

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB- REGISTRY
AT ARUSHA**

MISC. CIVIL APPLICATION NO 57 OF 2023

(Arising from Civil case No.16 of 2023)

ARUSHA HEALTH CENTER FOR WOMEN APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF NATIONAL

SOCIAL SECURITY FUND 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

17th October & 12th December, 2023

KAMUZORA, J.

This is an application for leave to appear and defend Civil Case No. 16 of 2023. The Respondents herein instituted summary suit against the Applicant for a claim of recovery of Tshs. 73,756,630.03, alleged to be unremitted members' contributions and the accrued penalty for the Applicant's employees who are members of the 1st Respondents. The instant application is intended for leave for the Applicant to appear and defend the suit as required by the law.

The application is supported by an affidavit sworn by Dr. Michael Wanjara, the Applicant's director containing grounds for the application. From the affidavit, the Applicant claim that she faced economic difficulties due to the drop in number of clients and that was the reason for delay in paying contributions. She however claimed to have paid some of the contributions which were not reflected in the Respondents' calculations. She thinks that she need chance to defend the suit to prove the true and clear claim against the Respondents. In the counter affidavit filed in response to the application, the Respondents strongly opposed the Applicant's prayer on account that the Applicant has been paying salary to its employee and deducting contribution which were not remitted to the 1st Respondent.

When the matter came up for hearing, this court ordered that disposal of the matter by way of written submissions. Mr. Peter Wanjara, learned counsel represented the Applicant, while the 1st and 2nd Respondents enlisted the services of Mr. Frank Jacob Idd, learned advocate.

In his submission, Mr. Wanjara cited a number of court decisions that support his position. That, in the case of **Attorney General Vs. Swiss Singapore Overseas Enterprises PTE Ltd and another**, Civil

Appeal No110/01 of 2019 Cat at Dar es Salaam (Unreported) it was insisted that a party should be heard before any adverse decision is made. The Applicant submitted that for the court to grant an application for leave to defend, it must be satisfied that there is a triable issue. He supported this position with the case of **Classic Professional Catere Vs. The Board of Trustees of the Public Service Social Security Fund**, Misc, Civil Application No 61 of 2019 HC DSM registry. Pointing at paragraphs 4, 5, 6 and 7 of affidavit in support of the application, it is the Applicant's submission that there is a triable issue in this matter as there is issue on whether there were payments made by the Applicant as mandatory contributions to the 1st Respondent and whether the said payments were actually reflected in the 1st Respondent's calculations.

Referring the case of **Exim Bank (Tanzania) Limited Vs. M/s Sero lease and Finance Limited and 5 others**, Misc. Commercial Application No 238 of 2015 HC of Tanzania (Commercial Division) the Applicant submitted that, the court in that case granted unconditional leave to defend after considering that the defendant satisfied the court that they have a good defence to the claim on merit. He insisted that the Applicant herein raised a triable issue indicating that they have a fair or bonafide or reasonable defence although not possibly good defence.

That, the Applicant disclosed fact sufficient to entitle it to defend the suit as the affidavits disclosed that at the trial, they may be able to establish a defence to the Respondents/plaintiffs' claim. That, as the Applicant has shown that their defence is not slam or illusory or practically moonshine, he prays for leave to defend the suit be granted unconditionally.

Responding the submission made by the counsel for the Respondents Mr. Iddi stated that, it is the Applicant's duty to contribute to the Social Security Fund. That, the Applicant failed to contribute for her employees despite the fact that the employees' salaries were deducted. The counsel insisted that the Applicant failed to satisfy the court that there is a triable issue. That, the claim that the Applicant faced financial difficulties is not a triable issue which this court could consider in granting leave to defend a summary suit. He insisted that, the principles to be considered in granting leave to defend a summary suit was stated in the case of **Nararisa Enterprises Company Limited and 3 others vs. Diamond Trust Bank Tanzania limited**, Misc. Commercial Cause No 2020 of 2015. He also referred the case of **Maktech and Tel Co. Limited Vs. The Board of Trustees of National social Security Fund**, Misc. Civil Case No 627 of 2020 where

this court held that, the admission for breach of its statutory obligation attracts penalties and so it cannot be a serious triable issue in law.

Citing the case of **National Bank of Commerce Limited Vs. Jaqueline Micahel Kimaro and Yohan Abraham Mwakalinga**, Commercial case No 1 of 2017 the Respondents insisted that it is in the interest of justice that the application be dismissed and the court grant a summary judgment in favour of the Respondents.

From the submissions by the parties, the issue for determination in this application is whether the Applicant demonstrated sufficient ground for the leave to appear and defend to be granted. It is settled principle of law that appearance and defence in summary suit is not a matter of right. It depends on the Applicant's ability to demonstrate to the Court that he/she has arguable case or triable issue which if given chance could raise reasonable defence against the claim. This is also found in law under Order XXXV rule 3(1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) which provides that,

"3 (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-

(a) disclose such facts as would make it incumbent on the holder to prove consideration, where the suit is on a bill of exchange or promissory note;

(b) disclose such facts as the court may deem sufficient to support the application; or

(c) in suits arising out of mortgages, where the mortgagor demonstrates that-

(i) loan or the portion of the loan claimed is indeed discharged; or

(ii) loan was actually not taken."

In **Exim bank (Tanzania) Limited v. M/S Sero Lease & 8**

Others [2015] it was held that,

"It is settled rule of law that wherever the defence put forth by the Applicant/Defendant is bonafide, raises triable issues and is not a moonshine, the Applicant/Defendant would be entitled to leave to defend conditional or unconditional depending upon the facts and circumstances of each case."

As well stated in the case of **Nararisa Enterprises Company Limited and 3 others Vs. Diamond Trust Bank Tanzania Limited (Supra)**, it takes perusal through the affidavit filed in support of the application for one to draw a conclusion that there is a triable issue that entitles the Applicant to enter defence in the main suit.

Going through the Applicant's affidavit filed in support of the application, it was deponed that the reason that hindered the Applicant from remitting the contributions to the 1st Respondent is economic hardship due to the drop in number of its clients. It was also deponed

that apart from economic hardships, the Applicant made several contributions to the 1st Respondents which however were not reflected in the 1st Respondent's calculations. The Applicant is seeking for leave not to contest the claim but show that the amount claimed does not reflect the actual amount which the Applicant is bound to pay. To me the claim that the Applicant made a contribution which are not reflected to the Respondent's calculation is an issue which requires determination in the main case.

The argument by the Respondents is that leave cannot be granted where the Applicant admits to the breach of statutory obligations which attracts penalties. It is true that the Applicant admits breach of statutory obligation by failure to pay employees' contributions on time but the concern is on the amount raised by the Respondents as claim against the Applicant. The Applicant believes that some of the contributions were paid but still counted as unpaid by the Respondents. For that, she needs chance to present evidence to prove so and that cannot be done unless the Applicant is granted leave to appear and defend the main suit.

I therefore find merit in this application as the Applicant was able to point out before this court that there is a triable issue that needs

determination by this court. Leave is hereby granted to the Applicant to appear and defend Civil Case No. 16 of 2023. The Applicant shall file the defence within 21 days from the date of this ruling. No order for costs is made.

DATED at **ARUSHA** this 12th day of December, 2023



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written over the printed name.

D.C. KAMUZORA

JUDGE