant Limited & Others v Diamond Trist Bank Tanzania Limited**, Misc. Commercial Cause No. 202 of 2015 HC (Commercial Division) (unreported) and **Rafiki Eng. & Pump Services Limited and Another v Mantrac Tanzania Ltd**, Misc. Commercial Application No. 17 of 2020, HC (Commercial Division) (unreported).

On the Respondents party, Nambilila Samson Ndoboka, from the respondents Directorate of the Legal Services, cited the provision of section 62(2) of the Public Service Social Security Fund Act No. 2 of 2018 and submitted that the application should be dismissed for failure to comply with this provision which requires the defendant to deposit a sum equal to the contribution being claimed. She further argued that since the erroneous calculation has been rectified in the amended plaint, the ground there is triable issue of the amount claimed can no longer be sustained.

I have given due regard to the submission. In my view, the averment made in the affidavit filed in support of the application, the respondent's counter affidavit and the submission made by both parties point to one issue for determination, namely whether it would be proper for this court to grant the Applicant leave to appear and defend the suit pending against him.

The summary procedure under which the suit against the applicant is preferred, does not accord the defendant a right to appear and defend his respective case. The Defendants appearance and defence is predicated on a leave dully granted by the court. Rule 2(1) of Order XXXV under which this application is made provides that:

Suits 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....

The object underlying the summary procedure is to prevent unreasonable obstruction by the defendant who has no defence and to assist expeditious disposal of cases.

Section 62 of the Public Service Social Security Fund Act under which this application emanates provides as follows:

62.-(1) Every statutory contribution and other contributions payable under this Act shall be a debt due to the Board, and may be recovered by way of summary suit at the instance of the Director General at any time within twelve years after the date on which it was due.

The Procedure is meant to enable the plaintiff to obtain judgment expeditiously where the defendant has in effect no substantial defence to the suit and to prevent such a defendant from employing delaying tactics to postpone the day of reckoning (see **CRDB Bank Limited v. John Kagimbo Lwambagaza** [2002] TLR 117). Through this procedure the plaintiff with a liquidated claim to which no good defence exists, is facilitated to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant (**Zola and Another vs Ralli Brothers Ltd and Another** [1969] EA 691, 694). In this regard, the granting of leave is predicated upon the respondent establishing that there is an arguable case between him and the respondent. As correctly submitted for the Applicant, leave to defend will be granted where the defendant /applicant raises triable issue of fact or law or both (See *Kundanlal Restaurant*(supra), **Tanzania Portland Cement Co. Ltd vs Continental Builders Ltd**. Civil Case No. 262/92 – HC at Dares es Salaam , (Chipeta,

J), and **Tanzania Telecommunications Company Limited v. Timothy Lwoga** [2002] TLR 150.

Having outlined the general principles, let me now return to their applicability to the instant application. The question to be determined, therefore, is whether the applicant has demonstrated an arguable case. In the affidavit supporting the application, the applicant has pointed to one deponed there is an arguable case between him and the respondent concerning the actual outstanding contribution whereby it was averred that the amount claimed by the Respondent is on the higher side. The applicant's second limb of the complaint, was on the actual penalty chargeable. His discontentment is that, is that the computation of penalty has been wrongly done rendering the claimed sum unmaintainable. In my humble view, these two complaints raises an arguable case between the parties.

The circumstances have however changed following the amendment of the plaint which substituted the outstanding mount of Tshs 93, 530,000/= which was initially claimed by the respondent with Tshs 73,700,000/= the amount which is not disputed by the Applicant. Thus, there is no longer dispute concerning the applicant's first complaint. The second complain however, persists, and in my settled view, entitles the applicant to a leave to enter appearance and defend the suit.

Ordinarily, where the defendant has demonstrated existence of a triable issue, leave may be granted with or without conditions. As stated in



**Kundanlal Restaurant** (supra) and **Souza Figuerido & Co. Ltd v Moorings Hotel Co. Ltd [1959] EA 425**, the general rule is that leave should be unconditionally granted unless there is a good reason for thinking that the defence put forward is a shame. This rule is however not applicable in the instant case where section 62 (2) of the PSSSF Act, prescribes a mandatory requirement for leave. It states that:

(2) In a case where a defendant applies for leave to defend, the trial court shall, before granting leave, require the defendant to deposit a sum equal to the contributions. [emphasis added]

Guided by the above principles, I grant the application and order the applicant to deposit in court a total amount of Tshs 73,700,000/= being the outstanding contribution. The amount shall be deposited prior to entering appearance in court. If the above amount is not deposited within 30 days from the date of this ruling, the applicant shall be deemed to have forfeited his right to enter appearance and defend himself. The parties will bear their respective costs.

DATED at DAR ES SALAAM this 20<sup>th</sup> day of July 2020.



**J.L. MASABO**  
**JUDGE**

