

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 347 OF 2022**

*(Arising from Civil Case No. 78 of 2023)*

**MSASANI PENINSULA HOSPITAL LIMITED ..... APPLICANT**

**VERSUS**

**BOARD OF TRUSTEES**

**OF THE NATIONAL SECURITY FUND ..... 1<sup>st</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>nd</sup> RESPONDENT**

**RULING**

*08<sup>th</sup> September & 18<sup>th</sup> October, 2023*

**BWEGOGGE, J.**

The applicant herein above named instituted an application herein praying this court to grant leave to appear and defend the suit, to wit, Civil Case No. 78 of 2023. The application is brought under the provision of Order XXXV, rule 3(1)(a)(b) and Section 95 of the Civil Procedure Code [Cap.33 R.E. 2019] and supported by the affidavit of one Peter Emmanuel Mutagahywa, the applicant's principal officer.

The facts of this matter, as gathered from the pleading filed herein, are as follows: The 1<sup>st</sup> respondent herein filed a suit (Civil Case No. 78 of 2023) against the applicant herein under summary procedure claiming the total amount of TZS. 611,861,020,52/= being the unremitted members' statutory contributions and accumulated penalties payable to the 1<sup>st</sup> respondent, among others. It has been alleged that the applicant has breached her statutory obligation by defaulting to remit principal amount of TZS 556,361,652.32/= from the period of June, 2016 to December, 2021. The said amount attracted the penalty of TZS 55,499,384.20 making a total amount TZS 611,861,020,52/=.

It is the applicant's deposition that the alleged facts are not true and the claimed amount is unrealistic on the ground that following the auditing made by the 1<sup>st</sup> respondent on the applicant, they both reached a reconciliation on 28<sup>th</sup> July, 2022 that the applicant would pay TZS 16,514,224 on monthly basis commencing from 31<sup>st</sup> August, 2022 which renders the claimed amount by the 1<sup>st</sup> respondent to be unrealistic and inflated. Moreso, it is deposed that the main suit was filed under summary procedure contrary to the law. As the applicant has no automatic right to appear and defend herself in the main

suit; hence, this application was preferred by the same.

The applicant was represented by Mr. William Kamugisha Mukebezi, learned advocate, whereas the respondents were represented by Mr. Godfrey Paul Ngwembe, learned state attorney. The application herein was argued by written submissions.

In amplifying the facts deposed in the affidavits supporting the application, Mr. Mukebezi submitted that, it is the position of law that a defendant is entitled for leave to appear and defend a summary suit if it is shown that there is triable issue. The counsel referred the mind of this court to the cases: **Tanzania Telecommunications Company Limited vs. Timoth Lwoga** [2002] TLR 150 and **Kagera Tea Company Limited vs. The Board of Trustees of The National Social Security Fund** (Misc. Civil Application 14 of 2022) [2022] TZHC 11396, among others, to buttress the point.

Further, the counsel argued that it has been demonstrated in the affidavit deposed by the applicant's principal officer that there was an agreement which was entered with the 1<sup>st</sup> respondent herein to liquidate the outstanding amount for monthly payment of TZS 16,514,224/= from 31<sup>st</sup>

August, 2022 and the applicant had commenced to liquidate the amount claimed. Therefore, the counsel asserted that the amount claimed in the plaint is unrealistic and inflated. Hence, the counsel opined that this is the triable issue which can only be substantiated upon the applicant being granted leave to appear and defend the suit herein. The counsel cited the case of **Strategic Business Solutions Limited vs. the Board of Trustees of the National Social Security Fund** (Misc. Civil Application 476 of 2021) [2022] TZHC 12073 to bolster the point. He concluded that the applicant has furnished trial issues to warrant the grant of the application herein.

Apart from the above, the applicant's counsel argued that the main suit has been lodged contrary to the law as the relief claimed for social security contribution in the suit falls out of the ambit of Order XXXV of the Civil Procedure Code. That the social security contribution is not among the claim which the summary procedure can be invoked in terms of Order XXXV, rule 1 of the Civil Procedure Code. The counsel cited the case; **The Board of Trustees of National Security Fund vs. Registered Trustees of the Evangelical Church of Tanzania and Sebastian Kolowa Memorial**

**University** (Civil Case 7 of 2020) TZHC 2106 to bring his point home. On the above premises, the applicant's counsel prayed this court to grant leave to the applicant to defend the suit.

In reply, Mr. Ngwembe vehemently contested the application herein. In respect to the argument that the suit herein was filed contrary to the dictates of the provision of Order XXXV, rule 1 of the CPC, the attorney contended that this allegation has to be disregarded. That the 1<sup>st</sup> respondent is a creature of statute established under section 53 of the National Social Security Fund Act [Cap 50 R.E. 2018]. And, by wisdom, the parliament enacted section 18(1) and 74A (2) of the Act to supplement Order XXXV of the Civil Procedure Code. That the provisions of section 18(1) and 74A (2) of the NSSF Act echoes the spirit of Order XXXV of the Civil Procedure Code in that the suits for recovery of debts to the republic, the government, are recoverable by way of summary suit. That the provision of section 70 of the NSSF Act provides that the monies in the 1<sup>st</sup> respondent's account are held by the same in trust of the Government of United Republic of Tanzania. Therefore, the 1<sup>st</sup> respondent's claims are indeed covered by Order XXV, rule 1(e) of the Civil Procedure Code.

