

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA TABORA SUB REGISTRY AT TABORA
MISC. CIVIL APPLICATION NO. 18979 OF 2024 (Arising from Civil Case No. 13805 of 2024) YAPI
MERKEZIINSAAT VE SANAYI ANONIM SIRKET <LOT

4).....APPLICANT VERSUS BOARD OF TRUSTEES OF
NSSF..... 1st RESPONDENT ATTORNEY GENERAL..... 2nd
RESPONDENT

RULING

MANGO, J On 14th June 2024, the Respondents instituted Civil Case No. 13805 of 2024 against the Applicant praying for payment of TZS 1,099,615,356.68(Tanzanian Shillings One Billion Ninety-Nine Million Six hundred fifteen thousand, three hundred Fifty-Six and Sixty-Eight Cents only being unremitted member's contributions and accumulated penalties, interest, costs of the suit and any other reliefs that the Court may deem fit and just to grant. The suit was filed under summary procedure thus, right to appear and defend the suit is not automatic. To secure such right, the Defendant, herein i the Plaintiff and other relevant document, the Applicant filed the application at hand seeking for courts leave to appear and defend the suit. The application was preferred under Order XXXV Rule 2(2) and Rule 3(1)(a), (b) and (2) of the Civil Procedure Code, [Cap 33.R.E 2019]. The application is supported by an affidavit affirmed by Aydin Ozer, a Principal officer of the Applicant Company. In the said affidavit, the Applicant advanced three grounds to move the Court to grant leave to the Applicant to defend the suit. The grounds are incorrectness of the amount claimed by the Respondents as un remitted contributions, that the suit was wrongly preferred under summary procedure and that the Applicant is claiming a considerable amount of money from the first Respondent which has been remitted as contributions for her foreign employees who left the company and the country before the First Respondent paid their benefits The Application is contested by the Respondents who filed a counter a joint counter affidavit affirmed by Abdul Jaza a Principal officer in the office of the first Respondent. The Counter containing reasons as to why they contest grant of this application. According to the contents of the Counter affidavit, the Respondents are against the grant of leave to defend the suit because the Applicant acknowledges to have not remitted members contributions to the tune reflected in the suit and that the amount alleged to have been paid does not settle the entire amount of unremitted contributions. The Respondents also disputed to owe the Applicant any amount and insisted that, the suit is properly preferred under summary procedure. The

Application was held by way of written submissions. The Applicant was represented by Donald Magina and Rehema Daffy learned advocates while the Respondent was represented by Geoffrey Paul Ngwembe and Samwel Mahuma learned State Attorneys. In his submission in support of the application, the Applicant's counsel referred to chamber summons and affidavit filed by the applicant Company. He submitted that, according to the two documents, the Applicant raised three triable issues that the court ought to consider when determining the application at hand. The raised triable issues are as follows;

- i. That the claimed amount is not true as the Applicant has already settled a considerable amount to the First Respondent, therefore, the applicant disputes claimed amount ii. That, the suit has been wrongly filed under summary suit and iii. Lastly, the Applicant claims against 1st Respondent a considerable amount of her contributions from her expatriates' employees. He argued that, it is a well settled principle of the law that, in order for the court to consider granting a leave to the Applicant to defend a suit, there must be a triable issue which needs to be determined in the main suit. He referred the Court to the case of Tanzania Telecommunication Company Limited Vs Timothy Lwoga, Civil case No. 61 of 1999, (2002) TLR to cement his argument. In brief, in the cited case, the Court held that, where there is a single triable issue, leave should be granted to the Applicant to defend in a suit preferred under summary procedure. On the first issue, the learned counsel submitted that, the claimed amount of TZS. 1,099,615,356.68 (Tanzania Shillings One Billion, Ninety-Nine 3 Million, Six Hundred Fifteen Thousand, Three Hundred Fifty-Six and Sixty- Eight Cents only) by the 1st Respondent is a misconceived one, inflated and does not correlate with the Applicant's records. He argued that, the Applicant has already settled a considerable amount of contributions claimed as indicated in para 5 of the affidavit filed in support of the Applicant's affidavit and annexure thereto. He argued further that, the Respondent has acknowledged receipt of the said payments under paragraphs 5 and 6 of their joint filed Counter Affidavit. Despite such acknowledgement by the Respondents, the amount so paid was not deducted in the amount claimed by the first Respondent. He added that, despite the amount paid and acknowledged by the Respondents, the Applicant has made some efforts to clear the debts even after the matter instituted by the Respondents. In this, he alleged that, on the 30th of September 2024, the Applicant paid to the 1st Respondent TZS. 234,013,820.45, (Tanzania Shillings Two Hundred Thirty-Four Million, Thirteen Thousand, Eight Hundred Twenty and Forty-Five cents only). He is of the view that, with the amounts already paid which were not considered by the Respondents at the time of filing the suit, the Court should grant leave to the Applicant to appear and defend her interests in the pending summary suit. To buttress his arguments, he cited the case of Strategic Business Solutions Limited Vs the Board of Trustees of the National Social Security Fund (Misc. Civil Application 476 of 2021)

