

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO. 18 OF 2023

(Arising from Civil Case No. 11 of 2023)

POMMERN 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 ruling resolves an application for leave to for the applicant to appear and defend in Civil Case No. 11 of 2023 instituted before this Court by the respondents against the applicant. 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**"). The application has been supported by an affidavit dully sworn by Ms. Joyce Francis, learned counsel for the applicant.

The brief facts of the main case are that, the applicant is a contributing employer registered by the first respondent in terms of sections 11 to 20 of Part IV [REGISTRATION AND CONTRIBUTIONS TO THE FUND] of **the National Social Security Fund Act [Cap. 50 R.E 2018]** (henceforth "**the NSSF Act**"). The respective part requires all employers to register and make remittances of members contributions to the first respondent. The allegation is that the applicant has defaulted to make remittances amounting to Tshs. 386,884,885.45 being members contributions. As a result of the default, the respondents instituted the suit by way of summary suit as provided for under section 18 of the NSSF Act and Order XXXV Rule 1 and 2 of the CPC.

To prosecute the application, the Applicant was represented by Ms. Eneles Kitta, learned Advocate, whilst the respondents enjoyed the legal representation of the Office of the Solicitor General through Ms. Neema Sarakikya, learned State Attorney.

In support of the application, Ms. Kitta prefaced her submissions by seeking to adopt the entire contents of the affidavit filed in support of the application. The learned advocate submitted

that the stated affidavit disclosed sufficient material facts that supports the application within the meaning and interpretation of Order XXXV Rule 3 of the CPC. The learned counsel urged the court to grant the application on the strength of the prayers made in the chamber application and factual dispositions contained in the affidavit filed in support of the application,

Ms. Sarakikya informed the court that upon review of the affidavit filed in support of the application, the respondents were not resisting the application. The learned state counsel submitted that interests of justice necessitated the court to grant the application so that the applicant may defend the suit.

My duty now is to consider whether or not the application is merited.

It is trite that defending a summary suit is not automatic. The law is also settled that for the defendant to appear and defend a summary suit he must obtain leave defend from the court. This seems to be the import of Order XXXV rule 2 (2) of the CPC. The procedure for application is provided for under sub-rule (1) of rule 3 of Order XXXV. The respective provision provides as follows:

"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.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into court, giving security, framing and recording issues or otherwise as the court thinks fit.

(3) For the purpose of paragraph (c) of sub-rule (1), a mortgagor or an applicant acting on that behalf shall be deemed to have complied with or discharged his responsibility if upon a bank account through which loan was given it is shown that loan is fully paid."

The requirement to obtain leave of the court in order to defend a summary suit was also articulated by the Court of Appeal of Tanzania in unreported case of **Tanzania Sewing Machine Company Limited vs. Njake Enterprises Limited**, Civil Appeal No. 1 of 2008, where the Court (Othman J.A) stated:

"It is evident from the above, therefore, that the risk of immediate judgment against a defendant is real in a summary suit if he does not obtain leave to defend the suit. We wish to recall that the fundamental character of a summary suit is that the defendant is not, as in the case of an ordinary suit, automatically bestowed with the right to defend it. The right of a defendant to exercise his defence will be granted on leave only if the court is satisfied that he has made a showing that there are triable issues to be litigated or of the existence of a good and plausible defence. (see, M/s Mechalec Engineering and Manufacturing v. M/s Basic Equipment Corp, AIR 1977 SC 577)."

[Emphasis mine]

In the instant case, having examined the contents of the affidavit filed in support of the application in light of the pleadings

available on record. I am satisfied that the applicant's affidavit has disclosed sufficient facts to support the grant of the application. For the foregoing reasons, I will grant the application.

The applicant is granted 21 days within which to file his defence without failure. It is also the order of this court that, upon completion of pleadings issues for determination shall be accordingly framed. Each party shall cover their costs.

The matter is disposed in the aforementioned terms.

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




S.M. KALUNDE

JUDGE