

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 406 OF 2023
(Originating from the Civil Case No. 63 of 2023)

RESOLUTION INSURANCE COMPANY LIMITED..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL1ST RESPONDENT

THE BOARD OF TRUSTEES OF

THE NATIONAL SOCIAL SECURITY FUND..... 2ND RESPONDENT

RULING

05th December, 2023 & 08th January, 2024

This is an application instituted by the applicant herein above named for grant of leave to appear and defend the suit in Civil Case No. 63 of 2023 commenced by the respondents herein under summary procedure. The application is brought under Order XXX, rule 2 (1), (2) and 3 of the Civil Procedure Code [Cap. 33 R.E. 2019] and supported by the affidavit of Mr. Sethwine Mpingwa, the Principal Officer of the applicant herein.

The pleadings filed hereto entails that the applicant herein is required by law to make her own compulsory contributions and that of her employees at the rate of 10% each making total contribution of 20% of each employee's wage. It is alleged that the applicant herein failed, neglected and, or defaulted to remit the members statutory contributions in each month and, or delayed the remittance in some months which attract imposition of the penalty. It is further alleged that the applicant default is not only contrary to the law but also denies her employees (members to the 2nd respondent) to be paid their rightful pension benefits in the event of their retirement, death and, or upon leaving the scheme in any other manner.

Hence, upon the foregoing particulars, it is the respondent's case that the applicant is in breach of her statutory obligations for defaulting to remit the members' principal contributions to the tune of TZS 821, 691, 275.73 within the periods of between June, 2019 to April, 2022 being the outstanding principal's contributions and accumulated penalties amounting to TZS 28, 283, 501.26 of which continues to accrue. Therefore, total claim levelled against the applicant is TZS 849, 974, 776.99.

It is likewise alleged that all means to oblige the applicant to pay the above claimed amount have ended in vain; hence, the respondents herein were constrained to commence the civil proceedings against the applicant herein under the summary procedure.

The applicant herein rebuts that the claim made by the respondent herein is excessive and, or over exaggerated if not miscalculated. Likewise, the applicant contends that there are triable issues between the parties herein; and that the applicant has good defence against the claims made by the respondents; hence, this application.

The application herein was argued by written submissions. Mr. Shukrani Elliot Mzikila, learned advocate, argued the written submission in chief for the applicant whereas Mr. Kennedy Kasongwa, learned state attorney, argued the submission in reply for the respondents.

In substance, Mr. Mzikila concedes that it is an established principle that grant of leave to defend the suit commenced under summary procedure can only be granted upon the applicant demonstrating triable issues. However, the counsel argued that the applicant herein has demonstrated in the sworn affidavit of her principal officer the triable issues between the parties herein of which obliges this court to grant the leave sought.

Further, the counsel submitted that it is demonstrated in the sworn affidavit supporting the application herein that one of the 2nd respondent's members vide membership No. 37694324 is not the applicant's employee. Hence, her contributions should not be involved in the claim made by the respondents against the applicant. Likewise, the counsel contended that one of the applicant's employees (previous Managing Director) one Maryanne Mugo is a foreigner from Kenya who had entered mutual separation agreement with the applicant herein, including unremitted amounts and relocated back to her country of domicile.

The counsel concluded that, on above accounts, he has raised triable issues sufficiently to move this court to grant the leave sought to appear and defend the suit; hence, he has satisfied the requirement of the law. To bring his point home, the counsel cited the decision of this court in the case of **Kagera Tea Co. Ltd., vs. The Board of Trustees of the National Social Security Fund** (Misc. Civil Application 14 of 2022) [2022] TZHC 11396 whereas this court held:

"...the defendant is entitled to leave and defend a summary suit if it is shown that there are triable issues in the case..."

Mr. Kasongwa, the applicant's counsel vehemently resisted the application herein. He contended that Order XXXV, rule 3(1) of the CPC provides that leave to appear and defend the suit shall be granted upon the affidavit(s) which disclose such facts as the court may deem sufficient to support the application. That the applicant is obliged to demonstrate triable issues prior to grant of leave sought. The counsel directed the mind of this court to the decisions in the cases of **Tanzania Telecommunication Company Ltd., vs. Timothy Lwoga** [2002] TLR 150 and **Nararisa Enterprises Company Limited & Others vs. Diamond Trust Bank Limited** (Misc. Commercial Cause 202 of 2015) [2016] TZHCCOmD 23 to buttress his point.

Further, the counsel contended that in the recent decision of the Apex Court in the case of **Prosper Paul Massawe & 2 Others vs. Access Bank Tanzania Limited** (Civil Appeal 39 of 2014) [2021] TZCA 321 whereas it was aptly expounded that:

"In deciding whether a defendant should be granted leave to appear and defend a summary suit, the role of the court is limited to looking at the affidavits filed by the defendant in order to decide whether there is any triable issue fit to go to trial."

Having explored the above-mentioned principles, the counsel countered that the grounds deposed by the applicant's principal officer to establish the allegation that the claim raised against the applicant is excessive and, or exaggerated are that; **First**, one Regina Mwengi vide Membership No. 37694324 was not the applicant's employee. **Second**, the applicant's Managing Director one Maryanne Mugo, a foreigner from Kenya, entered mutual separation agreement with the applicant herein including unremitted amounts and relocated back to her country of domicile.

The counsel contended that the inspection was conducted in the applicant's company and payment arrears of the statutory contributions of her employees were generated in the presence of the applicant's principal officer and it was found that the applicant was aware of all the unremitted statutory contributions. That the employee namely, Regina Mwangi was found with the 2nd respondent's membership number and her statutory contributions arrears appeared in the schedule of arrears the applicant is liable to pay. And, it was found that the respective applicant's employee had her previous contributions paid by the applicant. Hence, the applicant is attempting to escape her liability and compliance of the law which should not be allowed.

