

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SHINYANGA SUB-REGISTRY)
AT SHINYANGA**

CIVIL CASE NO. 1358 OF 2024

THE BOARD OF TRUSTEES OF THE

NATIONAL SOCIAL SECURITY FUND..... 1ST PLAINTIFF

THE ATTORNEY GENERAL.....2ND PLAINTIFF

VERSUS

PASCHAL CHARLES KABUGA

T/A KABUGA PRE & PRIMARY SCHOOL..... DEFENDANT

RULING

Date of Last Order 20.05.2024

Date of Ruling: 14.06.2024

MWAKAHESYA, J.:

The Plaintiff herein, The Board of Trustees of the National Social Security Fund, through the Attorney General instituted this summary suit, against the defendant, under order XXXV of the Civil Procedure Code (the CPC) claiming a total of TZS 17,076,000/= being outstanding member's contribution (principal sum and accumulated penalties).

In the plaint, it is asserted that, the defendant, a member of NSSF, since June 2016, in breach of his statutory duty of making compulsory contributions to the plaintiff has accrued the aforementioned sum.

After lapse of the period within which the defendant was statutorily allowed to file an application for leave to defend the suit, if he so desired, and in the absence of such an application, Mr. Mussa Mpogole, learned State Attorney, appearing for the plaintiffs, moved this court to grant the prayers contained in the plaint as per Order XXXV rule 2(2) of the CPC. I then examined the learned State Attorney whether the recovery of NSSF contributions fell within the ambit of Order XXXV of the CPC.

Addressing the court, Mr. Mpogole's response was in the affirmative. He submitted that, Order XXXV rule 2(2)(a) of the CPC makes reference to Order XXXV rule 1(e) which deals with suits for recovery of debts due to the Government. The contributions of the members of the NSSF are contributions whose custodian is the Board of Trustees and the owner is the Government.

He submitted further that, the provision when read together with section 70 of the National Social Security Fund Act (the NSSF Act), it becomes

obvious that the NSSF is a government entity since the Government is the one administering the NSSF Board and the Board Members are appointed by the President of the URT.

The learned State Attorney went on to submit that, section 18(1) of the NSSF Act directs that every statutory contribution due to the fund may be recovered by way of summary suit under Order XXXV of the CPC at any time after the date on which it becomes due.

He went on to submit that, section 74A(2) of the NSSF Act, states that every contribution and additional contributions due to the Fund may be recovered by way of summary suit under Order XXXV of the CPC at any time within 12 years after the date on which it is due.

The learned State Attorney concluded that, because these claims are within 12 years then it is correct for NSSF to bring them in the form of a summary suit under Order XXXV of the CPC. He made reference to the case of **Msasani Peninsular Hospital Ltd. v. Board of Trustees of the National Security Fund and the Attorney General**, Miscellaneous Civil Application No. 347 of 2022, High Court- Dar es Salaam (unreported), to support his position.

Having considered the learned State Attorney's submission in support of the position that the recovery of NSSF contributions falls within the purview of Order XXXV of the CPC I shall now proceed to rule on the same.

Order XXXV reads:

1. This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-

(a) suits upon bills of exchange (including cheques) or promissory notes;

(b) suits for the recovery of income tax; and

(c) suits arising out of mortgages, whether legal or equitable, for-

(i) payment of monies secured by mortgage;

(ii) delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property;

(iii) redemption; or

(iv) retransfer or discharge;

(d) suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer;

(e) suits for the recovery of rent, interest or other debts due to the Republic, the Government or any local government authority. [Emphasis mine]

Meanwhile, Order XXXV Rule 2(2)(a) reads:

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from the judge or magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave

or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled-

(a) where the suit is a suit, referred to in paragraph (a), (b) or (d) of rule 1 or a suit for the recovery of money under a mortgage and no other relief in respect of such mortgage is claimed, to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith;

It is clear that Order XXXV is explicitly limited to only a few selected causes of action, and suits for the recovery of NSSF contributions is not amongst them.

The only connection between the recovery of NSSF contributions and Order XXXV of the CPC is by virtue of section 18(1) and 74A of the NSSF Act. Therefore, I am not oblivious that, indeed, the mentioned provisions categorically state that NSSF contributions are recoverable under Order XXXV of the CPC.

However, I am also aware that, amendment of the Orders contained in the First Schedule to the CPC, Order XXXV inclusive, by virtue of section 81 of the CPC, is within the exclusive realm of the Chief Justice (after

consultation with the Minister responsible for legal affairs) who is better placed to develop the rules of practice and procedure in civil matters by codifying them as and when need arises.

Therefore, even though the NSSF Act states that the recovery of NSSF contributions may be done through summary suit under Order XXXV of the CPC, I am of the considered view that the same is not automatic. The relevant provisions of the NSSF Act can only be effective if the Chief Justice amends the First Schedule to the CPC to cater for them. Such amendment is wanting and therefore uninspiring me to find that it is proper for the plaintiffs to pursue recovery of NSSF contributions through Order XXXV of the CPC.

I share the observations of this court in **The Board of Trustees of National Social Security Fund Act v. The Registered Trustees of the Evangelical Church of Tanzania and another**, Civil Case No. 07 of 2020, High Court, at Tanga (unreported) where it was held that:

*"...A body corporate or any individual either by an agreement or an enactment cannot give to itself the right to recover anything by way of summary suit if that right is not mentioned in Order XXXV Rule 1 of the Civil Procedure Code. Summary suit is not a right to be conferred in any agreement or any enactment, **suit cannot be entertained as summary suit merely because the Act that establishes NSSF has a provision that gives them the right to recover the contributions from its members by a summary suit.** To invoke*

summary suit under Order XXXV, that right or claim or even the Institution itself must be permitted by Order XXXV Rule 1 of the Civil Procedure Code. See for example TANESCO, this body corporate has been mentioned in Rule 1 of Order XXXV but it can only recover by way of summary suit the meter rents and charges for supply of electricity. NSSF is not mentioned anywhere in Rule 1 of Order XXXV. The plaintiff must know that no relief not falling within the ambit of Order 35 Rule 1 can be recovered by it by a summary suit. The claim of Social Security contributions in the suit falls outside the scope of Order XXXV of the Code of Civil Procedure because the relief claimed therein is based on an action the nature of which does not fall within the classes specified in Order XXXV, Rule 1 of the Civil Procedure Code.” [Emphasis added]

The learned State Attorney also submitted that NSSF contributions are owned by the Government. This is a fallacy, and it is easily debunked through section 70 of the NSSF Act which reads:

"70. For the avoidance of doubt it is hereby declared that the Fund and the monies in the account established pursuant to section 61 shall not constitute or be regarded as funds of the Board but shall, for the purposes of this Act and all other written laws, be deemed to be funds held by the Board in trust for the insured persons and the Government of the United Republic to be administered by the Board in accordance with the provisions of this Act.."

Therefore, the Government might be one part of the ownership of the monies held by the NSSF, but the insured persons are the other significant part. In essence, the wording of section 70 disqualifies recovery of NSSF

contributions through Order XXXV rule 1(e), notwithstanding the decision in **Msasani Peninsular Hospital Ltd.** (supra).

Regarding the administration of the NSSF Board and its appointment, I do not see the relevancy of the learned State Attorney's assertion to the matter at hand therefore I find it prudent to leave it as it is.

In the end, I find that this suit is unmaintainable and accordingly strike it out. It is so ordered.

DATED at **SHINYANGA** this 14th day of JUNE 2024.



N.L. MWAKAHESYA

JUDGE

14/06/2024

