

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CIVIL CASE NO. 4067/2024

REFERENCE NO. 202402281000004067

BETWEEN

PEK BROTHERS COMPANY LTD.....APPLICANT

AND

BUNDA TOWN COUNCIL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

Date of Last Order: 18/03/2024

Date of Ruling: 25/03/2024

RULING OF THE COURT

Kafanabo, J.:

This is a ruling on an application for leave to appear and defend a summary suit instituted by the Respondents under Order XXXV Rule 2(2) of the Civil Procedure Code Cap. 33. R.E. 2019 (hereinafter the 'CPC'). The application is the result of the fact that the Respondents instituted a civil suit number 27200/2023 against the applicant claiming a total sum of Tanzania Shillings 23,153,560.40 being service levy in arrears. The Applicant being sued under Order XXXV of the CPC, as a matter of law, has no automatic right to defend the suit unless she seeks and obtains leave of the court, hence this application.

The application is made by chamber summons and supported by an affidavit of Paul Ephraim Paul, the principal officer of the Applicant. The application

is resisted by a counter affidavit of Ms. Adelina E. Mfikwa, the acting Town Director of the 1st Respondent.

When the matter was called for hearing, Mr. Emmanuel Mng'arwe, learned Advocate, entered an appearance for the Applicant and Messrs Stamili Ndaro, Aneisius Kamugisha, and Abdallah Makulo, learned State Attorneys, entered an appearance for the Respondents.

In support of the application, Mr. Mng'arwe submitted that the reasons supporting the application are stated in paragraphs 3, 4, 5, 6, and 7 of the affidavit supporting the application. The counsel for the Applicant submitted that all the reasons demonstrate that the Applicant is not in arrears of the service levy claimed by the 1st Respondent. The Applicant's counsel also submitted that for an application of this nature to be granted, the Applicant must, as a matter of law, establish a triable issue worth being considered by the court. The submission was buttressed by reference to the case of **Tanzania Telecommunications Company Limited v. Timothy Lwoga [2002] TLR 150.**

It was further submitted by the Applicant's counsel that the triable issue must be made clear in the affidavit supporting the application as it was held in the case of **Mohamed Enterprises (T) Ltd v. Biashara Consumer Services Ltd [2002] TLR 159.** The learned counsel submitted that in the affidavit filed by the Applicant in support of the application, attachments show that the Applicant rendered services in different districts and regions of Tanzania Mainland. It was his submission that there is no dispute that those places mentioned in the affidavit are outside the jurisdiction of the first

Respondent. The learned counsel referred this court to section 6(1)(u) of the **Local Government Finance Act Cap 290 R.E. 2019**.

According to the Applicant's counsel, the section stipulated above is to the effect that service levy is paid by an entity or any person in the area where such entity provides services. On that basis, it was his submission that the 1st Respondent is not entitled to claim payment of service levy from the Applicant for the projects which were implemented outside the jurisdiction of the 1st Respondent. He thus urged the court to grant the application pursuant to the powers conferred to the court under Order XXXV Rule 3(1)(b) of the CPC, so that the Applicant may be given a chance to challenge the suit instituted against her because the facts as deposed in the affidavit disclose a triable issue.

Replying to the Applicant's submissions, Mr. Ndaro, the learned State Attorney for the Respondents, launched his submission by entirely objecting and disagreeing with the submission made by the counsel for the Applicant. He also prayed that the counter affidavit filed by the Respondents be adopted as part of the Respondent's submission.

The learned counsel further submitted that the basis of imposition of tax is Article 138(1) of the Constitution of the United Republic of Tanzania which provides that *'No tax of any kind shall be imposed save in accordance with a law enacted by the parliament'*.

It was further submitted by Mr. Ndaro that having in mind the said article, the Parliament of the United Republic of Tanzania enacted the **Local Government Finance Act, Cap. 290 R.E. 2019** which stipulates the

sources of revenue of the local governments. Section 6(1)(u) of the said Act includes all monies derived from the service levy payable by corporate entities or any person conducting business with a business licence.

The Respondents' counsel also submitted that there is an exception that allows branches of corporate entities to pay service levy to the urban authorities in the areas of jurisdiction in which they are located. The Respondent also submitted that section 6(1)(u) of the LGFA does not provide that the service levy shall be paid where the services are rendered as the Applicant would want this court to believe.

