

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

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**CIVIL CASE NO. 07 OF 2020**

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

**VERSUS**

**THE REGISTERED TRUSTEES OF THE EVANGELICAL  
CHURCH OF TANZANIA.....1<sup>ST</sup> DEFENDANT**

**SEBASTIAN KOLOWA MEMORIAL  
UNIVERSITY.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Date of Ruling- 25<sup>TH</sup> APRIL 2022**

**Mansoor, J:**

The Plaintiff filed a suit under Order XXXV of the Civil Procedure Code, Summary Procedure for recovery of Tshs 678,465,762.01/= being unremitted members' contributions plus accumulated penalties thereon due and payable to the

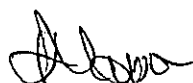


plaintiff by the defendants. The plaintiff also prayed to be granted interests and costs of the suit.

To the above claim of the plaintiff, the defendant, having been served, filed for appearance, and thereafter filed an application under Order 35 Rule 3 (1) (b) of the Civil Procedure Code seeking unconditional leave to defend the suit on the ground that there are contentious issues to be tried by the Court. The High Court (Dr Agatho Ubena, J) refused to grant leave to the defendants saying that the defendants have not made out an arguable case which would entitle them for grant of unconditional leave. In summary suit the defendant has no automatic right to defend the suit unless leave is sought and obtained.

After denying leave to defend the suit, on 24<sup>th</sup> February 2022, Hon Judge Ubena Agatho recused himself from entertaining the suit for the reasons recorded in the proceedings, and he had this to say:

*"Since I was the one who determined Misc. Civil Application No. 44 of 2020, it would be fair this case be reassigned to another Judge for determination. I thus,*



*remit the file to the Deputy Registrar who shall forward to the Judge in Charge for re-assignment.*

Then the suit was re-assigned to Hon. Judge Latifa Mansoor, and when the plaintiff's counsel, Theresia Mponzi, Learned State Attorney appeared in Court and asked for a Judgement in terms of Order XXXV Rule 2 (2) paragraph (a) of the Civil Procedure Code, Honourable Judge Mansoor asked the Learned State Attorney to address the Court on the competency of the summary suit filed by the plaintiff, a social security fund, and whether the suit falls under Order XXXV Rule 1 of the Civil Procedure Code and whether the summary suit can be filed against two different institutions registered under different laws in one suit. The Learned State Attorney addressed the Court on 12<sup>th</sup> April 2022.

She submitted that the plaintiff is established under the National Social Security Fund Act, Cap 50 R.E 2018 which among other things is vested with collection of contributions from the employers i.e. Statutory contributions and pay benefits through the contributions. The employers registered



by the plaintiffs are required under sections 12, 13 and 14 of the NSSF Act to pay to the plaintiffs' statutory contributions of their employees. As per section 18 (1) of the NSSF Act, the recovery of contributions shall be recovered by the Board in a court by way of summary suit under Order XXXV of the Civil Procedure Code. Also, Section 64 (2) of Public Service Social Security Fund Act, provides that recovery of contributions by the public sector shall be by summary suit in a court of law under Order XXXV of the Civil Procedure Code. Thus, on both laws governing Social Security Funds, recovery of contributions is by a summary suit under order XXXV of the Civil Procedure Code.

The Learned State Attorney provided the Court with High Court decisions in which a summary suit filed by NSSF under Order XXXV of the Civil Procedure Code was allowed, and the NSSF was given a summary judgement under order XXXV Rule 2 (2) of the Civil Procedure Code. The first case cited was the case of **The Board of Trustees of the National Social Security Fund vs Ms the Registered Trustees of Evangelical Lutheran Church in Tanzania, North**



**Western Diocese t/a Ndolage Hospital, Civil Case No. 6**

**of 2020** (High Court , Bukoba, judgement entered by Hon Kairo J (as she then was), and the case of **The Board of Trustees of the National Social Security Fund vs Simon Logistics Group Limited, Civil Case No. 29 of 2021**, High Court, Dar es Salaam, Itemba J, whereas a summary suit was entered in favour of the plaintiff.

Regarding as to whether a summary suit can be instituted against two defendants, the Learned Counsel argues that the two companies are related, as the 1<sup>st</sup> defendant is the owner of the 2<sup>nd</sup> defendant, and the 1<sup>st</sup> defendant has always been in control of the 2<sup>nd</sup> defendant. That the two companies have interchangeably been paying the contributions of the Members of the Fund. The Learned Counsel argues that the employees are employed by the 2<sup>nd</sup> defendant, but their salaries are paid by the 1<sup>st</sup> defendant, and she says it was necessary to join both these two companies in one summary suit. She however, admitted that she does not know who the employer of the members is since she has not seen the contracts of



employments. The learned counsel then rested her submissions.

