

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISCELLANEOUS CIVIL APPLICATION NO. 39 OF 2021

*(Arising from Civil Case No. 11 of 2021 in the High Court of Tanzania,
Mbeya District Registry)*

**THE BOARD OF TRUSTEES OF SHINING
NURSERY AND PRIMARY SCHOOLAPPLICANT**

VERSUS

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

RULING

Date of Last Order: 18/05/2022
Date of Ruling : 15/06/2022

MONGELLA, J.

This is an application for leave to defend following a summary suit instituted by the respondent in this Court through Civil Case No. 11 of 2021. In the summary suit the respondent claims against the applicant, its member, among other reliefs, payment of **T.shs. 260,820,893.07** for unremitted contributions and statutory penalty accrued over forty eight months from January 2016 to January 2019, for seventeen members. The



claimed amount is divided into two parts being: **T.shs. 29,927,044.60** as principal amount; and **T.shs. 230,893,848.47** as statutory penalty.

The application is preferred under **Order XXXV Rule 3 (1) (b) and section 95 of the Civil Procedure Code, Cap 33 R.E. 2019**, which allows the defendant to apply for leave to defend in summary suit. It is supported by the affidavit of one, Aman Kajuna, the principal officer of the applicant institution with authority to depose to the facts in the affidavit.

The applicant was represented by Ms. Irene Msuya, learned advocate and the respondent was represented by Ms. Paulina Msanga, learned state attorney. It was argued orally by the learned counsels.

Ms. Mwakyusa first prayed for the contents of the applicant's supporting affidavit to be adopted as part of her submission. She was convinced that the applicant has reasonable grounds to defend the main suit, hence the application at hand. She advanced two points. First, that the debt claimed by the respondent is disputed by the defendant. She said that the defendant has documentary evidence on reduction of part of the debt whereby the same was sent to the respondent. Second, she submitted that some of the beneficiaries that the respondent claims to have not been remitted their contributions are deceased, and others left the applicant's institution and got employed elsewhere. She claimed that the applicant has evidence on that, but can only present the evidence if given the opportunity to defend.



On the other hand Ms. Mwakyusa conceded that the applicant is indeed indebted by the respondent, however, she said, not to the extent claimed by the respondent. In the circumstances, she prayed for the applicant to be accorded the right to defend. She added that the applicant's rights shall be prejudiced if not accorded the opportunity as she shall have nowhere to present her case and the execution of the decree shall be difficult.

Ms. Msanga, on behalf of the respondent, opposed the application on three grounds. First, she contended that the application has contravened the provision of **section 62 (2) of the Public Service Social Security Fund Act, No. 2 of 2018**, which requires the applicant to pay the whole principle amount for him to obtain leave to defend, and the applicant has not done that.

Second, that the applicant through her counsel claims that the amount claimed is incorrect, however she has not stated if she has already paid the amount she thinks to be correct and has never reported on the wrong calculation. She added that the applicant has never disputed the claims sent to him on various notices by the respondent. She found the applicant's claim at this stage an afterthought.

Third, she challenged the applicant's claims that the employees who have left work have been included in the respondent's claims on the ground that the Fund is not in the position to know that if the said names were not communicated to the Fund by the applicant. She argued further that the Fund depends on contributions to pay pensions thus if the

employers are not faithful, they deny their employees contributions by not remitting the same to the Fund thereby hindering or delaying their employees to get their benefits while out of employment.

In conclusion she contended that the Fund comes to court as last resort after several follow ups by the contributions department. In the premises, she had the view that the reasons given by the applicant in this application were supposed to be given to the Fund when the contributions department was making follow ups. She prayed for the application to be dismissed for non-compliance with the law.

In rejoinder, Ms. Mwakyusa first acknowledged the provisions of section 62 (2) of Act No. 2 of 2018. On the other hand however, she argued that since the respondent's counsel has not objected the provision under which the application at hand was preferred, that is, **Order XXXV Rule 3 (1) (b) of the Civil Procedure Code**, which does not direct payment of the debt, the application stands to be competent in this Court. She added that since the applicant contests the amount claimed by the respondent in the summary suit whereby she has overwhelming evidence, denying her the right to defend until payment of the principal amount claimed shall render the case in court nugatory.

Rejoining on the second point by Ms. Msanga, she argued that the issue raised is factual needing evidence in proof. She said that since the applicant has not been given the chance to defend, she is not in the position to adduce such evidence at this stage. Regarding employees who have resigned, Ms. Mwakyusa argued that the applicant sent



information, but cannot substantiate the same if not given the chance to defend. She prayed for the application to be granted.

After considering the arguments by both counsels I find the issue to be determined in this application is whether the Applicant's affidavit has disclosed sufficient facts raising triable issues to warrant this Court to grant her leave to defend. **Order XXXV Rule 3 (1) (b) of the Civil Procedure Code, Cap 33 R. E. 2002** which is the relevant provision in the matter at hand states:

"The court shall upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which...disclose such facts as the court may deem sufficient to support the application."