Moreover, the Respondents' counsel submitted that the Applicant attached contracts of projects allegedly implemented outside the jurisdiction of the 1st Respondent and a demand notice from Mwanza City Council for payment of a service levy. However, apart from the said contracts of work and the demand notice, there is no any evidence that the Applicant has ever paid service levy to any local government authority. It was the learned counsel's submission that if the Applicant was honest and had a genuine defence, she would have submitted evidence that she had paid the said service levy to other local government authorities, but none has been produced so far.

The Respondents' counsel further submitted that the Applicant would have a good defence if would prove that they have no headquarters (head office) in the 1st Respondent's jurisdiction, or that other monies were generated and received by the Applicant's branches in other jurisdictions. There is no such evidence and it is not deposed in the affidavit.

The Respondent's counsel submitted that a similar situation arose in the case of **Mbeya District Council v Mbeya Cement, Civil Case No. 04/2008** in the High Court at Mbeya. In that case, Mbeya Cement refused to pay the service levy on account that the sales of her products are conducted outside the jurisdiction of Mbeya District Council where the factory is located. The court held that service levy should be paid where the headquarters or the branch is located.

It was also submitted by the Respondent's counsel that the Applicant's defence, as stated in the affidavit, is a sham as the Applicant has not demonstrated any plausible defence. Further, it was argued that the application had been brought in bad faith citing the case of **African Banking Corporation v. Lake Transport Ltd, Commercial Case No. 291 of 2002** (page 3).

Mr. Kamugisha, the learned State Attorney, also representing the Respondents, submitted that the application be dismissed as it has no legal footing before this court. He submitted that the Applicant's argument that the Applicant is not required to pay service levy to the 1st Respondent because the turnover was earned from the services that were rendered outside the jurisdiction of the 1st Respondent is not sufficient ground for granting leave to defend the suit.

Mr. Kamugisha's submission is based on the view that the Applicant has failed to prove that she had paid the service levy to those other jurisdictions in which she claims to have rendered services. Therefore, failure to provide proof of payment of the same, coupled with the fact that the Applicant has

registered office in the 1st Respondent's jurisdiction, the Applicant is required to pay the service levy to the 1st Respondent.

In a brief rejoinder, the Applicant's counsel submitted that the Respondents' counsels raised the issue that if the applicant could have attached a proof of payment, then the applicant would not have been liable to pay the service levy in the 1st Respondent's jurisdiction, then why the same should be paid to the 1st Respondent and not to other urban authorities? He insisted that in the Applicant's affidavit a demand notice requiring the Applicant to pay service levy to Mwanza City Council because the Applicant rendered services in the city of Mwanza is attached. According to the learned counsel for the Applicant, the said demand notice is the evidence that the service levy is paid where the service is rendered.

After hearing the parties' submissions, it is upon this court to decide whether the application discloses such facts warranting the grant of the application for leave to defend a summary suit according to the relevant laws.

It is, therefore, important to uncurl the facts that are not in dispute, and identify a point of the parties' disagreement based on the pleadings filed in court and as demonstrated by the submissions for and against the application, since they are useful in determining the application, as follows:

1. The 1st Respondent is an urban authority as defined in the LGFA.
2. The Applicant is conducting business with a business licence.
3. Parties agree that the Applicant has its registered office within the 1st Respondent's area of jurisdiction.

4. It is also not in dispute that during the period under review (i.e. 2019-2023), the Applicant implemented projects outside the administrative jurisdiction of the 1st Respondent.
5. That there is no dispute on the total amount of service levy to be paid by the Applicant based on the turnover accrued during the period under review;
6. It is also agreed that the point of departure between the Applicant and the Respondents is on the 1st Respondent's entitlement to claim and be paid the service levy by the Applicant based on the turnover having its source from projects implemented outside the jurisdiction of the 1st Respondent.

