

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 256 OF 2021

BY BLOCK CONTRACTORS LIMITED APPLICANT

VERSUS

**THE BOARD OF TRUSTEES OF
PUBLIC SERVICES SOCIAL SECURITY FUND 1ST RESPONDENT**

**STONE BOLCK CONTRACTORS &
INVESTMENT COMPANY LTD 2ND RESPONDENT**

RULING

28th June, & 14th July, 2021

ISMAIL, J.

A suit is pending in this (Civil Case No. 64 of 2020) for recovery TZS. 564,755,792.22, alleged to be arrears of contributions, penalty and interest on unremitted contributions from the applicant's employees. The pending matter has been instituted as a summary suit whose defence must be preceded by leave to appear and defend. The instant application is intended

to secure the said leave and allow the applicant's participation in the proceedings as one of the defendants.

The application is supported by an affidavit sworn by James Omahe, the applicant's principal officer, containing grounds on which the application is based. Part of the applicant's contention is that the applicant is not party to the debt which was accrued subsequent to the applicant's splinter from the 2nd respondent.

In the counter-affidavit filed in reply, the applicant's prayer has been strongly opposed by the 1st respondent. The contention is that the applicant's owner was a director of the 2nd respondent's company and that in previous engagements between the parties, the said director committed himself to liquidate the outstanding debt for the applicant.

When the matter came up for hearing, the Court ordered that disposal of the matter be by way of written submissions. Mr. Mutakyahwa Charles, learned counsel represented the applicant, while the 1st respondent enlisted the services of Ms. Anna Shayo, learned advocate.

In his submission, Mr. Mutakyahwa cited a number of court decisions that support his case, key among them being the case of ***Elias Kigua Marwa v. Standard Chartered Bank Tanzania***, HC-Misc. Commercial Application No. 246 of 2018 (unreported). In the cited case, the Court quoted

with approval the decision in ***Mohamed Enterprises (T) Ltd v. Biashara Consumer Services*** [2002] TLR 159. In the latter it was held:

"in deciding whether the Defendant should be granted leave to appear and defend a summary suit, the role of the court is limited to looking at the affidavit as filed by the Defendant in order to decide whether there is any triable issue fit to go to the trial."

Learned counsel urged the Court to hold that the applicant has done enough to demonstrate that there are triable issues for which leave is craved.

The respondent's argument is that, while there may be triable issues to be determined by the Court, grant of leave to defend must conform to the requirements of section 62 (2) of the Public Service Social Security Fund Act, No. 2 of 2018. This provision requires that grant of leave to defend be preceded by depositing, by the applicant, of security for due performance of the decree that may be entered by the defendant. The deposit must be in the sum equal to contributions claimed. Learned counsel took the view that failure to meet the requirement of the law entitles the plaintiff, in this case, the 1st respondent, to a summary judgment.

Regarding the cited authorities, the contention by the 1st respondent is that the same are distinguishable, as in none, the condition of furnishing security for due performance was discussed.

The 1st respondent urged the Court to find that there is no triable issue that justifies grant of leave to appear and defend.

The issue for determination in this application is whether leave should be granted.

It is widely acknowledged that appearance and defence in suits preferred under the summary procedure is not as of right. It is dependent on the defendant's ability to move the Court to grant leave which would enable him to appear in court and be allowed to field a defence to the allegations set forth in the statement of claim. This requirement is enshrined in Order XXXV rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). Instructively, summary suits are a creature of Order XXXV of the CPC, meaning that its conduct is governed by such law.

As stated and agreed by counsel for both parties, grant of leave is conditioned on demonstration that there is a triable issue or a fair, *bonafide* or reasonable defence. This position was underscored by the Court, in ***Eximbank (Tanzania) Limited v. M/S Sero Lease & 8 Others*** [2015] TLR 244, wherein the following finding was made:

"It is settled rule of law that wherever the defence put forth by the Applicant/Defendant is bonafide, raises triable issues and is not a moonshine, the Applicant/Defendant would be

entitled to leave to defend conditional or unconditional depending upon the facts and circumstances of each case.”

Thus, as stated in ***Mohamed Enterprises (T) Ltd v. Biashara Consumer Services*** (supra), it takes glancing through the supporting affidavit to draw a conclusion that a triable case, fit to take it to the trial stage of the proceedings, exists.

I have unflinchingly gone through the affidavit that supports the application. What comes out of it is that a divergence exists on who is responsible for payment of the sum owing to the 1st respondent. The contention by the applicant is that the said debt constitutes a liability by the 2nd respondent, and that the applicant and the 1st respondent are distinct personalities, and that the applicant is in no way liable to payment of a debt that accrued after one of its directors had relinquished from his position in the 2nd respondent company.

This is a contention which requires an audience. It is an issue which requires that the matter goes all the way to the full trial which will call for full participation of the defendant, the applicant in this matter

The 1st respondent has clung on the requirement set out in section 62 (2) of Act No. 2 of 2018, which requires that a security for due performance

be deposited. My take is that the law governing summary proceedings is what should take precedence in these proceedings. The said statute was not intended to curtail appearance of a defendant through imposition of stringent conditions which make it impossible for him to exercise his constitutional right of access to justice. This is especially critical where the said defendant is, as is the case here, challenging his involvement in a debt that he denies any knowledge of. In my considered view, the applicant has done what is necessary to book her day in court. She should not be impeded or stifled.

In the upshot of the foregoing, leave is granted, allowing the applicant to appeal and defend the matter that is pending in court. Accordingly, the applicant, 2nd defendant in the suit, is allowed to file a written statement of defence within 21 days from the date hereof. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 14th day of July, 2022.



M.K. ISMAIL



JUDGE

14.07.2022