

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF IRINGA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISC. CIVIL APPLICATION NO. 05 OF 2021

(Arising From Civil Case No. 1 of 2021)

**THE REGISTERED TRUSTEES OF EVANGELICAL LUTHERAN
CHURCH OF TANZANIA –SOUTHERN DIOCESE ... APPLICANT
VERSUS**

**THE BOARD OF TRUSTEES OF THE NATIONAL
SOCIAL SECURITY FUND..... RESPONDENT**

21/10/2021 & 23/11/2021

RULING

MATOGOLO, J.

This is an application by the applicant the Registered Trustees of Evangelical Lutheran Church of Tanzania Southern Diocese in which he is praying for leave of this court to defend the suit preferred against him under summary procedure.

The applicant initially was sued by the Respondent the Board of Trustees of the National Social Security Fund in Civil Case No. 01 of 2021 in which among other things the respondent prays to this court for judgment and decree against the applicant to pay the respondent the sum of Tshs. 599,339, 205/13 being unremitted members contributions and accumulated

penalties for the previous delayed payment of contributions. The suit was brought under the summary procedure under Order XXXV of the Civil Procedure Code Cap. 33 R.E. 2019.

As the suit was filed under the summary procedure, the applicant has no automatic rights to defend the suit. It is that is why he filed an application for leave to defend the suit. The application is by chamber summons made under order XLIII Rule 2 and order XXXV Rule (3)(1)(b) of the CPC. It is accompanied by an affidavit taken by Grayson C. Shillongoji, the Secretary General of the applicant. The application was brought under the certificate of urgency. The application was orally argued and at the hearing the parties were represented by advocates. While Mr. Marco Kisakali learned advocate appeared for the applicant, Ms. Theresia Marietha Matupa learned advocate appeared for the Respondent Submitting in support of the application, Mr. Marco Kisakali first prayed to adopt the applicant's affidavit and submitted that in the application of this nature, the court is invited to look at the applicant's affidavit to see if has facts that lead to the discovery of triable issues in the main suit. He said the applicant in his affidavit under paragraph 3 he has disclosed facts which they believe they are contentious, which if granted leave to appear and defend the suit will enable this court to do justice. He mentioned some of the contentious issues to include; -

- (i) The amount claimed does not tally with the real amount applicant is indebted.
- (ii) The applicant is continuing to pay the debt.

- (iii) The number of employees contributing is different to what is in dispute.
- (iv) The number of months employees are required to contribute is more than the real number.

Mr. Kisakali cited the case of ***Tanzania Telecommunication Ltd vs. Timoth Luoga [2002] TLR 150***, in which the High Court, Nchallah J. as he then was held that a defendant is entitled for leave to defend the suit if it seems there are triable issues. He said legally triable issues does not necessary that led to succeed in the case. He said the facts disclosed in paragraph (3) of the applicant's affidavit suffices to show the triable issues involved in the main suit. He said the question of triable issues was discussed in the case of ***Paul Massawe & 2 Others vs. Access Bank Tanzania Limited***, Civil Appeal No. 39 of 2014 CAT (unreported).

He said the circumstances explained by the applicant, for interest of justice leave should be granted as the applicant runs school. In order for him to be able to proceed rendering services he prayed that this court should grant them leave to defend the suit.

On her part Marietha Matupa learned advocate for the Respondent submitted that they filed their suit under order XXXV of the CPC. The defendant usually has no automatic right to defend the suit unless he has sought and granted leave. She said in the application of this nature the applicant's affidavit must disclose triable issues in order for the court to grant leave, as provided for under order XXXV rule 3 (1)(b) of the CPC. The learned counsel said this provision has been interpreted in the case of

Narasina Enterprises Company Limited and 3 Others vs. Diamond Trust Bank Tanzania Limited, Misc. Commercial Cause No. 22 of 2015 in which at page 7 Mwambegele, J as he then was gave six principles to be considered in granting leave to defend a suit. She said the applicants affidavit at paragraph 3 is admitting the debt that is why he is saying is repaying the same. She said the applicant has also alleged number of months unpaid which he said is 33 months. But their claim is more than 33 months. She said if the applicant is granted leave to defend the suit he cannot continue to pay. She said that the applicant is bound to pay contribution for his employees because some are going to retire soon and the Fund has nothing to pay them.