In accordance with **Order XXXV Rule 3 (1) (b)** as quoted above, the court has limited powers whereby it is confined to consider the facts raised in the applicant's affidavit. This was also stated by this Court in the case of **Mohamed Enterprises (T) Ltd. vs. Biashara Consumer Services Ltd.** [2002] TLR 159 in which it held:

"In deciding whether a defendant should 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."

The applicant's main reason to be granted the leave to defend is that she challenges the amount claimed by the respondent on two reasons being;

one, that part of the claim has already been paid; and two, that, some of the employees included in the claim have already resigned from employment by the applicant and some are deceased.

Ms. Msanga challenged the applicant's contention on the ground that the applicant has not stated the amount she agrees to be indebted; and that the claims that part of the claim has already been remitted to the respondent; and that some of the employees have already resigned and others died were not communicated to the respondent. She added that no proof to that effect has been presented by the applicant before this Court in the application at hand.

Considering the argument by Ms. Msanga, I find that she puts the applicant into task to put her line of defense against the summary suit for the leave to be granted. I however, agree with Ms. Mwakyusa that at this stage, the applicant is not supposed to advance any defence against the summary suit, but to demonstrate triable issues for determination in the main suit without being too detailed. Dealing with a similar issue, the Court of Appeal in the case of **Makungu Investment Company Ltd. vs. Petrosol (T) Limited** [2014] TLR 392 discussed the applicability of **Order XXXV of the Civil Procedure Code** and the role of the court in granting leave to defend.

The Court stated that the role of the court is to decide whether or not there is a factual (I would add, "or legal") dispute to resolve, which arose from the affidavit evidence presented to the Court by the defendant. The Court found that going further to require the defendant to show a good



defence against a summary suit amounts to going beyond the requirement of the law in an application to defend a summary suit. It further noted that, after the application for leave to defend, the applicant is normally granted leave to file his/her written statement of defence. Thus if he/she has already disclosed the defence on merit during the hearing of the application for leave to defend, then he/she will have nothing to include in the statement of defence.

On the strength of the above decision, I find the contention by the applicant challenging the amount indebted and that the respondent's claims covers employees already resigned and deceased, thus not obligating the applicant to remit their contributions, being a serious triable issue warranting grant of the leave to defend as sought.

However, on the other hand, as argued by Ms. Msanga, the grant of leave to defend is also subject to the provisions of **section 62 (2) of the Public Service Social Security Fund Act, No. 2 of 2018**, which, for ease reference provides:

"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 being claimed in the suit as security for due performance of the decree that may be entered against the defendant."

Ms. Mwakyusa challenged the provision on two main reasons. First, that the application at hand has been brought under the Civil Procedure Code, which does not have such requirement. Second, that if the said amount is paid, then there shall not be any relevance in having the suit in

this court as the applicant shall have paid the sum claimed by the respondent.

With all due respect, I do not subscribe to her contention. In my view, being registered under the respondent's Fund, the applicant agreed to be governed by the law regulating their contractual relationship, that is, the Public Service Social Security Fund Act. In the premises, as much as the Civil Procedure Code is the applicable law in the application at hand, it cannot be applied in isolation of the provisions of the Public Service Social Security Fund Act, under which the parties agreed to be bound.

The provision of **section 62 (2) of the Public Service Social Security Fund Act**, as quoted above, is couched in mandatory terms. In addition, I find that Ms. Mwakyusa has misconceived the applicability of the said provision. The provision provides for payment of security for costs, which is deposited in court, and not paid to the respondent in extinguishment of the debt claimed. As such, in the event the applicant succeeds in the main suit, she shall not lose her finances as portrayed. See also: ***Classic Professional Caterer vs. The Board of Trustees of the Public Service Social Security Fund***, Misc. Civil Application No. 250 of 2019 (HC at DSM, reported at Tanzlii).

Having observed as hereinabove, I grant the applicant leave to defend and order her to deposit into court a total sum of **T.shs. 29,927,044.60** as the outstanding principal amount prior to entering appearance in court. The amount should be deposited within thirty (30) days from the date of this Ruling, failure of which shall be construed as forfeiture of the right to

enter appearance and defend by the applicant. Each party shall bear her own costs of the application. It is so ordered.

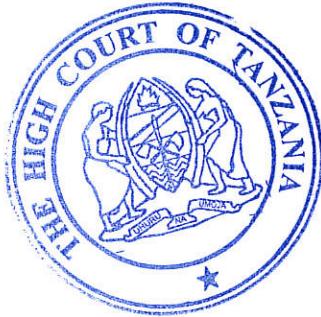
Dated at Mbeya this 15th day of June 2022.



L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 15th day of June 2022 in the presence of the parties' counsels, Ms. Irene Mwakyusa, for the applicant and Ms. Anna Shayo, for the respondent.



L. M. MONGELLA

JUDGE