

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO 4188 OF 2024

(Originating from Civil Case 65 of 2023)

THE BHARYA ENGINEERING

AND CONTRACTING CO.LTD..... APPLICANT

VERSUS

THE HON.ATTORNEY GENERAL..... 1ST RESPONDENT

THE BOARD OF TRUSTEES OF THE

NATIONAL SOCIAL SECURITY FUND.....2ND RESPONDENT

RULING

21st May & 24th June 2024

MWANGA, J.

Under Order XXXV Rule 3(1) (b) of the Civil Procedure Code, Cap 33 R.E 2019, the applicant has applied for leave to appear and defend the suit

in Civil Case No. 65 of 2023, pending before this court. The application is brought through chamber summons supported by an affidavit deposed by Michael Yudas Mwambeta, the applicant's advocate. Nevertheless, the respondents who filed their counter affidavit duly deposed by Opiyo Marcellus, the respondent's principal legal officer, strongly resisted the same.

The Brief fact of this application is simple to recite; the respondents filed a civil suit against the applicant under summary procedure claiming among other things payment of **TZS 475,636,385.97** (Tanzanian Shillings Four Hundred Seventy-Five Million Six Hundred Thirty-Six Thousand Three Hundred Eighty-Five Shillings and Ninety- Seven Cents) being outstanding principal members' contributions plus accumulated penalties thereon, cost of the suit, interest and other reliefs that the court may deem fit to grant.

Thus, the applicant filed the present application seeking this court for leave to defend. As per the affidavit, the applicant disputes the existence of the alleged debt, claiming that the same has been paid, and the 2nd respondent acknowledged the payment. Secondly, he claims that there was no evidence nor any document attached to justify the claims on the figures claimed even though the 2nd Respondent has claimed to have attached them as Annexure *NSSF-2; NSSF-3 NSSF-4 and NSSF-5* but the fact mentioned

annexures were not served to the Applicant. Thirdly, she claims that the 2nd Respondent has never written any notice of default to the Applicant, which was not complied with by the Applicant. With the above three disputed facts, the applicant claims that there are triable issues to be determined during the case hearing, thus praying this application is granted. It is crucial that all evidence is thoroughly examined to ensure a fair and just outcome. All those disputed facts are resisted by the respondents, who claim that the payments made to the second respondent do not cover the period claimed by the respondent in Civil Case No.65 of 2023, as the claimed amount covers January 2020 to February 2022 thus leave should not be granted to the applicant. Instead, she is ordered to pay the outstanding debt.

The application hearing proceeded viva voce, as both parties were represented. The applicant hired the services of Mr. Michael Mwambeta, learned counsel, while the respondents enjoyed the representation of Mr. Danstan Lubandwa, learned State Attorney.

Mr. Mwambeta adopted the applicant's affidavit to support the application and reiterated the abovementioned three disputed issues. On his side, Mr. Lubandwa insisted that the applicant has no triable issues as the documents were attached, and paragraphs 4,5 and 6 do not concern the

debt in this suit. He thus implored the court to dismiss the application. In a short rejoinder, Mr. Mwambeta was persistent in saying that the claimed amount was paid and that the payment was acknowledged.

Under Order XXXV Rule 3(1)(b) of the CPC, the law is evident that the Court shall grant leave to appear and defend a summary suit upon the applicant's affidavit disclosing some facts that the court may consider sufficient to support the application. For clarity, the said order states that:

The court shall, upon application by the defendant, give leave to appear and to defend the suit upon affidavits which- (b) disclose such facts as the court may deem sufficient to support the application;

The above exposition of the law is reflected in the Court's decisions, such as the Mohamed Enterprises (T) Ltd Vs case. **Biashara Consumer Services Ltd** (2002) TLR 150 (HC) and **Nararisa Enterprises Company Limited & 30 others Vs. Diamond Trust Bank Tanzania Limited**, Misc. Commercial Cause No.202 of 2015 (HC-Unreported), **Mbezi Fresh Market Ltd & 2 Others Vs. International Commercial Bank (Tanzania) Ltd**,

Misc. Commercial Application No 176 of 2021 (HC) where the court observed that, for leave to appear and defend the summary suit to be granted, the applicant must disclose in his affidavit that there exist merits and triable issues or existence of bonafide or reasonable defense by him/her. However, the same might not be a positive one.

The above being the position on the conditions for grant of leave to appear and defend summary procedure suit, the calling issue for determination by this court is whether the applicant has managed to demonstrate the existence of meritorious and triable issues or the existence of bonafide or reasonable defense warranting this court grant him leave to appear and defend the main suit as prayed.

In paragraphs 6 and 7 of the affidavit and submission, the applicant has raised some points as triable issues in the main suit, claiming them to be sufficient and reasonable facts worth consideration by this court. However, in my view, all three points fall under one central point: the claimed amount covering the period from January 2020 to February 2022 has been paid. In his affidavit, the applicant listed monthly contribution for the stipulated period plus receipt numbers. It is noted that the respondents did

not respond to this issue but generally stated that the payments mentioned in paragraph 6 do not concern the debt in Civil Case No. 65 of 2023.

I had time to peruse the plant in the case discussed above; it came to my findings that under paragraph 9.0, the respondent's claims cover the period of January 2020 to February 2022, the same period disputed by the applicant. For easy reference, the paragraph states that;

*That the Defendant is in total breach of its statutory obligations, has defaulted remittance of members' principal contribution amounting to **TZS 212,212,843.00** (Tanzanian Shillings Two Hundred Twelve Million Two Hundred Twelve Thousand Eight Hundred Forty-Three [Shillings) being the outstanding principal members' contributions which cover the period of January 2020 to February 2022 and accumulated penalties amounting to **TZS 263,423,542.97** (Tanzanian Shillings*

Two Hundred Sixty-Three Million Four Hundred Twenty-Three Thousand Five Hundred Forty-Two Shillings and Ninety-Seven Cents); which sum continues to accrue as long as it remains due.

In my profound view, the issue requires evidence to prove it as it goes to the root of the suit itself, which necessitates both sides to be heard. Thus, the same can only take place if the applicant is given the right to defend in the leading case to establish who stands to be correct.

Therefore, I am satisfied that that alone raises a triable issue for determination by this Court in the main suit. Hence, I answer the issue in the affirmative: The applicant has demonstrated a triable issue warranting this Court to grant the prayer sought.

In the upshot, I grant the applicant unconditional leave to defend the suit. The applicant is ordered to file her defense within twenty-one (21) days from the date of this ruling—costs to follow the event.

It is so ordered accordingly.



MWANGA J.

JUDGE.

24/06/2024