Having been enlightened by the said facts, it is now important to consider the factor relevant in granting leave to defend a summary suit. The same is provided for under **Order XXXV Rule 3(1)(b) of the Civil Procedure Code, Cap 33 R.E. 2019**. The said rule 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) N/A

*(b) **disclose such facts as the court may deem sufficient to support the application;** (Emphasis added).*

(c) N/A

The above provision requires an affidavit to disclose facts which court deems sufficient to support the application for leave to defend a summary suit. Moreover, courts of law in our jurisdiction have considered the relevant

provision in various decisions and have developed benchmarks worthy to be considered by the court in applications for leave to defend a summary suit. The key criteria are that the affidavit in support of the application shall disclose a plausible defence, and/or a triable issue for the court to grant leave to defend a summary suit. The cases of **Tanzania Telecommunications Company Limited v. Timothy Lwoga [2002] TLR 150** and **Mohamed Enterprises (T) Ltd v. Biashara Consumer Services Ltd [2002] TLR 159**, **Makungu Investment Company Ltd v. Petrosol (T) Limited, Civil Appeal No. 23 of 2013** (unreported) are relevant.

It follows, therefore, that the important factor to consider at this moment is whether the facts, as disclosed in the affidavit in support of the application, are sufficient to warrant granting leave to the Applicant. In other words, are the facts as stated in the affidavit disclosed a triable issue or a plausible defence?

Going through the affidavit of the Applicant, paragraphs 3, 4, 5, 6, and 7 in particular, and the submissions in support of the application, it is crystal clear that the major and only reason advanced by the Applicant to convince this court to grant the leave to defend the suit is that the applicant rendered her services outside the jurisdiction of the 1st Respondent as an urban authority, and thus the 1st Respondent is not entitled to demand payment from the Applicant.

Given the parties' submissions and the relevant pleadings, the heart of the matter is hinged on the interpretation of section 6(1)(u) of the **Local**

Government Finance Act, Cap. 290 R.E. 2019 (hereinafter the 'LGFA').

The said section provides as follows:

"6(1) The revenues, funds, and resources of an urban authority shall consist of-

(u)all monies derived from the service levy payable by corporate entities or any person conducting business with business licence at the rate not exceeding 0.3 percent of the turnover net of the value added tax and excise duty:

Provided that, the branches of corporate entities shall pay services levy to the urban authorities in whose areas of jurisdiction they are located.

The interpretation of the Applicant's counsel, as regards the said section, is that the service levy is payable to the urban authority in whose jurisdiction the service is rendered and not to the urban authority where the Applicant has its registered office. It is on that basis the Applicant attached several contracts and a demand notice in the affidavit supporting the application attempting to show that the Applicant rendered services to urban authorities other than the 1st Respondent. To the Applicant's learned counsel, the contracts and a demand notice demonstrate that there is a triable issue and/or a plausible defence warranting a grant of the leave to defend a summary suit.

The Respondents' counsels' interpretation of the said section, however, is quite the opposite of that of the Applicant. They argued that the said service levy is payable to the urban authority at which the corporate entity has its

registered office, or its headquarters, or if it has a branch then the levy would be payable to the area where the branch is located.

It is this court's observation that after the interpretation of section 6(1)(u) of the LGFA the following are deduced:

1. The provision directs that service levy payable by corporate entities or any person shall be a source of revenue for an urban authority;
2. The service levy shall be payable by a corporate entity or any person conducting business with a business licence;
3. The rate of the service levy should not exceed 0.3 percent of the turnover, net of value-added tax and excise duty;
4. That the branches of corporate entities, if any, shall pay services levy to the urban authorities at which those branches are located.

Therefore, as rightly submitted by Messrs. Ndaro and Kamugisha, learned State Attorneys, the interpretation above is to the effect that a corporate entity or any person conducting business with a business licence is not exempted from paying service levy to the urban authority to which his registered office is located simply because he is rendering services or rendered services to other urban authorities outside the jurisdiction of an urban authority to which his registered office is located.

Instead, the only exception provided by the said section is that if a corporate entity has a branch or branches outside the jurisdiction of an urban authority to which its registered office is located, then the service levy accruing from the turnover (net of the value-added tax and excise duty) earned by the relevant branch in the jurisdiction of a particular urban authority shall be

paid to the urban authority to which the branch of a particular corporate entity is located.

Therefore, it is clear that if the affidavit does not disclose, sufficiently, that the whole or part of the turnover was earned by a formal branch of a corporate entity in the jurisdiction of another urban authority, then the service levy on the turnover, as qualified by the LGFA, shall be paid to the urban authority at which a corporate entity is registered (see the case of **Mbeya District Council v Mbeya Cement in Civil Case No. 04/2008**).