In the same vein, the counsel contended that one Maryanne Mugo, the previous applicant's Managing Director, in the period of June, 2019 to April, 2022 when the impugned inspection was conducted in the applicant's company, the same was still working for the applicant and her contributions were deducted by the applicant but not remitted. Hence, the purported mutual agreement should not be permitted to circumvent the law.

Finally, the respondent's counsel concluded that the facts deposed in the affidavit doesn't demonstrate triable issues to warrant grant of leave sought. He prayed the application herein to be dismissed with costs.

The issue for determination before this court is whether the applicant has demonstrated triable issues in the suit commenced by the respondents to warrant grant of leave to appear and defend the suit.

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 the suit when the applicant has established a triable issue fit to go for trial. The law imposes an obligation on the applicant to demonstrate the triable issues before grant of leave to appear and defend the suit may issue. See the case of **Tanzania Telecommunication Company Limited vs. Timothy**

Lwoga (supra) and **Nararisa Enterprises Company Limited & Others vs. Diamond Trist Bank Limited** (supra). 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 cases; **Mohamed Enterprises (T) Ltd vs. Biashara Consumer Services Ltd** [2002] TLR 159, and **Prosper Paul Massawe & 2 Others vs. Access Bank Tanzania Limited** (supra), among others, in this respect.

In particular, in the case of **Nararisa Enterprises Company Limited & Others vs. Diamond Trist Bank Limited** (supra), this court, citing the case of **M/S Mechalec Engineers & Manufactures vs. M/S Basicment Corporation** 1977 AIR 577 adopted in **Mohamed Enterprises (T) Ltd vs. Biashara Consumer Services Ltd** [2002] TLR 159, held that leave to defendant the suit may only issue in the following circumstances:

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- 1. The defendant must satisfy the court that he/she has a good defence to the claim on its merit.*

- 2. If the defendant raises triable issues indicating that he has a fair or bonafide or reasonable defence although not a positively good defence;*
- 3. If the defendant discloses such facts as may be deemed sufficient to entitle him/her to defend. That is to say although the affidavit doesn't not positively and immediately make it clear that he/she has a defence yet shown that such a state of facts as leads to the inference that at the trial of the action he/she may be able to establish a defence to the plaintiff's claim.*
- 4. If the defendant has no defence or the defence set up illusory or sham or practically moon shine then ordinarily the defendant is not entitled to leave to defend.*
- 5. If the defendant has no defence or the defence is illusory or sham or practically moonshine the defendant may be denied leave. Alternatively, the court can allow the defendant to proceed if the amount claimed is paid into court or otherwise secured and give to the defendant on such conditions.*

As rightly submitted by the respondent's counsel, the only grounds deponed by the applicant's principal officer to establish the allegation that the claim raised against the applicant is excessive and, or exaggerated are such that; one Regina Mwengi vide Membership No. 37694324 was not the applicant's employee. That, the applicant's Managing Director one

Maryanne Mugo, a foreigner from Kenya, entered mutual separation agreement with the applicant herein including unremitted amounts and relocated back to her country of domicile. Hence, the alleged arrears of their statutory contributions should not have been included in the claim. Otherwise, notwithstanding the above contention, the applicant doesn't dispute the claim made by the respondents.

The respondent counsel rebutted the above facts on the grounds that the inspection was conducted in the presence of the applicant and payment arrears of the statutory contributions of her employees were generated in her presence. And, it was found that the applicant was aware of all the unremitted statutory contributions whereas the employee namely, Regina Mwangi was found with membership number and her statutory contributions arrears appeared in the schedule of arrears the applicant is liable to pay.

Likewise, the respondent's counsel enlightened this court that one Maryanne Mugo, the previous applicant's Managing Director, in the period of June, 2019 to April, 2022, the same was still working for the applicant. Hence, the purported mutual agreement should not be permitted to circumvent the law.

And, upon scrutiny of the pleadings filed hereto, I found that it is deponed in the counter affidavit filed by the respondent in that the statutory contributions of the applicant's employees, Regina Mwangi and Maryanne Mugo inclusive, were deducted from their salaries but were not remitted to the Fund.

In tandem to above, the only proof advanced by the applicant to establish that one Regina Mwengi was not her employee, is the employment contract which was signed by principal officer of the applicant but not signed by the respective employee. I would choose to believe the respondent's depositions in that the respective employees appeared in the list of employees of the applicant whose statutory contributions were deducted but not submitted whereas this fact was not disputed during the inspection.

Likewise, I purchase wholesale the submission of respondent's counsel in that in the period of June, 2019 to April, 2022, one Maryanne Mugo, the previous applicant's Managing Director, was still working for the applicant whereas her statutory contributions were deducted but not remitted to the Fund. It was contended by the applicant's counsel that the said Maryanne Mugo entered into mutual separation agreement with the applicant herein including unremitted amounts. I have deciphered into the

purported mutual agreement annexed to the affidavit supporting the affidavit herein and I found nothing to support the assertion that the respective former Managing Director foregone her unremitted statutory contributions deducted from her salary. Even if such agreement would have been made, as rightly contended by the respondent's counsel, the same would not be allowed to circumvent the statutory provision of the law.

In view of the foregoing, I find that the applicant failed to satisfy the court that she has a good defence to the claim on its merit. I find no triable issues demonstrated by the same. The purported material facts deponed as defence set up against the claim made by the respondent are practically moon shine.

Consequently, I find no sufficient facts demonstrated to warrant grant of the application for leave to appear and defend the suit. The application is hereby dismissed with costs.

So ordered.

DATED at **DAR ES SALAAM** this 08th day of February, 2024.




O. F. BWEGOGUE

JUDGE