

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

AT DAR ES SALAAM

MISC. APPLICATION NO. 133 OF 2023

(Arising from Civil Case No. 04 of 2023)

EFFCO SOLUTION (T) LIMITED..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL1ST RESPONDENT

**THE BOARD OF TRUSTEES OF THE
NATIONAL SOCIAL SECURITY FUND.....2ND RESPONDENT**

RULING

Date of Last Order: 15/06/2022

Date of Ruling: 14/07/2023

E.E.KAKOLAKI, J.

Before the Court the applicant is seeking for a leave to defend a summary suit in respect of Civil Case No. 04 of 2023 pending before this Court. The application is preferred under the provisions of Order XXXV Rule 3 (1)(b) and Rule 3(2), section 68(e) and section 95 of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC) and supported by an affidavit duly affirmed by Ramadhan Said, the principal officer of the applicant. On the adversary part Mr. Karim Kambagha, principal officer to the 2nd respondent affirmed a counter affidavit strenuously opposing the application.

A brief background to this application as garnered from the affidavit and counter affidavit filed by the parties in Court goes thus, the 2nd respondent under Order XXXV of the CPC and vide Civil Case No. 04 of 2023, preferred a summary procedure suit against the applicant, as the contributing member employer to the respondent, duly registered with her vide certificate No. 123478, claiming for payment of the sum of **Tshs. 1,243,457,510.92**, being principal amount of **Tshs. 754,469,256.04** for unremitted of members' pension contributions plus **Tshs. 488,988,254.88** accumulated penalties thereon due and payable to the 2nd respondent/plaintiff by the applicant/defendant for a period between February 2021 to August 2022, interest on the decretal sum accrued from February 2021 to the date of judgement, interest on judgment debt at the prescribed Court rate 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 which fact is not disputed by the applicant, the applicant is required to remit to the 2nd 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 the amount specified above. 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 4,5, 6 and 7 of her affidavit that, the calculations and computation made by the respondent leading to a total claim of **Tshs. 1,243,457,510.92** are wrong, unsubstantiated hence strongly dispute the assertion that she has failed to remit the contributions to the 2nd respondent within the prescribed time to attract interest/penalty as alleged by the respondents in the suit. She also challenges the 2nd respondent's records particularly the number of employees attracting the alleged contributions and penalty to the extent claimed, contending that, even the manner in which the claimed outstanding arrears were arrived at is unknown, vague and uncalled for, hence to her this application seeking for leave of the court to defend the suit is substantiated as there is a need for this Court to ascertain the alleged number of employees involved, status of the contributions already paid to the 2nd respondent, justification for the none-payment on the alleged period of repayment and the amount due to the 2nd respondent if any.

Hearing of the application took the form of written submission and both parties were represented as submissions for the applicant and respondents were prepared and filed by Mr. Gerald Shita Nangi and Ms. Theresiah Mponzi, learned advocate and State Attorney, respectively. Mr. Nangi's submission in support of the application was preceded by the prayer for adoption of the affidavit to form part of his submission. He then invited the Court in determination of this application to be guided with the provisions of Order XXXV Rule 3(1) and (2) of the CPC and the principles in the cases of **CRDB Bank Limited Vs. Dantan Electronic Limited and Another**, Commercial Case No. 12 of 2000, (HC-unreported), **David Sasson and Co. Ltd Vs. Navichandra Patee and Others** (1972) HCD 148 and **M/s Mechalec Engineers and Manufactures Vs. M/s Basic Equipment Corporation**, AIR SC 577 which in essence provide for the circumstances under which leave to defend as summary procedure suit may be granted. According to him as displayed in paragraphs 4,5,6 and 7 of the affidavit, the applicant has demonstrated numerous triable issues calling for ascertainment by this Court of number of the alleged employees involved, status of their contributions already paid to the 2nd respondent, justification for non-payment of the alleged period of repayment and the amount due to the respondents. He

had it that, the fact that the applicant does not admit liability to the above raised claim, is enough for this Court to grant her leave to defend herself from the trumped up and baseless service levy claimed. Relying on the case of **National Bureau De Change Limited Vs. Small Holder Tractor Co. E.A Limited**, Commercial Case No. 26 of 2000 (HC-unreported) Mr. Nangi was insistent that, this Court's duty is to determine if there is factual triable issues and questions in dispute which ought to be tried, which duty he called this Court to discharge basing on the raised triable issues. He thus, pressed the Court for leave to defend the main suit as there is triable issues in the main suit.