In the same vein, the attorney opined that the decision in the case of **The Board of Trustees of National Security Fund vs. Registered Trustees of the Evangelical Church of Tanzania and Sebastian Kolowa Memorial University** (*supra*) cited by the applicant should not be followed by this court. That this court is not bound by the decision of another High Court.

With regard to the supposed triable issue, the respondent's counsel contended that, section 110 and 112 of the Law of Evidence Act [Cap. 6 R.E. 2019] provides that he who allege must prove. That it has been asserted that the applicant has commenced to liquidate the outstanding debts; and alleged that the claim is unrealistic and inflated, but the applicant has not provided proof of payment either by receipts or any other mode of proof of payment. Therefore, the respondent's counsel opined that the applicant has failed to demonstrate the triable issue to justify the grant of the leave sought to defend the summary procedure suit commenced herein.

Further, the attorney contended that the case of **Strategic Business Solutions Limited** (*supra*) cited by the applicant's counsel to validate the prayer for leave is distinguishable from this case in that in the respective

case, the applicant made payment to the respondent and proved the same by receipts of payment which is not the case in the matter at hand. Based on this fact, the attorney opined that the applicant herein has failed to establish the triable issue to warrant grant of leave to defend the suit. On above accounts, the attorney prayed this court to dismiss the application with costs

The point of determination is whether this application is meritorious.

As aforementioned, the application at hand is brought under provisions of Order XXXV, rule 3(1)(a)(b) of the Civil Procedure Code which enjoins this court with power to grant leave to appear and defend when the applicant has established a triable issue fit to go for trial. The defendant duty has been elaborated in various cases. For instance, in the case of **Tanzania Telecommunication Company Limited vs. Timothy Lwoga**, Civil Case No. 61 of 1999, (2002) TLR at pg. 150, it was held:

*"I have carefully referred to the decision of the Court of Appeal for East Africa In **Kundanlal Restaurant vs Devshi and Company** at page 77 which set out the conditions for court to grant to a defendant leave to defend a summary suit, it was held in that case, inter-alia" if there is one triable issues*



*contained in the affidavit supporting the application for leave to appear and defend then the appellant is entitled to have leave to appear and defend unconditionally.”*

In abiding to the above established principle, the applicant raised two grounds to justify the grant of application. **First**, that the main suit was lodged contrary to Order XXXV, rule 1 of the Civil Procedure Code on ground that the 1<sup>st</sup> respondent claim doesn't fall in the ambit of Order XXXV, rule 1 of the Civil Procedure Code. **Secondly**, the amount claimed is unrealistic and inflated as the applicant has begun to liquidate the outstanding amount.

I would canvass the grounds fronted by the applicant's counsel in seriatim commencing with the 1<sup>st</sup> ground. The contention herein is that the claim instituted against the applicant herein doesn't fall within the ambit of Order XXXV, rule 1 of the Civil Procedure Code whereas the applicant's counsel buttressed his argument on the decision of this case in the case of **The Board of Trustees of National Security Fund vs Registered Trustees of the Evangelical Church of Tanzania and Sebastian Kolowa Memorial University** (*supra*). In the respective case, this court, inter-alia, opined:



*"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 summary suit.....The plaintiff must know that no relief not falling within the ambit of Order XXXV, rule 1 can be recovered by 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."*

The respondent's attorney contested that the provision of Order XXXV rule 1 (e) of the Civil Procedure Code entails that the debt due to the republic and, or the government, is recoverable by way of summary suit; hence, the suit is properly instituted in this court. Further, the attorney expounded that the provisions of section 18(1) and 74A (2) of the National Social Security Fund Act supplement and underline the spirit Order XXXV of the Civil Procedure Code in that the suit for recovery of debt be filed by way of summary suit.

I find it pertinent to reproduce the provisions of section 18(1) and 74A (2) of the National Social Security Fund Act, for clarity, as hereunder: -

*S. 18:- (1):-*

*"Every statutory contribution due to the Fund may be recovered by way of a summary suit under Order XXXV of the Civil Procedure Code at any time after the date on which it is due."*

And the provisions of section 74A (2) of the Act provides:

*"Every contribution and additional contributions due to the Fund may be recovered by a summary suit under order XXXV of the Civil Procedure Code at any time within twelve years after the date on which it is due"*

The plain interpretation rule entails that Courts must presume that the legislature says in a statute what it means and means what it says. See the case of **Prime Catch (Exports) Limited and 4 Others Versus Diamond Trust Bank Tanzania Limited**, Civil Appeal No. 273 Of 2019 (2022) TZCA 613, among others, in this respect.