Ms. Marietha Matupa suggested an alternative way is for the applicant to deposit security in court as provided under order XXXV. r. 3(2) of the CPC in the event this court find that the applicant is entitled for leave to defend. The learned Counsel said in the case of ***Classic professional Caterer vs. the Board of Trustees of the Public Service Social Security Fund***, Misc. Civil Application No. 250 of 2019 Masabo J, at page 6 discussed about this.

She prayed for the application not to be granted as they are dealing with rights of employees, and the particulars disclosed in the applicant's affidavit were supplied to the Respondent by the applicant himself, for example the number of employees and payment of contributions made. She submitted that rights of employees should be paid promptly so that respondent can pay their rights in time, she concluded.

In rejoinder Mr. Kisakali mainly insisted what was held in the case of ***Prosper Paul Massawe*** (supra) and asked this court to confine itself to what was deposed at paragraph 3 of their affidavit as the respondent did not dispute to the payment that was affected. It is the same amount claimed in the main suit. The fact that the number of months is typing error, that was not disclosed in the counter affidavit. It is a statement from the bar.

Regarding requirement provided under O. XXXV rule (3)(2) of the CPC he said the circumstances of the present case does not fit to the requirement provided in the cited provision as they did not state as to how are they going to be affected and made them fail to pay the employees who are retiring. He said the requirement to deposit security is not mandatory it is optional, and the condition for depositing security will affect the applicant as period for paying schools fees has elapsed. He therefore prayed to this court to grant leave unconditionally Mr. Kisakali cited the case of ***Camilla vs. Merali (1968) EA 314*** in which the court insisted for leave to be granted unconditionally unless there is good ground for thinking that the defence put forward is no more, sham and it must be more than a mere suspicion. Mr. Kisakali insisted for the application to be granted.

Having heard the rival submissions by the learned counsel and upon going through the applicant's affidavit supporting this application, the question this court has to address is whether the affidavit by the applicant which supports the application has disclosed triable issues worth for consideration upon which this court can grant leave to defend the suit.

Mr. Marco Kisakali has consistently referred to paragraph 3 of the applicant's affidavit. That paragraph states:-

"3 that there is triable issue to be determined by the court when leave to appear and defend is granted on the follow aspects:

- (a) That, the debt pending to be paid by the applicant is smaller than what is claimed by the respondent as the amount outstanding by the respondent is different from real sum pending.
- (b) That, the applicant has since continued paying the respondent the outstanding debt as payment made in several occasions for instance the applicant made payment on 27th day of January, 2021 and 15th day of March, 2021 crave for leave of this court marked and annexure as annexure ELCT-SD1.
- (c) That, list of employees who are subject to contributions are disputable and number of months are not real as far as from December, 2015 to Date cannot make a total of 117.

Normally the summary procedure under which the suit against the applicant is preferred does not accord the defendant a right to appear and defend the suit. It is until the defendant has applied and leave to appear and defend the suit summary suit has been granted by the court. This is according to O. XXXV rule 2 which provides:-

"2-(1) 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 and shall also inform him of the manner in which application may be made for leave to defend"

(Emphasis supplied)

In compliance to the above reproduced provision, the defendant has filed the present application for leave of the court to appear and defend the suit.

In Miscellaneous Commercial No. 202 of 2015 ***Nararisa Enterprises Company Limited and 3 Others vs. Diamond Trust Bank Tanzania Limited***, the High Court Commercial Division at page referred an Indian case of ***M/s Mechalec Engineers and Manufactures vs. M/S Basic Equipment Corporation 1977 AIR 577*** in which the following principles which are to be followed when considering the question of granting leave to defend a summary suit were laid:-

- (i) The defendant must satisfy the court that he/she has a good defence in the claim or in its merit.
- (ii) If the defendant raises triable issues indicting that has a fair or bonafide or reasonable defence although not a positively good defence.

