

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBIA DISTRICT REGISTRY**

**AT BUKOBIA**

**MISCELLANEOUS CIVIL APPLICATION NO. 14 OF 2022**

*(Arising from Civil Case No. 1 of 2021 of High Court of Tanzania Bukoba District Registry)*

**KAGERA TEA COMPANY LIMITED..... APPLICANT**

**VERSUS**

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

**RULING**

**17/07/2022 & 03/08/2022**

**E. L. NGIGWANA, J.**

It is trite law that when a party sues under Summary Procedure, the defendant has no automatic right to appear and defend the suit. He/she can only do so after seeking and obtaining leave of the court. It is in that premise that the Applicant, Kagera Tea Company Limited has brought this application seeking leave of this court to appear and defend Civil Case 01 of 2022 brought to this court under summary Procedure, Order XXXV of the Civil Procedure Code Cap. 33 R: E 2019. The application is supported by an affidavit deposed by Mr. Joseph Salum Njalikai, Applicant's Principal Officer.

By way of plaint filed in this court on 6<sup>th</sup> day of January, 2022, the Board of Registered Trustees of the National Social Security Fund, the respondent herein instituted Civil Case No. 01 of 2022 under Summary Procedure against the applicant herein praying for judgment, decree and orders as follows:-

- (i) The Applicant be ordered to pay the sum of **TZS 575,374,061.7/=** (Tanzania Shillings Five Hundred Seventy Five Million Three Hundred Seventy Four Thousand Sixty one and Seven Cents Only) being un-remitted members' contributions plus accumulated penalties thereon due and payable to the respondent by the Applicant.*
- (ii) The Applicant be ordered to pay Interest on the decretal sum from February 2013, when the sum accrued to the date of judgment at an overall lending interest rate of 15.37% per annum.*
- (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) Cost of and incidental to the filing of the suit; and*
- (v) Any other and further relief as this Honourable Court shall deem fit and just to grant.*

When the application came up for hearing on 04/07/2022, Mr. Frank Karoli, learned advocate appeared for the Applicant while Ms. Aisha Salehe learned State Attorney, appeared for the Respondent. The application proceeded orally.

At the outset, the learned advocate for the applicant adopted the affidavit of the Applicant's Principal Officer, and submitted that the applicant disputes the claim of **Tshs. 575,374.061.7/=** allegedly being un paid members' contributions to the respondent, therefore if the applicant is not granted the right to appear and defend the suit, its rights may be jeopardized. The

learned counsel made reference to the case of **Tanzania Telecommunication Company Limited versus Timothy Lugoya** [2002] TLR where the court held that, the applicant has to be granted leave to defend the case where there is a triable issue. The learned counsel made reference to paragraph 4 of the affidavit supporting the application to show that there is a triable issue.

On the other hand, Ms. Aisha Salehe, learned State Attorney for the respondent adopted a counter affidavit deposed by her to form part of her submission. She submitted that, in the affidavit supporting the application it is not denied that the employees as per annexure 2 to the plaint, are not the applicant's employees, and nowhere is indicated that the claimed amount had been paid by the applicant, thus according to her, no triable issues demonstrated by the applicant.

She added that, in the case of **Nararisa Enterprises Company Limited and 3 Others versus Diamond Trust Bank Tanzania Limited**, Misc. Commercial Cause No. 202 of 2015 HC DSM, factors to be considered before exercising its discretion of granting or refusing leave to appear and defend the suit have been stated, thus urged this court to consider the same factors in this application. She added that if the court finds the triable issue has been demonstrated by the applicant, the court may be pleased to grant leave with a condition that such amount or less than that be deposited in court by the applicant.

In his rejoinder, Mr. Frank stated that it is not a legal requirement that leave to appear and defend a suit should be conditional leave.

Now, having considered the record, the brief submissions by the parties and requirements of the law, the issue for determination is whether the application raises triable issue(s) as to warrant the grant of leave to appear and defend the main suit.

It is a trite law that in application of this nature, the court is not required to involve itself in lengthy argument but, rather, to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue fit to go per trial. In other words; the applicant is only required to show by affidavit or otherwise that there is a fair and reasonable defence. See **Mwanauta & Company Hunting Safari (T) Limited and 2 Others versus National Bank of Commerce**, Commercial Case No. 3 of 2014 (unreported).

Where the application raises no bonafide triable issues of fact or law or where the defence raised is found by the court to be a sham, definitely; the application will not be granted, instead, a summary judgment will be entered.

In the instant application, Paragraph 4 and 5 of the affidavit supporting the application were coached as follows;

4. *That the applicant strongly refutes the claim of **Tshs. 575,374,061.7/=** as being fabricated, concocted and unfounded claim and that the applicant has been paying members contributions to the respondent and was duly received by respondent as will be exhibited by the attached bank statement here with marked as **KGT.1 forming part of this affidavit**".*

*5. That when leave to appear and defend will be granted by the Honorable court, the applicant will be heard and will be in a good position to defend and prove such payments which were received by the Respondent.*

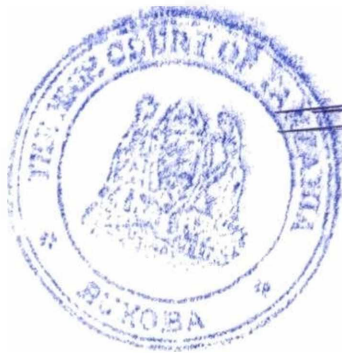
I do agree with the applicant's advocate that, as per Court of Appeal decision in **Tanzania Telecommunications Company Limited versus Timothy Lwoga** (supra), the defendant is entitled to leave to appear and defend a summary suit if it is shown that there are triable issues in the case.

In the instant matter, having read paragraph 4 and 5 of the affidavit supporting the application, together with submission of the applicant's learned counsel, the court is convinced that the Applicant has disclosed sufficient reason as to warrant the grant of leave to appear and defend the main suit filed against Applicant.

Order XXXV rule 3 (2) of the Civil Procedure Code Cap 33 R:E 2019 provides that; leave to appear and defend the suit may be given **unconditionally or subject to such terms as to payment into court, giving security, framing and record issues or otherwise as the court thinks fit.**

In the circumstances of this case I exercise the discretion of this and grant unconditional leave. In the upshot the applicant is granted unconditional leave to appear and defend the main suit; Civil Case No.01 of 2022. The Applicant shall file a Written Statement of Defence within 21 days from the date of this ruling. The costs of this application shall abide the result of the main suit. It is so ordered.

Dated at Bukoba this 3<sup>rd</sup> day of August, 2022.

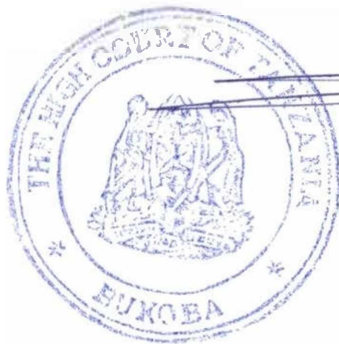


E. L. NGIGWANA

JUDGE

03/08/2022

Ruling delivered this 3<sup>rd</sup> day of August, 2022 in the presence of Ms. Aisha Salehe, learned State Attorney for the Respondent, but also holding brief for Mr. Frank Karoli; learned Advocate for the Applicant, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu.



E. L. NGIGWANA

JUDGE

03/08/2022