

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 27217 OF 2023.

(Arising from Civil Case No. 223 of 2023, Hon. Mwanga J.)

BUSINESS TRUST LTD APPLICANT

VERSUS

THE BOARD OF TRUSTEE OF NSSF 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

19th May 2024 & 18th June 2024

KIREKIANO, J:

Under the summary procedure, the respondents filed a civil case no 223 of 2023 against the applicant for recovery of remittance of members' statutory contribution amounting to Tshs. 215,470,380

Upon being served with the plaint, the defendant, now the applicant, filed this application seeking leave to appear and defend the suit (Civil Case No. 223 of 2023). The application has been preferred under Order XXXV Rule 2 (1) and (2), Rule 3(1) (b) and (2), and Section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] referred herein as CPC, supported by an affidavit of Emmanuel Kazimoto, the Managing Director of the Applicant.

The respondents contested the application and filed a counteraffidavit sworn by Mr Said Bawaziri, the Respondent's compliance officer.

When the application came up for hearing on 08/05/2024, Mr. Deogratius Ogunde appeared for the applicant while the respondent defaulted on appearance. The application proceeded orally in the respondent's absence and will be determined after the respondent's counter-affidavit is considered.

In his submissions, the counsel for the applicant adopted the affidavit and submitted that the application has to disclose facts that may lead to the court inferring that the defendant may establish a defence. In support of this proposition, he cited the case of **Mohamed Enterprises v Biashara Consumer Ltd (2022) TLR pg. 159**. He argued that in this application, the applicant wishes to prove the facts stated in paragraph 8 of the affidavit that the debt is incorrect. He referred to the receipt annexed in paragraph 9 (iii), that if the applicant is not granted leave, he will be condemned to pay the amount he has already paid.

As such he argued that the plaintiff's claims under paragraph 12(1) are pegged on a wrong provision for interest from judgment till full payment. The same are not the claims made under Order XXXV of the CPC. He argued that if the applicant is not heard, they will be penalised for the claims not

provided by law. He referred to the case of **Prosper Paul Massawe and two others v Access Bank Tanzania Ltd on page 13**, stating that the relief in the summary suit are those available under the summary procedure. On that base, the applicant asks this Court to grant him leave to defend Civil Case No. 223 of 2023.

The respondent's counter-affidavit noted some of the facts alleged by the applicant under paragraph 7 of his affidavit and disputed the allegations under paragraph 8, save for paragraph 8 (ii) on a joint reconciliation of the accounts between the 2nd respondent and the applicant, and stated that all the allegations and averments are not supported by any attachments to prove the same.

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 two others v National Bank of Commerce, Commercial Case no. 3 of 2014 (unreported), Nararisa Enterprises Company Limited and 3 others v Diamond Trust Bank Tanzania Limited, Misc. Commercial Case No. 202 of 2015**, Mwambegele J, (as he then was)

(unreported), Tanzania Telecommunications Company Limited v Timothy Lwoga (200) TLR 150, Mohamed Enterprises (T) Limited v Biashara Consumer Services Ltd (supra), Hon. Bwana, J (as he then was) stated that;

"In the application of this nature, the Court is not required to involve its lengthy arguments but to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue fit to go for trial. The applicant is only required to show a fair and reasonable defence."

As rightly submitted by the Counsel for the applicant, this Court has been moved under Order XXXV Rule 2(1) and (2), Rule 3(1) (b) and (2), and Section 95 of the Civil Procedure Code, **Order XXXV Rule 3(1)** Provides that: -

"Rule 3(1) The Court shall upon application by the defendant give leave to appear and defend the suit upon affidavit: -

(b) disclose such fact as the Court may deem sufficient to support the application."

Given the above conditions and being guided by the law, i have reviewed the applicant paragraphs 6, 7, 8 (i) (ii) (iii) (iv) (v), and (vi), of the applicant affidavit. The applicant has demonstrated that he has been contributing 10% each month and that the contribution was affected by the outbreak of Covid 19, the fact which is known to the 2nd respondent, he further stated

that other contributions were made to the respondent but mistakenly done through the applicant's sister company and that reconciliation of the same has not been done. It has also been deposed in the applicant's affidavit that all the claims are based on wrong calculations and embedded in wrong principles of law. The respondents disputed this fact and stated that no attachments were made to prove the same. I have seen the attachments; some support the applicant's deposition.

Considering the arguments by the applicant's counsel and reading between the lines the contents of the affidavit filed in support of the application, considering the cited case laws and the provision of the law above, I agree with the applicant's advocate that the applicant has established the existence of the triable issue in the main suit (Civil Case No. 223 of 2023).

Under Order XXXV Rule 3 (2) of the CPC, the same provides to the effect that "Leave to appear and defend the suit may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and record issues or otherwise as the Court thinks fit. Having reflected on this discretion, I shall refrain from providing any conditions.

All said this application is merited. 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. I shall make no order as to cost.



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

A.J. KIREKIANO

JUDGE

18.06.2024

COURT:

The ruling was delivered in the presence of Mr Deogratius Ogunde for the applicant and in the respondent's absence.



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

A.J. KIREKIANO

JUDGE

18.06.2024