On the other side Ms. Mponzi for the respondent persuasively and in agreement with Mr. Nangi submitted that, for leave to be granted by this Court, the applicant has to convince the Court that there are triable issues in the main case. She 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) to support her stance, where this Court stated that, defendant must satisfy the court that triable issues exist in the main case or indicate that he/she has fair or bonafide or reasonable defence although not positively good one. And where he/she has

no defence or his/her defence set up illusionary or sham or practically moonshine the defendant's leave may be denied, but in the alternative Court can grant conditional leave by allowing the defendant to proceed defending him/herself upon depositing the amount claimed into Court.

In this application Ms. Mponzi argued, applicant's supposedly suggestion and contention that, she was paying the statutory contributions in a timely manner to unidentified employees is ridiculous and contradictory in nature, paying regard to the detailed and accurate documents that were annexed to the respondents' plaint including the schedule of arrears showing the insured persons names with numbers, routine inspection report, the duly signed exit meeting acknowledging the default in remittance of the statutory contributions and the demand notice served to the applicant prior to the institution of this matter which notice was not protested by the applicant. According to her a thorough review of the facts deposed in paragraphs 4,5,6,7,8 and 9 of the respondents' counter affidavit demonstrates how the applicant has not raised any sufficient grounds or triable issues of law or fact warranting grant of leave by this Court. In her view the applicant clearly failed to meet the requirement both of case law and statute in respect of

application for leave to defend a summary suit given her vague denials which simply do not even amount to an actual justification.

In the alternative Ms. Mponzi argued, if this Court decides to grant the applicant with leave to defend, it may do so with conditions of partial payment of the outstanding amount as provided under Order XXXV, rule 3(2) of the CPC. To buttress her argument the learned State Attorney cited to the Court the cases of **Felix Gamaliel Mosha and Another Vs. Exim Bank Ltd**, Misc. Commercial Cause No. 273 of 2015 and **Classic Professional Caterer Vs. The Board of Trustees of the Public Service Social Security Fund**, Misc. Civil Application No. 250 of 2019 (both HC-Unreported), where this Court ordered the applicant to deposit in Court partial payment of the outstanding amount before she (applicant) could enter her defence. That notwithstanding, Ms. Mponzi prayed the Court to find the applicant's affidavit in support of the application does not suffice the requirement of the law for the grant of leave and proceed to dismiss the application with costs. The applicant could not make any rejoinder to the respondent's submission instead prayed for ruling date which prayer was cordially granted hence the present ruling.

I have had ample time to consider the rivalry arguments by the learned two legal minds, the averments in the filed affidavit and counter affidavit in support and against the application, the provisions of Order XXXV Rule 3(1) (b) of the CPC as well as the case laws cited. It is true as deciphered from the submissions of both parties and in terms of the above provision of the law that, leave is not automatically granted to the defendant, as for this Court to grant the same, applicant must demonstrate 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 also satisfy the Court that, he has a good defence the plaintiff's claims that compels the Court to accord him with the right to be heard of his defence. See the cases of **Felix Gamaliel Mosha and Another** (supra), **National Bureau De Change Limited** (supra), **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 object of the requirement for the applicant to establish existence of triable issues in the main suit is very obvious, as 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, while knowing that his defence is illusory or sham or practically moonshine. 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, **M/s Mechalec Engineers & Manufacturers** (supra) and **Classic Professional Caterer** (supra).

