

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

AT DAR ES SALAAM

MISC. APPLICATION NO. 515 OF 2021

(Arising from Civil Case No. 71 of 2021)

JUNACO (T) LIMITED..... APPLICANT

VERSUS

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

RULING

Date of Last Order: 30/08/2022

Date of Ruling: 16/09/2022

E.E.KAKOLAKI, J.

This ruling is in respect of an application for leave to defend a summary procedure suit. The application is made under the provisions of Order XXXV Rule 3 (1)(b) and Order XLIII Rule 2 of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC) and supported by an affidavit duly sworn by Ferdinand Masoy, the principal officer of the applicant. On the adversary part Mr. Baraka Y. Mgya, State Attorney swore a counter affidavit in opposition to the application.

A brief background to this application goes thus, the respondent under Order XXXV of the CPC and vide Civil case No. 71 of 2021, lodged a summary procedure suit against the applicant, as the contributing member employer

to the respondent, duly registered with her vide certificate No. 673668, claiming for payment of the sum of Tshs. 965,694,887.3, being unremitted of members' pension contributions plus accumulated penalties thereon due and payable to the respondent/plaintiff by the applicant/defendant for a period between January 2015 to September 2020, interest at the rate of 15.42% per annum on the decretal sum accrued from September 2020 to the date of judgement, interest on decretal sum at the rate of 7% from the date of delivery of judgment until full satisfaction, costs of the suit and any other relief as this Court deems fit and just to grant.

In accordance with the law establishing the respondent, the applicant is required to remit to the respondent compulsory pension contributions each month for its employees at the rate of 10% and 10% respectively making a total of 20% of the employees' wage, hence a total claim of Tshs. 965,694,887.3 claimed being Tshs. Tshs.769,507,636.33 as principal sum plus accumulated penalties of Tshs. 196,187,250.97. It is alleged that, despite the facts that, payment of her employees' contributions is mandatory, the applicant failed, neglected, ignored and or defaulted to remit the same to the respondent for some months, the act which attracted imposition of the penalty due to breach of her statutory obligations. In

contest, the applicant contends in paragraphs of 5 and 6 of her affidavit that, there is a need for reconciliation of the undisputed defaulted outstanding principal members' contributions of Tshs.769,507,636.33, as she is able to pay and had paid a total of Tshs. 46,874,000/- in a period between 12th June, 2020 and 1st February, 2021. Apart from that principal due amount which to a large extent is uncontested, the applicant is disputing the respondent's assertion in paragraphs 7 and 10 of the plaint that, she ignored to remit the said pension contributions as there is no proof of demand notices from the respondent hence this application seeking for leave of the court to defend the suit so as to establish the exact due principal contributions and the charged penalties by the respondent.

At the hearing of this application, Ms. Catherine Zakaria, learned counsel and Mr. Baraka Mgya, learned State Attorney appeared for the applicant and respondent respectively, and both parties were accorded with the right to be heard viva voce. It is Ms. Zakaria who staged the floor first and adopted the affidavit in support of the application to form part of her submission. She then conceded that, it is true the applicant owe the respondent the principal amount of Tshs. 672,633,636.33 as due pension contributions since Tshs. 46,874,000/- is already paid save for the penalty imposed on her which is

contested. She argued, unless the applicant is given leave to defend the case she cannot establish the exact amount owed by the respondent to her as she is contesting the penalties imposed on her. She thus, pressed the Court for leave to defend the main suit as there is triable issues in the main suit.

On the other side Mr. Mgaya for the respondent eloquently submitted that, for the leave to be granted this Court, the applicant has to convince the Court that there is trial issues in the main case. He cited the case of **Nararisa Enterprises Company Limited & 30 others Vs. Diamond Trust Bank Tanzania Limited**, Misc. Commercial Cause No.202 of 2015 (HC-Unreported), where this Court stated that, defendant must satisfy the court that in the main case there is triable issues or indicate that he/she has fair or bonafide or reasonable defence although not positively good one.

In this application Mr. Mgaya argued, since the applicant concedes to be indebted to the respondent on the claimed unpaid up principal contributions to the tune of Tshs.672,633,636.33, save for the amount on the imposed penalties to her, this Court be pleased to grant the applicant conditional leave to defend by ordering her to deposit with Court first the uncontested amount before entering her defence. To buttress his argument and prayer the learned State Attorney cited to the Court 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 (HC-Unreported), where this Court ordered the applicant to deposit in Court a total due and uncontested amount before she (applicant) could enter her defence. Mr. Mgaya prayed the Court to be persuaded with that decision and proceed to order the applicant to deposit in court the uncontested amount before she is allowed to enter her defence.

In her brief rejoinder, Ms. Zakaria did not resist the respondent's prayer for grant of conditional leave but went further to notify the Court that, the applicant on that day was even ready to deposit Tshs. 50,000,000/= to reduce the outstanding amount. Otherwise she stood up to her prayer for the Court to grant the application.