In the present case, the affidavit simply states that the turnover indicated in the applicant's Tanzania Revenue Authority account was earned because of services rendered outside the jurisdiction of the 1st Respondent. However, there is neither proof nor mention of any branch of the Applicant established outside the jurisdiction of the 1st Respondent whose Applicant registered office is located.

Moreover, the applicant did not state or provide proof in his affidavit that the claimed service levy or any part thereof has been paid either to the 1st Respondent or to any other urban authority. This would constitute a triable issue or plausible defence for the court to grant leave to defend a summary suit to avoid double payment of service levy on the same turnover.

The contracts for various projects allegedly implemented in other urban authorities (annex PEK/1 to the affidavit) and the purported demand notice for the payment of service levy to Mwanza City Council (annex PEK/2 to the affidavit) is neither proof of the existence of the Applicant's branch(es) in

other urban authorities, nor a prima-facie evidence of payment of the said service levy.

Besides, it is this court's firm observation that for the applicant to establish a triable issue or plausible defence in an application for leave to defend a summary suit demanding payment of a service levy, should demonstrate, by stating in the affidavit and providing *prima facie* evidence thereof, at least one of the following:

1. That the applicant has paid part, or the whole of the demanded service levy to the urban authority demanding payment of the same, or to the deserving urban authority according to law. (*Msasani Peninsula Hospital Limited vs Board of Trustees of the National Security Fund and Attorney General (Misc. Civil Application 347 Of 2022) [2023] TZHC 22009 (19 October 2023)*, *M/s Tendar International Co. Ltd vs Sumbawanga Municipal Council (Misc. Civil Application 4 of 2021) [2022] TZHC 10566 (14 July 2022)*).
2. The turnover relied upon by the urban authority in computing the payable service levy is wrong to make the service levy demanded higher and contrary to the law.
3. The applicant has no registered office or branch in the jurisdiction of an urban authority demanding the payment of the service levy. (*Mbeya District Council v Mbeya Cement in Civil Case No. 04/2008 [2015] TZHC 2071 (18 March 2015)*).
4. That part or the whole of the relevant turnover has been earned by either a head office or a branch outside the jurisdiction of the demanding urban authority.

5. The applicant is not liable to pay the service levy because there is no turnover/earning from which a service levy could be paid.
6. A factual dispute that presents itself as a triable issue to be resolved and arises from evidence as deposed in the Applicant's affidavit.
(Makungu Investment Company Ltd v. Petrosol (T) Limited, Civil Appeal No. 23 of 2013 (unreported)).

This court is also cognizant that the above list is not exhaustive depending on the nature of the case and that each case should be decided based on its facts.

Hence, based on the facts averred by the Applicant in the affidavit supporting the application, and taking into account the Respondents' counter affidavit and the parties' submissions thereof, it is safe to conclude that there is no factual dispute between the parties herein that establishes a triable issue or a plausible defence. Instead, the major contention was on the interpretation of the law as to whom the service levy is payable if a corporate entity renders her services outside the jurisdiction of an urban authority to which her registered office is located.

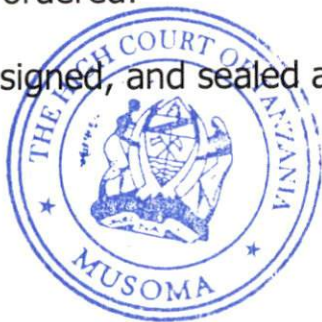
The parties addressed this court at lengthy on that point of law, and the same has been resolved that in the absence of proof that the turnover was earned by a recognized branch outside the jurisdiction of the urban authority in which the applicant has her registered office, then the service levy is payable to the urban authority at which the applicant's registered office is located.

Therefore, in light of the foregoing, this court undoubtedly rules that the applicant has failed to demonstrate facts that would convince this court to grant the applicant leave to defend the summary suit subject matter of this application. The application for leave to defend a summary suit is, thus, unmeritorious and is hereby dismissed.

Since the applicant was exercising her statutory right of applying for leave to defend a summary suit, each party shall bear their costs.

It is so ordered.

Dated, signed, and sealed at Musoma this 25th day of March 2024.



K. I. Kafanabo

Judge

The ruling has been delivered in the presence of Messrs Stamili Ndaro, Aneisius Kamugisha and Abdallah Makulo (learned State Attorneys) for the Respondents and in the absence of the Applicant who was aware of the ruling date.

K. I. Kafanabo

Judge

25/03/2024