The issue to be determined is whether NSSF is permitted under Order XXXV to recover the members contributions by way of a summary suit. Order XXXV reads, and I shall reproduce hereunder.

*Order XXXV Rule 1. This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-*

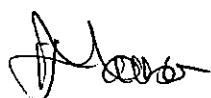
*(a) Suits upon bills of exchange (including cheques) or promissory notes.*

*(b) suits for the recovery of income tax; and*

*(c) suits arising out of mortgages, whether legal or equitable, for-*

*(i) Payment of monies secured by mortgage; G.N. No. 256 of 2005*

*(ii) Delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged*



*to be in possession of the mortgaged property.*

*(iii) Redemption; or (iv) retransfer or discharge.*

*(d) Suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer.*

*(e) Suits for the recovery of rent, interest, or other debts due to the Republic, the Government, or any local government authority.*

*(f) Suits for the recovery of possession of any immovable property including any building or other premises where the right of the person seeking to recover such possession is not restricted by the provisions of the*



*Rent Restriction Act, and suit for the recovery of rent, mesne profits, or damages for unlawful occupation in respect of such immovable property, building or premises; and*

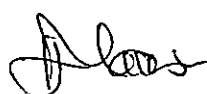
*(g) Suits for the recovery of possession of any immovable property from a lessee under a financial lease agreement where under a financial lease agreement where under such agreement the lessee has no right of ownership over the property leased to him.*

At this stage, I find it appropriate to consider the contentions about forms of summary suit. The contributions payable to Social Security Fund do not fall under Rule 1(a) of Order XXXV since it is not suits upon bills of exchange (including cheques) or promissory notes; they do not fall under Rule 1 (b) because they are not suits for the recovery of income tax; and they do not fall under Rule 1 (c) because they are not suits arising out of mortgages, legal or equitable. The suit for recovery of contributions by Social Security Fund do not fall under Rule 1





(d) because they are not suits by the Tanzania Electric Supply Company Limited "TANESCO" for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer; they do not fall under Rule 1 (h) because they are not suits for the recovery of rent, interest or other debts due to the Republic, the Government or any local government authority; they also do not fall under Rule 1 (f) because they are not suits for the recovery of possession of any immovable property including any building or other premises where the right of the person seeking to recover such possession is not restricted by the provisions of the Rent Restriction Act, and suit for the recovery of rent, mesne profits or damages for unlawful occupation in respect of such immovable property, building or premises; and they do not fall under Rule 1 (g) since they are not suits for the recovery of possession of any immovable property from a lessee under a financial lease agreement where under a financial lease agreement where under such agreement the



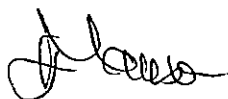
lessee has no right of ownership over the property leased to him.

When a claim for recovery of contributions is made in summary suit but not covered by any of the category of Rule 1 of Order XXXV, the suit cannot be maintained as a summary suit. A body corporate or any individual either by an agreement or an enactment cannot give to itself the right to recover anything by way of summary suit if that right is not mentioned in Order XXXV Rule 1 of the Civil Procedure Code. Summary suit is not a right to be conferred in any agreement or any enactment, suit cannot be entertained as summary suit merely because the Act that establishes NSSF has a provision that gives them the right to recover the contributions from its members by a summary suit. To invoke summary suit under Order XXXV, that right or claim or even the Institution itself must be permitted by Order XXXV Rule 1 of the Civil Procedure Code. See for example TANESCO, this body corporate has been mentioned in Rule 1 of Order XXXV but it can only recover by way of summary suits the meter rents and charges for supply of electricity. NSSF is not mentioned



anywhere in Rule 1 of Order XXXV. The plaintiff must know that no relief not falling within the ambit of Order 35 Rule 1 can be recovered by it by a summary suit. The claim for Social Security contributions in the suit falls outside the scope of Order XXXV of the Code of Civil Procedure because the relief claimed therein is based on an action the nature of which does not fall within the classes specified in Order XXXV, Rule 1 of the Civil Procedure Code.

Therefore the NSSF contributions were not negotiable instruments, they were not income tax, they are not suits arising out of mortgages, , they are not suits by TANESCO for recovery of meter rents, they are not suits for rent, interest or other debts due to the Republic, the Government or any local government authority, they are not for recovery of immovable possession of property so as to permit a suit on them to be brought in the Court in the summary manner under the special provisions of Order XXXV of the Code. The instant summary suit under Order XXXV of the Code is not maintainable and no question of obtaining leave to defend the




same would have arisen, and there would be no necessity or occasion for obtaining such leave.

For the above stated reasons, the suit is not maintainable, and it is therefore struck out, and the plaintiff is at liberty to institute a fresh ordinary suit.

**DATED at Tanga this 25<sup>th</sup> day of APRIL 2022**



  
**MANSOOR**  
**JUDGE**  
**25<sup>TH</sup> APRIL 2022**