I have had ample time to consider the rival arguments by the learned two legal minds, the averments in the filed affidavit and counter affidavit in support and against the application as well as the provisions of Order XXXV Rule 3(1) (b) of the CPC. Under the above cited provision of the law, leave is not automatically granted to the defendant, as for this Court to grant the same, applicant must disclose to the court sufficient facts to enable it

exercise its discretion whether to grant the application or not. Order XXXV
Rule 3(1)(b) of the CPC reads:

*3.- (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-
(b) disclose such facts as the court may deem sufficient to support the application; or*

From that above dictates of the law, the applicant is duty bound to adduce to the Court's satisfaction sufficient facts disclosing that, there is triable issues in the main case sought to be defended. He must satisfy the Court that, he has a good defence to the claim by the plaintiff. See the cases of **Kundanlai Restaurant Vs. Devshi & Co.** [1952] EACA 77, **Tanzania Telecommunication Company Limited Vs. Timoth Lwoga** [2002] T.R.L 150, **Classic Professional Caterer** (supra) and **Nararisa Enterprises Company Limited & 30 others** (supra) when cited the case of **M/S Mechalec Engineers & Manufacturers Vs. M/S Basic Equipment Corporation** [1977] AIR 577 as adopted in the case of **Mohamed Enterprises (T) Ltd Vs. Biashara Consumer Services Ltd** [2002] TLR 159. The applicant has to establish existence of arguable case since the purpose of Summary Procedure suit is to enable the plaintiff to obtain judgment expeditiously where the defendant has in effect no

substantial defence to the suit and prevent the defendant from employing delaying tactics to postpone the day of reckoning the liquidated claim. See the cases of **Zola and Another Vs. Ralli Brothers Ltd and Another** [1969] EA 691 at page 694, **CRDB Bank Limited Vs. John Kagimbo Lwambagaza** [2002] TLR 117 and **Classic Professional Caterer** (supra).

Now back to the matter at hand, the only issue which this court is called to answer is whether the applicant has advanced sufficient facts warranting this Court exercise its discretion whether to grant the application or not. Going by the applicant's averments in paragraphs 7 and 10 of affidavit and Ms. Zakaria's submission, the outstanding balance of the principal contributions of Tshs. 672,633,636.33 which is the due amount after deduction of the already paid contributions to the tune of Tshs. 46,874,000/- is not disputed, save for the penalty imposed on her by the respondent raising the claimed due pension contributions to Tshs. 965,694,887.3, without any issue of demand notices to her. Save for the uncontested amount of Tshs. 672,633,636.33, it is the findings of this Court that, the issues as to whether Tshs. 46,874,000/- was paid by the applicant to the respondent in reducing the total outstanding amount of contributions between 12th June, 2020 and 1st February, 2021 as claimed and whether the penalty imposed by the

respondent to the applicant for failure to remit the pension contributions timely for a period of January 2015 to September 2020 is justified for want of demand notices, I find are the trial issues to be determined in the main suit, thus the applicant is entitled to grant of leave to defend the main case.

As regard to Mr. Mgaya's prayer to this Court for grant of conditional leave by ordering the applicant to deposit into Court's account the uncontested amount of Tshs. 672,633,636.33 before her defence is entered, it is this Court's view that, the same is accommodative by the law. It is the law under Order XXXV Rule 3(2) of the CPC that, this Court may grant to the applicant unconditional leave or conditionally subject to payment in Court some amount of money though the general rule is that, leave should be granted unconditionally unless there is reason for thinking that the defence put forward is a shame one. See the cases of **Kundanlal Restaurant** (supra), **Souza Figuerido & Co. Ltd Vs. Moorings Hotel Co. Ltd** [1959] EA 425 and Classic Professional Caterer (supra). Rule 3(2) of the CPC provides:

3(2) Leave to defend may be given unconditionally or subject to such terms as to payment into court, giving security, framing and recording issues or otherwise as the court thinks fit. (Emphasis supplied)

Guided with the above general rule, in this matter, I would have granted leave unconditionally but for the applicant's concession to the outstanding contributions to the tune of Tshs. 672,633,636.33 due to the respondent as rightly made clear by Ms. Zakaria who also did not contest Mr. Mgaya's prayer for the conditional grant, I find it fit to grant conditional leave with an order for payment of that amount first, as the applicant has not advanced any defence challenging the same, leave alone a shame one as deliberated in **Kundanlal Restaurant** (supra) and **Souza Figuerido & Co. Ltd** (supra).

In the circumstances and for the forestated, leave to defend is granted to the applicant on the condition that she must deposit first Tshs.672,633,636.33, as admitted outstanding pension contributions as prayed by the respondent. The amount shall be deposited in court within 30 days from the date of this ruling failure of which the applicant shall be counted to have waived her right to enter her defence in Civil Case No. 71 of 2021. The application is allowed to that extent.

Costs shall be in the course.

Ordered accordingly.

Dated at Dar es Salaam this 16th September, 2022.



E. E. KAKOLAKI

JUDGE

16/09/2022.

The ruling has been delivered at Dar es Salaam today 16th day of September, 2022 in the presence of Mr. Baraka Mgya, State Attorney for the respondent and Mr. Rashid Umande, Court clerk and in the absence of the applicant.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

16/09/2022.