Now with the above principles in mind, the 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. as it was

held in the Indian case of **David Sasoon and Co. Ltd** (supra) as cited in the case of **CRDB Bank Limited and Dantan Electronics Ltd and Another** (supra), my role in these proceedings is fairly limited to deciding upon considering the filed affidavit by the applicant, whether there is disclosed any issue fit to go for trial and no more. Going by the applicant's averments in paragraphs 4,5,6 and 7 of the affidavit and Mr. Nangi's submission, the applicant has demonstrated numerous triable issues calling for ascertainment by this Court as to the number of the alleged employees involved dispute, status of their contributions already paid to the 2nd respondent, justification for non-payment of the alleged period of repayment and the amount due to the respondents. Further to that there is implied assertion by the applicant in paragraph of the affidavit that, contrary to what is being claimed by the respondents she paid timely the alleged outstanding contributions between February, 2021 to August, 2022. In rebuttal Ms. Mponzi says the justifications of respondents' claim is well spelt in paragraphs 4,5,6,7,8 and 9 of the counter affidavit and its annexures displaying numbers and names of insured persons, copy of the routine inspection report, the copy of Exit meeting form duly signed acknowledging applicant's default in remittance of the statutory contributions and the

demand notice served to her prior to the institution of this matter which notice is not denied by the applicant.

Upon close scrutiny and consideration of the facts deposed in the paragraphs relied on by both parties it is true and I agree with Ms. Mponzi that, apart from bare assertions that the claimed statutory contributions by the respondents were paid timely and questioning the manner in which the said claimed outstanding amount was arrived at, no sufficient materials were tabled by the applicant showing that, the claimed principal outstanding statutory contributions of **Tshs. 754,469,256.04** leave alone the accrued interest of **Tshs. 488,988,254.88** were paid by her either partly or in full and timely to the 2nd respondents as contended so as to demonstrate existence of triable issue in the main suit. Similarly, the applicant failed to file a reply to counter affidavit to challenge the evidence in annexure 7 of the plaint which she (applicant) also annexed in her affidavit proving existence annexed copies of insured persons with their number, routine inspection report conducted and participated by the applicant and the signed Exit meeting form by the applicant's officer acknowledging default in remittance of the alleged statutory contributions. Failure of the applicant to challenge such evidence no doubt is an admission of the respondent's claims,

the fact which leads this Court to conclude that, the raised defence by the applicant is illusory or sham or practically moonshine, not entitling her to leave to defend for want of demonstration of triable issues more particularly on the principal outstanding statutory contributions, aside of accumulated penalties of **Tshs. 488,988,254.88**, which my view might arise contentious issue on the manner it was arrived at.

It is the law under Order XXXV Rule 3(2) of the CPC that, this Court may grant unconditional leave or conditionally as an alternative 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 believing that the defence put forward by the applicant is a sham one or illusory or practically moonshine. See the cases of **M/S Mechalec Engineers & Manufacturers** (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 by the above general rule and basing on the above findings, in this matter, I would have granted leave unconditionally but for the applicant's failure to challenge the evidence adduced by the respondents on the amount due particularly the principal statutory contributions basing on list of names of insured persons, routine inspection report and Exit Meeting form duly signed by the applicant's office acknowledging default in remittance the statutory contributions as rightly submitted on by Ms. Mponzi, I find it fit and just to grant the applicant with conditional leave for her to pay in Court first the principal claimed amount as partial outstanding statutory contributions and security to the respondents claims pending disposal of the main suit.

In the circumstances and for the fore stated reasons, leave to defend summary suit is granted to the applicant on the condition that she must deposit first in court **Tshs. 754,469,256.04**, as principal outstanding pension contributions. The amount shall be deposited in court within 30 days from the date of this ruling failure of which the applicant shall be deemed to have waived her right to enter the defence in Civil Case No.04 of 2023. The application is allowed to that extent.

Costs shall be in the cause.

Ordered accordingly.

Dated at Dar es Salaam this 14th July, 2023.



E. E. KAKOLAKI

JUDGE

14/07/2023.

The ruling has been delivered at Dar es Salaam today 14th day of July, 2023 in the presence of Ms. Victoria Lupande, State Attorney for the respondent and Mr. Oscar Msaki, Court clerk and in the absence of the applicant.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

14/07/2023.

