

TANZANIA / JUDGMENT

MISC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB-REGISTRY AT ARUSHA MISC. CIVIL APPLICATION NO. 47 OF 2023 (Arising From Civil Case No. 9 of 2023) KYIMBILA TEA PACKAGING COMPANY LIMITED APPLICANT VERSUS THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND 1st RESPONDENT THE ATTORNEY GENERAL 2nd RESPONDENT 26/03/2024 & 07/06/2024

RULING

BADE, J. In this Application, the Applicants are pleading with the court to grant them leave to appear and defend a summary suit that was filed against them in Civil Case No 9 of 2023. The Application has been brought under the provision of Order XXXV Rule 3(1)(b) and 3(2), Order XLIII Rule 2 of the Civil Procedure Code CAP 33 R.E 2019, and Item 1 of part III of the schedule of the law of limitation Act CAP 89 R.E 2019. Supporting the Application, the Applicants maintained through their affidavit that there are serious triable issue to wit the amount claimed by the 1st Respondent herein is not correct since the Applicants have remitted employees contributions to the 1st Respondent but she failed to account Page 1 of 8 and acknowledge the same contributions in the filed Plaintiff for such period. He contends that if the Applicant will not be given leave to appear and defend the summary suit, they will not be able to address the court on the said issue and they will be highly prejudiced. Through the affidavit sworn by Kisaka Mbaga supporting the application to for leave to defend, the Applicants confirmed that she remitted part payment of employee's contributions for such periods mentioned by the 1st Respondent and she is currently continuing to remit employees contributions, and thus the amount that is still due and owing is disputable. In further argument, the counsel maintained that there are two prerequisites which have to come out in the affidavit for the court to grant leave to appear and defend. These are disclosure of such facts as would make it incumbent on the holder to prove consideration; and the secondly, disclosure of such facts as the court may deem sufficient to support the application. Supporting this position, he cited the case of Mohamed Enterprises (T) Limited vs Biashara Consumer Services Limited,

[2002] TLR 159, in which the court stated that the role of the court when 'age 2 of 8 faced with an application for leave to appear and defend in the following terms: "The court has always followed the settled province of law namely that it has to determine whether there are triable issues or not... triable issues are to my considered view those issues which are

contested and therefore, in the interest of justice, ought to be canvassed further through evidence" He insisted that he earnestly believe they have pointed out a triable issue as required by the provision of Order xxxv Rule 3 (i)(b) and (2) of the Civil Procedure Code, Act Chapter 33 R.E. 2019 as well as the decisions cited to the court. He referred this court to the case of Ahaco Oil Limited and Hadija Abdul Faraji vs Apel Petroleum Limited in which the facts of the case resemble the present case whereby the court ruled: "the law requires that the applicants have to satisfy the conditions given in the law. The applicant has to either deny that they did not take any loan, or they have to show that they have paid either all or part of the loan ". 1 Page 3 of 8 He also made reference to the case of Nararisa Enterprises Company Limited and 2 others Vs Diamond Trust Bank Limited, Miscellaneous Commercial Cause No. 202 of 2015, and prayed to have them allowed to defend the suit. Responding the counsel adopted their own Counter Affidavit as sworn by Frank Jacob Iddi to be part of their submission. He maintained that heir claim against the Applicant is TZS 184,196,205 being the outstanding principal members' contributions covering various periods between April 2019 to August 2022 and accumulated penalties amounting to TZS 58,203,117.48 which makes a total of TZS 242,399,322.48. He explains that these are Statutory Contributions and hence statutory rights of every member where the Applicant deducted from their employees' salaries but failed to remit to the Respondent. He also clarified that the Applicant has reduced TZS 79,132,140.4 out of TZS 242,399,322.48 being outstanding principal members' contributions plus accumulated penalties after filing a case to the present. The reduced amount of TZS 79,132,149.4 is for principal contributions only and it does not involve Penalty. /u (Page 4 8 of The Applicant does not dispute the penalties amounting TZS 58,203,117.48 other than saying the amount is incorrect and does not know the exact figure and proof. He referred this court to the case of Maktech and Tel Co. Limited vs The Board of Trustees of the National Social Security Fund, Misc. Civil Case No. 627 of 2020 (unreported), where it was held that the admission for breach of its statutory obligations attracts penalties and thus, it cannot be a serious triable issue in law to accord the applicants leave to defend. Order XXXV Rule 3 (2) of Civil Procedure Code [Cap 33 R.E 2019] provides 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 fit. In his opinion, there has not been established any serious triable issues to allow the Applicants to defend the suit, and urge the court to dismiss the present application. Having looked at the application, the affidavits filed by both parties and considering the arguments filed, it is incumbent upon this court to determine whether this application is tenable. As pointed out by the Applicants, the legal provision is as provided under Order XXXV Rule 3(l)(b) and (2) of the Civil Procedure Me CAP 33 R.E / Page 5 of 8 2019, thus "(1) 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.

- (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". I should also restate the legal position as put across in Tanzania Telecommunications Company Limited vs Timothy Lwoga [2002] TLR 150 where this court stated: "if there is one triable issue contained in the affidavit supporting the application for leave to appear and defend then the applicant is entitled to have leave to appear and defend unconditionally" This brings me to the point that has been succinctly established that the court is enjoined to grant leave to appear and defend where a triable issue is pointed. The presence of a triable issue necessarily means that there shall be required evidence in order to determine it between the parties. i am also minded to look at the position as famously stated in the case of Page 6 of 8 M/s Meeh alec Engineers and Manufacturers vs Basic Equipment Corporation, AIR 1977 SC 577, and restated severally in our own jurisdiction see Nararisa Enterprises Company Limited and 2 others Vs Diamond Trust Bank Limited, Miscellaneous Commercial Cause No. 202 of 2015, when considering the question of granting leave to defend a summary suit:
- i. The defendant must satisfy the court that he/she has a good defense to the claim on its merits; ii. If the defendant raises triable issue indicating that he has a fair or bonafide or reason 'although not a positively good defence; Hi. If the defendant- discloses such facts as may be deemed sufficient to entitle him/her to defend. That is to say although the affidavit does not positively and immediately make it dear that he/she has a defence yet shows that such a state of facts as leads to the inference that at the trial of the action he/she may be able to establish a defence to the plaintiffs claim; iv. If the defendant has no defence or the defence is illusory or sham or practically moonshine the defendant may be denied leave. Alternatively, the court can allow the defendant to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such conditions. A/ Page 7 of 8 In my considered view, the Applicant herein has raised a triable issue bona tides, which is not manifestly dishonest or unreasonable, to wit, that the amount claimed against them is disputable since there have been remittances made by them to the Respondents, however the same have not been acknowledged and thus making the claimed amount disputable. I am satisfied that an unconditional leave to defend should be granted in this case. The Application is hereby allowed. The Applicant should file their written statement of defence expeditiously within 21 days. Costs to follow suit. It is so ordered. DATED at ARUSHA this 07th day of June 2024 A. Z. Bade Judge 07/06/2024 Ruling is delivered in the presence of the parties / their counsel / representatives in chambers on the 07th day of June 2024. 07/06/2024 Page 8 of 8

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