Having read between the lines the provision of Order XXXV, rule 1(e) of the Civil Procedure Code, together with the provisions of section 18(1) and 74A (2) of the National Social Security Fund Act, I am bent to purchase wholesale

the assertion made by the respondent's attorney in that the social security statutory contributions falls within the category of debts due to the republic and, or the government that are recoverable by way of summary suit. My opinion is buttressed by the provision of section 70 of the NSSF Act which provides that the monies in the 1<sup>st</sup> respondent's account are held by the same in trust of the Government of United Republic of Tanzania. I therefore, of the settled opinion that the suit herein is competently before this court.

Regarding the 2<sup>nd</sup> limb of argument fronted by the applicant's counsel, it was contended that the amount claimed by the 1<sup>st</sup> respondent is unrealistic and inflated as the applicant has begun to liquidate the outstanding amount as agreed, since 31<sup>st</sup> August, 2022. The respondent's attorney contended that apart from the submission that the applicant has begun to liquidate the outstanding amount as agreed since 31<sup>st</sup> August, 2022, there is no proof of the purported payment to ascertain the discrepancy in the amount claimed and actual amount into which the applicant is in arrears. That the case of **Strategic Business Solutions Limited** (supra) cited by the applicant's counsel to justify his prayer for leave is distinguishable from this case in that the applicant in the said case had proved payment made which altered the

amount claimed through summary procedure. It is for this ground that the attorney opined that the applicant herein has failed to satisfy this court the presence of triable issue to warrant grant of leave.

In attending the contention above, I find it pertinent to restate that the applicant who is the defendant herein in the main suit brought by way of summary procedure has no right to enter defence and contest the claim until granted leave by this court to appear and defend herself. And, leave would not be granted until the applicant herein demonstrates that there are triable issues. And in deciding whether the applicant herein should be granted leave to appear and defend a summary suit preferred by the respondents herein the role of this court is limited to looking at the affidavits filed herein as amplified by the submission made before this court to decide whether there is any triable issue in the matter before this court. See the case of **Mohamed Enterprises (T) Ltd vs. Biashara Consumer Services Ltd** [2002] TLR 159, among others, in this respect. As afore said, it is deposed in the affidavit deposed by the applicant's principal officer and amplified by the applicant's counsel in this court that the following the auditing made by the 1<sup>st</sup> respondent on the applicant, they both reached a reconciliation on 28<sup>th</sup>

July, 2022 that the applicant would pay TZS 16,514,224 on monthly basis commencing from 31<sup>st</sup> August, 2022 which renders the claimed amount by the 1<sup>st</sup> respondent to be unrealistic and inflated. It is for this sole ground the applicant's counsel insinuates that there is triable issue fit for grant of leave to defend.

In the case of **Strategic Business Solutions Limited vs the Board of Trustees of the National Social Security Fund**, Misc. Civil Application No.476 of 2021, the court observed that, I beg to quote:

*"From the affidavit, it is deciphered that leave is sought to enable the applicant to appear and defend herself in Civil Case No. 54 of 2021 in which the respondent is praying for summary judgment and decree against the applicant herein for payment of Tshs 288,676,144/= being unremitted members social insurance contribution for the period between May 2019 and August 2020 and accrued penalties to a tune of Tshs 45,175,386.95. **Her main reason in support of the application for leave as inferred from paragraph 5 and 6 of the affidavits is that, the figure claimed by the respondent is inaccurate as during the claimed period, she remitted a sum of Tshs 110,650,290/=.** Thus, the claim due to her is far below the claimed amount."* (Emphasis mine).

As rightly submitted by the respondent's attorney, the case cited above is distinguishable from this case in that the applicant in the respective case had proved payment made which altered the amount claimed through summary procedure. In the case at hand, apart from the deposition that the applicant has begun to liquidate the outstanding amount as agreed since 31<sup>st</sup> August, 2022, there is no proof of the purported payment to ascertain the discrepancy in the amount claimed and actual amount into which the applicant is in arrears. This court is led to presuppose the fact that the applicant has made payment which has altered the claimed amount. I had expected that, at least, the applicant's counsel would enlighten this court how much has been paid by the applicant since 31<sup>st</sup> August, 2022 which renders the claimed amount inflated. And, this court is not in a position to presume such fact. This being the case, I am constrained to agree with the respondent's attorney in that no payment has been made by the applicant to render the claimed amount contestable. Therefore, it follows that the applicant herein has failed to satisfy this court the presence of triable issue to warrant grant of leave defend.

For the foregoing reasons endeavored to be given, I find that the applicant herein has failed to satisfy this court the presence of triable issue to warrant grant of leave. I, therefore, find the application herein bereft of merit. The application herein is hereby dismissed. Taking into consideration of the nature of the matter herein, I make no order as for costs.

So ordered.

**DATED** at **DAR ES SALAAM** this 19<sup>th</sup> day of October, 2023.



O. F. BWEGOGGE  
**JUDGE**