

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC. CIVIL APPLICATION NO. 44 OF 2020

*(Arising from Civil Case No. 07/2020 of the High Court of the United Republic of Tanzania,
Tanga District Registry at Tanga)*

THE REGISTERED TRUSTEES OF NED-ELCT.....1st APPLICANT

SEBASTIAN KOLOWA MEMORIAL UNIVERSITY.....2nd APPLICANT

-VERSUS-

THE BOARD OF TRUSTEES OF

NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

RULING

Date of Last Order: 05/08/2021

Date of Ruling: 23/02/2022

AGATHO, J.:

The Respondent/Plaintiff herein instituted a suit against the Applicants under summary procedure pursuant to Order XXXV of the Civil Procedure Code [Cap 33 R.E 2002] now R.E 2019, read together with Section 74A (2) Of the National Social Security Fund Act [Cap 50 R.E 2018] for a statutory breach of the obligation to remit members (employees) contributions for the total period of 55 months from September 2015 to March 2020, the amount which continue to accrue as it remains due. In the suit, the Respondent is claiming for the following reliefs;

- (i) Payment of the sum of TSH. 678,465,762.01/= being 2015 un-remitted members contributions plus accumulated penalties thereon due.
- (ii) Payment of interest on the decretal sum from September, the sum accrued to the date of judgment at an overall lending rate of 15% per annum as published by the Bank of Tanzania Monthly Economic Review, January 2010 publication.
- (iii) Interest on decretal sum at the prescribed Court rate of 7% per annum from the date of delivery of judgment until the same shall be fully satisfied.
- (iv) Costs of the suit and any other incidental costs pertaining to the filing of the suit.
- (v) Any other and further relief as this Honourable Court shall deem fit and just to grant.

As a matter of procedure, the Applicants/Defendant filed an application for leave to defend as per Order XXXV Rule 2 and 3 of the Civil Procedure Code [Cap 33 R.E 2019].

Before hearing, the Respondent raised a Preliminary Objection to the effect that the Application is time barred, however the objection was overruled by the Court hence the hearing where

the Court on the 5th day of August 2021 preferred the same be conducted by way of written submissions. The Applicants were ordered to file submission on 10/08/2021. The Respondent was ordered to file submission on 17/08/2021. The Applicants were ordered to file rejoinder on 24/08/2021.

The Applicants however filed their submission on 13/08/2021.

In reply to the submission, the Respondent submitted that failure to file a written submission amounts to dismissal of the Application. He referred the case of **Seti Tete v Mwanjelwa Saccos, Misc. Civil Application No. 22 of 2018**. This position was also stated in the case of **Godfrey Kimbe v Peter Ngonyani, Civil Appeal No. 41 of 2014, CAT at Dar es Salaam at Page 3**.

According to the records before the Court, the Applicants filed their submission on 13/08/2021. They did not timely file their submission. Courts however vide the principle of overriding objective are required to ensure justice rather than embarking in legal technicalities. See the case of **Yacobo Magoiga Gichere v Peninah Yusuph, Civil Appeal No. 55 of 2017 CAT (unreported)**. The fact that the Applicants did not timely file the submission cannot render the dismissal of the Application, to

ensure that justice is done, I allow the hearing of the Application proceed.

Now, considering the Applicant's submissions, the first Applicant stated that it is neither the owner of the University nor the employer of the Sebastian Kolowa Memorial University (SEKOMU) employees, as such the debts owed do not involve it and that is why the prayer to defend the suit was made.

The second Applicant on his part submitted that some of the employees listed are not working at the University, they are terminated, dead or resigned and that is the reason why the second Applicant prayed to be allowed to defend the suit.

The Respondent on his part submitted that Order XXXV Rule 3(1) (b) of the Civil Procedure Code Cap 33 R.E 2019 provides that a leave to appear and defend the suit shall be granted upon the affidavit disclosing facts as the Court deems sufficient to support the Application. The Respondent also referred the case of **Tanzania Telecommunication Company Limited v Timothy Lwoga (2002) TLR 150** where it was held that the defendant is entitled to leave to defend the suit if it is shown that there is a triable issue and the case of **Narasisa Enterprises Company**

Limited and Others v Diamond Trust Bank Limited, Misc. Commercial Cause No. 202 of 2015 (unreported) where the principles for granting leave to appear and defend a summary suit were elaborated and amongst them is the requirement that the Defendant must satisfy the Court that he/she has a good defence to the claim on its merits and that the Defendant must raise triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence.