- (iii) If the defendant discloses such facts as may be deemed to entitle him that is to say although the affidavit does not positively and immediately make it clear that he/she has a defence yet shows that such a state of facts as lead to the inference that at the trial of the action he/she may be able to establish a defence to the plaintiff's claim.
- (iv) If the defendant has no defence on the defence set up is illusory or sham or practically moonshine then ordinarily the defendant is not entitled to leave to defend.
- (v) If the defendant has no defence or the defence is illusory or sham or practically moonshine the defendant may be denied leave.

Alternatively the court can allow the defendant to proceed if the amount claimed is paid into court or otherwise secure and give leave to the defendant on such conditions"

In determining whether not there are triable issue in the plaint, the court has to look on the fact disclosed in the applicant's affidavit.

The Court of Appeal of Tanzania in the case of **Prosper Paul Massawe & 2 Others vs. Access Bank Tanzania Limited**, Civil Appeal No. 39 of 2014 at page 8 last paragraph has this to say:

"... It is common ground that the underlying factor for grant of that leave is existence of triable issues, a matter of fact which has to be demonstrated by the defendant. The courts determination on whether or not there are triable issues has to be based on the affidavit..."

The court also referred the High Court decision in the case of ***Mohamed Enterprises (T) Ltd vs. Biashara Consumers Services Ltd (2002) TLR 149*** in which it was held:-

"(1) In deciding whether a defendant is to be granted leave to appear and defend a summary suit the role of the court is limited to looking at the affidavits filed by the defendant in order to decide whether there is any triable issue fit to go to trial"

After elucidate the principles governing grant of leave to appear and defend the suit let now look at the facts disclosed by the applicant in his affidavit. The relevant part is paragraph 3. In that paragraph among fact which applicant has complained to be in dispute and thus triable issues are that the amount claimed does not tally to the real amount applicant is indebted to the plaintiff.

- Applicant is continuing to pay the debt.
- The number employees contributing is different to what is in dispute.
- The number of months employees are required to contribute is more than real number.

In her reply submission learned counsel for the respondent stated that by saying that the applicant is repaying the debt is admitting to be indebted. But for number of unpaid months which the applicant's counsel said in 33 months but their claim is more is 33 months. However Marietha Matupa submitted also that there was typing error on the number of months. This as it was submitted by Mr. Marco Kisakali was not disclosed in the Respondent's counter affidavit. It is the statement from the bar which if not pleaded cannot be entertained. By alleging that it is a typing error that by itself a triable issue.

But also, there is the question of number of employees required to contribute, learned counsel for the Respondent did not adequately reply to it. She just stated that what they have is what was supplied to them by the applicant. If the respondent's counsel is not certain of the number of employees required to contribute and rely on the number supplied to her by the applicant which is disputed is a triable issue.

Mr. Kisakali also pointed out the issue of repaying the debts, that alone does not amount to a trial issue, as it was correctly submitted by the Respondent's counsel that is an admission that applicant is indebted.

But for the question of number of months and number of employees who are required to contribute, those are in dispute and thus triable issues. These issues are disclosed in the applicant's affidavit at paragraph 3. That said, and in the up short the applicant has managed to demonstrate that there are triable issues which were disclosed in the applicant's affidavit. The factors for the grant of leave to appear and defend the suit have been met, thus I find merit in this application. The same is granted. Respondent's counsel has an alternative prayer to dismiss the application, she prayed to this court to grant the application but on condition that the applicant has to pay security in court. But it was correctly submitted by Mr. Kisakali that after the court is satisfied that there are triable issues, I grant of the leave to appear and to defend the suit is to be given unconditionally as it was held in the case of ***Camilla vs. Meriali (1968) EA 314.***

That said therefore leave to appear and defend the summary suit is granted, the applicant is given 21 days from today to appear and file written statement of defence. It is so ordered.




F. N. MATOGOLO

JUDGE

23/11/2021

Date: 23/11/2021
Coram: Hon. S. R. Ding'ohi - DR
Applicant: Mr. Kajiba for Advocate Marieta Matupa
Respondent: Present
C/C: Grace

Mr. Kajiba:

The matter is for ruling.

COURT:

Ruling delivered this 23rd day of November, 2021.




S. R. DING'OHI
DEPUTY REGISTRAR
23/11/2021