

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

MISC. CIVIL APPLICATION NO. 2025 OF 2024.

(Arising from Civil Case No. 74494 of 2023)

NICE CATERING LTD..... APPLICANT

VERSUS

THE BOARD OF TRUSTEE OF NSSF 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

9th & 29th May 2024

KIREKIANO, J:

The respondents filed in this court a suit (Civil case no 28494 of 2023) against the applicant under the summary procedure, praying for judgment, decree and orders as follows: -

- i) The defendant to be ordered to pay the sum of Tshs. 379,767,773.43/= being un-remitted members' contributions plus accumulated penalties due and payable to the plaintiff by the defendant*
- ii) Interest on the decretal sum at the prescribed court rate of 7% from the date of delivery of judgment until the same shall be fully satisfied*
- iii) Costs of this suit*
- iv) Any other and further reliefs this Honourable Court shall deem fit and grant.*

Upon being served with the plaint under the summary procedure, the applicants filed this application seeking leave to appear and defend the suit (Civil Case No. 28494 of 2023). The application has been preferred under Order XXXV Rule 3 (1) (b) and Section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] referred herein as CPC, supported by an affidavit of Christian Yona Sonelo. The respondents contested the application and filed a counter affidavit sworn by Mr Baraka Y. Mgya, learned State Attorney.

When the application came up for hearing on 09/05/2024, Mr. Elisaria Jastiel Mosha appeared for the applicant while the respondent defaulted on appearance. The application proceeded orally in the respondent's absence and will be determined, also taking into account the respondent's counter affidavit.

In his submissions, the counsel for the applicant adopted the affidavit and submitted that the plaint and its annexures contain contentious matters of severe confusion and contradiction. He submitted that this is acknowledged in paragraph 9 of the respondents' counter affidavit. He says this fact makes it good grounds to grant the application.

In support of this proposition, he argued further that application of this kind may be granted if there is a triable issue. According to him, the

triable issue is deponed in paragraph 4 (a) (b) (c) on the scheduled statutory contribution. He argued that this issue can be resolved in a full trial so that the applicant will have the right to defend it by filing necessary documents under section 68 of the Evidence Act. He referred to the case of **Mohamed Enterprises (T) Ltd Vs Biashara Consumer Services Ltd [2002]** that considering that there is a triable issue to warrant the grant of the application, the same must be made clear in the affidavit.

The respondent's counter-affidavit disputed the applicant's affidavit and stated that all the allegations and averments are not supported by any attachments to prove the same. In the counter affidavit, the deponent added, under paragraph 10, the numerical figures indicating arrears were prepared with assistance from the applicant.

On my part, it is the law that in the application of this nature, the Court is not required to involve itself in a lengthy argument but, instead, to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue for the Court to go for a full trial. See the case of **Mwanauta & Company Hunting Safari (T) Limited and 2 others v National Bank of Commerce, Commercial Case no. 3 of 2014 (unreported), Tanzania Portland Cement Co. Ltd v Continental Builders Ltd. Civil Case No. 262/92-**

HC at Dar es Salaam, and Tanzania Telecommunications Company Limited v Timothy Lwoga (200) TLR 150.

Given the above conditions and being so guided, for this court to grant the application sought, the applicant must disclose such facts in the affidavit suggesting a triable issue of fact or law where the defence raised, if found by the court to be of most importance, and if not shown clearly the application will not be granted.

In this application at hand, paragraphs 4 (a) (b) (c) and (d), 5, and 6 of the affidavits supporting the application show contentious matters that need to be discussed and may be resolved by evidence. The respondents disputed this fact and stated that no attachments were made to prove the same. The applicant's counsel argued that submitting the document during trial would allow the applicant to defend the claims.

I agree with the applicant's advocate, as per the cited case of Mohamed Enterprises (T) Ltd vs **Biashara Consumer Services Ltd (supra)**, that in considering that the issue of the controversy is clearly shown in the affidavit thus, the application may be granted without drawing lengthy argument to ascertain facts. Having read paragraphs 4 (a)(b)(c) and (d), 5, and 6 of the affidavits supporting the application, together with the submission by the counsel for the applicant, this court

is convinced that the applicant has disclosed sufficient reasons to warrant the leave to appear and defend the main suit (Civil Case No. 28494 of 2023)

I have also reflected on the provision of Order XXXV Rule 3 (2) of the CPC, which provides that leave to appear and defend the suit may be given unconditionally or subject to such terms as the court may direct.

In this case, having reflected on this discretion, in the absence of facts suggesting a need to issue conditions, I shall refrain from giving any conditions. All said, this application has merit the applicant is granted unconditional leave to appear and defend the summary suit filed by the respondent. The applicant shall file a written Statement of Defence within 21 days from this ruling date. No order as to costs.

Dated at Dar es Salaam this 29.05.2024.



A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

AJ KIREKIANO

Judge

29th May 2024