The Respondent submitted that the Applicants' Affidavit does not disclose any triable issue. That requirement is stated in the Court of Appeal of Tanzania case of **Prosper Paul Massawe and 2 others v Acces Bank Tanzania Limited, Civil Appeal No. 39 of 2014** also in the case of **J. Mwanauta & Company Safaris (T) Limited & 2Others v National Bank of Commerce, of 2014 Commercial Case No. 3 of 2014 (unreported)**. The Respondent however added that leave may be granted if security is deposited and that since the Applicants had admitted that is indebted then there should be deposited an admitted amount as per the principle stated in the case of **Classic Professional Caterer v PSSF, Misc. Civil Application No. 250 of 2019 (unreported)** for the Court to grant leave. It was therefore the

Respondent's submission that since the Affidavit in support of the Application does not contain sufficient requirement of the law for leave to be granted then the application should be dismissed with costs.

Having considered submissions from both sides and Court records, the core issue is whether the Application contains triable issues sufficing the Court to grant leave to defend the suit.

The Court having extensively read the Applicant's Affidavit, the Applicant merely stated that if the Application is not granted, the Applicants will irreparably suffer because they would have been condemned unheard and that for the interest of justice, the Application should be granted as prayed. The Applicants did not disclose facts indicating that if the Application is not granted then they will be condemned unheard. From the above reasons the Court cannot exercise its discretion, the Application is therefore dismissed with costs. The Court further orders the hearing of Civil Case No. 07 of 2020 to proceed.

It is so ordered.

DATED at TANGA this 25th Day of February 2022.


U. J. AGATHO
JUDGE
25/02/2022

Date: 25/02/2022


Coram: Hon. Agatho, J

Applicant: Ms. Theresia Mponzi

Respondent: Advocate Ahmed Makallo holding

B/C: Zayumba

Court: Ruling delivered on this 25th day of February, 2022 in the presence of both the Applicant's counsel and the Respondent's counsel.


U. J. AGATHO
JUDGE
25/02/2022

Court: Right of Appeal is available as per the law.


U. J. AGATHO
JUDGE
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SEBASTIAN KOLOWA MEMORIAL UNIVERSITY.....2nd APPLICANT

-VERSUS-

THE BOARD OF TRUSTEES OF

NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

DRAWN ORDER

WHEREAS the Respondent /Plaintiff herein instituted a suit against the Applicants under summary procedure pursuant to Order XXXV of the Civil Procedure Code [Cap 33 R.E 2002] now R.E 2019, read together with Section 74A (2) Of the National Social Security Fund Act [Cap 50 R.E 2018] for a statutory breach of the obligation to remit members (employees) contributions for the total period of 55 months from September 2015 to March 2020, the amount which continue to accrue as it remains due.

AND WHEREAS the Respondent generally claimed for the following reliefs;

- (i) Payment of the sum of TSH. 678,465,762.01/= being 2015 unremitted members contributions plus accumulated penalties thereon due.
- (ii) Payment of interest on the decretal sum from September, the sum accrued to the date of judgment at an overall lending rate

of 15% per annum as published by the Bank of Tanzania Monthly Economic Review, January 2010 publication.

- (iii) Interest on decretal sum at the prescribed Court rate of 7% per annum from the date of delivery of judgment until the same shall be fully satisfied.
- (iv) Costs of the suit and any other incidental costs pertaining to the filing of the suit.
- (v) Any other and further relief as this Honourable Court shall deem fit and just to grant.

AND WHEREAS the Applicants/Defendant filed an application for leave to defend as per the requirement of the law under Order XXXV Rule 2 and 3 of the Civil Procedure Code [Cap 33 R.E 2019.

The Ruling being delivered on the 25th day of February, 2022 in the presence of both the Applicant counsel and the Respondent counsel.

THIS COURT DOTH HEREBY ORDER THAT:

Since the Applicants did not disclose facts in the affidavit indicating that if the Application is not granted they will be condemned unheard then this Court cannot exercise its discretion granting leave to defend the suit. Under that circumstance the Application is dismissed with costs and it is further ordered that hearing of Civil Case No. 07 of 2020 to proceed as scheduled.

GIVEN under my **HAND** and the **SEAL** of this Court this **25th** day of **February, 2022.**




U. J. AGATHO
JUDGE
25/02/2022