

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO. 20 OF 2023

(Arising from Civil Case No. 10 of 2023)

IMAGE SECONDARY SCHOOL APPLICANT

VERSUS

- 1. THE REGISTERED BOARD OF TRUSTEES OF
THE NATIONAL SOCIAL SECURITY FUND** } **RESPONDENTS**
2. THE HONOURABLE ATTORNEY GENERAL }

RULING

Date of Last Order: 21/12/2023 &
Date of Ruling: 05/03/2024

S.M. KALUNDE, J.:

This is an application for leave to appear and defend Civil Case No. 10 of 2023 which is pending before this court. The application is brought by way of a chamber summons under Order XXXV Rule 2 and 3 of, and section 95 of **the Civil Procedure Code [Cap. 33 R.E. 2019]** (henceforth "**the CPC**"). Together with the chamber application, the application is supported by an affidavit dully sworn by Ms. Joyce Francis, learned counsel for the applicant. The application was not challenged by the respondents.

It is common ground that Civil Case No. 10 of 2023 is brought by way of a summary suit Order XXXV Rule 1 and 2(1) of the CPC and section 8 of **the National Social Security Fund Act [Cap. 50 R.E 2018]** (henceforth "**the NSSF Act**"). In the said suit the respondents are suing the applicant for payment of Tshs. 202,125,297.00 being outstanding principal members contribution plus accumulated penalties and interests.

It is also common ground that in summary suits filed under Order XXXV Rule 1 and 2(1) of the CPC, the defendant has no automatic right to enter appearance and file his written statement of defence. The law requires that before the defendant appears and files his defence, he must first apply for leave to do so under Order XXXV rule 2 (2) of the CPC which reads:

*"2.- (1) Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform the defendant that **unless he obtains leave from the court to defend the suit, a decision may be given against him** and shall also inform him of the manner in which application may be made for leave to defend."*

[Emphasis is mine]

The requirement to seek for leave has also been emphasized in various decisions of the Court of Appeal including in the case of **Tanzania Sewing Machine Company Limited vs. Njake Enterprises Limited**, Civil Appeal No. 1 of 2008; and **M/s Roko Investment Co. Ltd vs Tanzania Electric Supply Co. Ltd** (Civil Appeal 327 of 2019) [2022] TZCA 693 (9 November 2022) TANZLII (all unreported).

In **M/s Roko Investment Co. Ltd vs Tanzania Electric Supply Co. Ltd** (supra), the Court (Mwampashi, J.A) stated:

"It should be emphasized that, in suits filed under summary procedure, the defendant has no automatic right to enter appearance and file his written statement of defence. It is a mandatory requirement of the law that before the defendant appears and files his defence, he must first apply for leave to do so under Order XXXV rule 2 (2) of the CPC."

The law, under Order XXXV rule 3 (1) of the CPC, requires an application be filed supported by an affidavit disclosing relevant facts showing that there are triable issues to be litigated or of the existence of a good and plausible defence. Upon consideration of the materials contained in the affidavit a court may grant the application unconditionally or subject to such terms as the court thinks fit. It can

therefore be safely stated that, whether or not grant leave to defend is dependent upon the factual dispositions in the affidavit. This view was affirmed by the Court in the case of **Prosper Paulo Massawe & Others vs Access Bank Tanzania Ltd** (Civil Appeal 39 of 2014) [2021] TZCA 321 (22 July 2021) (TANZLII).

"The next point for our determination is whether the trial court rightly dismissed the appellants' application for leave to appear and defend the suit. It is common ground that the underlying factor for grant of that leave is existence of triable issues, a matter of fact which has to be demonstrated by the applicant. The court's determination on whether or not there are triable issues has to be based on the affidavit, obviously because as of that stage, there is yet a statement of defence from the defendant."

In the instant case, Ms. Joyce Francis, learned advocate for the applicant submitted that the affidavit filed in support of the application raised triable issues in the sense that the applicant has paid several payments in fulfilment of her obligation as a registered employer that have not been considered. According to the learned counsel the affidavit raised triable issues and issued worthy of litigation. She therefore prayed that the application be granted. Ms. Neema Sarakikya, learned state attorney for the respondents submitted that the respondents did not file a counter affidavit

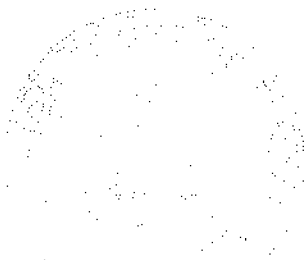
because they were not resisting the application. She urged the court to grant the application so that parties may be afforded a fair trial.

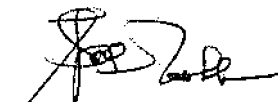
Admittedly, the affidavit filed in support of the application alleges that the applicant has since made several payments which have not been considered by the first respondent. These allegations raise the question whether the respondent's claims are justifiable and to what extent. Since there seems to be triable issues, I think it is prudent that the applicant is granted leave to appear and defend the suit so that justice is fairly done.

For the foregoing reasons, I will allow the application. I accordingly grant the applicant leave to appear and defend Civil Case No. 10 of 2023 on the condition that she shall file her defence within 21 days from the date of this ruling. I make no order as to costs.

It is so ordered.

DATED at IRINGA this 05th day of MARCH, 2023.




S.M. KALUNDE
JUDGE