[2022] TZHC 12073. On the second issue, the Applicant counsel challenged the manner the suit was preferred. He argued that, the 1st Respondent filed the suit under 4 summary procedure wrongly as she is not covered under ORDER XXXV of the Civil Procedure Code Act [CAP 33. R.E.2019]. He submitted that, Order XXXV Rule 1 items (a) up to (g), of the

Civil Procedure Code, [Cap. 33 R.E 2022] does not list contributions which are due to NSSF as one of the claims that should be recovered under Summary Procedure. He argued that, even the NSSF Act, does not mandate the first respondent to recover unremitted members' contributions via summary procedure. Citing Sections 18 (1) and 74A (2) of the NSSF ACT, [CAP 50 R.E. 2018], he submitted that, the two provisions provide that, the 1st Respondent MAY recover her contributions under summary suit under Order XXXV. He insisted that, the use of the word MAY in the two provisions connote that, the action of instituting claims for unremitted members' contributions by 1st Respondent to file a suit under summary procedure is optional and not mandatory. He asserted that, had the parliament wanted 1st Respondent to file her suits under summary procedure only, then, the draftsman would have used the word SHALL that connotes mandatory and not MAY which imply optional. To cement his argument, he cited the case of The Board of Trustees of National Social Security Fund Vs the Registered Trustees of the Evangelical Church of Tanzania and another, Civil case No. 07 of 2020, High Court of Tanzania, Tanga sub registry. In this case, the court observed 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 CPC. Summary suit is not a right to be conferred in any agreement or any enactment, suit cannot 5 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 a summary suit under Order XXXV, that right or claim or even the institution itself must be permitted by ORDER XXXV Rule] of the CPC. NSSF is not mentioned anywhere in Rule 1 of order XXXV." He cited also the case of the Board of Trustees of the National Social Security Fund and the Attorney General Vs Paschal Charles Kabuga T/A Kabuga Pre & Primary School, Civil Case No. 1358 of 2024 in which the Court struck out the suit for being unmaintainable by a reason of being filed under summary suit. He concluded on this issue that, the suit was wrongly filed under summary procedure and prayed to be granted leave to defend the suit with intent to raise the issue regarding competence of Civil Case No 13805 of 2024 which has been filed under summary procedure as among the issues to be determined by the Court. On the third issue he submitted that, the Applicant Company claims against the 1st Respondent considerable amount as indicated under paragraph 7 of the supporting affidavit that. Thus, if she allowed to appear and defend the summary suit, she will be in position to raise such claims as a counter claim to allow the claimed amount by the Applicant be used to set off the alleged outstanding contributions. He concluded by praying to have leave granted as the same will not anyhow prejudice the Respondents. In his reply submission, counsel for the Respondents adopted contents of 6 their joint Counter Affidavit to form part of the Respondents submission. He went on to submit on the issues raised by the Applicant Company as triable issues that entitles her to be granted leave to defend the main suit. He commenced his arguments on the first issue which regards partial payments of unremitted contributions by reiterating the cause of action for the claims before this court which reads; "the Defendant is in breach of statutory obligations/ has defaulted remittance

of members' principal contribution for the period of February 2023 to March 2024/ amounting to TZS 1,019,711,731.87 (Tanzania Shillings One Billion Nineteen Million Seven Hundred Eleven Thousand Seven Hundred Thirty-One and Eighty-Seven Cents Only); and outstanding penalties which arose due to delayed remittance of contribution periods amounting to TZS 79,903,624.81 (Tanzania Shillings Seventy-Nine Million Nine Hundred Three Thousand Six Hundred Twenty-Four and Eighty-One Cents Only), which sum continues to accrue as long as it remains due; making a total sum of outstanding claimed amount by the Plaintiffs to the Defendant to be TZS 1,099,615,356.68 (Tanzania Shillings One Billion Ninety- Nine Million Six Hundred Fifteen Thousand Three Hundred Fifty-Six and Sixty-Eight Cents Only)" The learned counsel challenged the partial payments alleged to have been paid by the Applicant Company as reflected under paragraph 5 of the Applicant's affidavit. He submitted that, for the period commencing from February 2023 to March 2024, the Applicant has paid only Tshs. 12,652,290.08 as reflected under paragraph five of the Respondents counter affidavit. According to him, other payments were made out of the cause of action brought in Court. 7 On the alleged payments of TZS 234,013,820.45 alleged made by the Applicant Company at the beginning of this case, he argued that, those are new facts not born by pleadings. He submitted that, the Courts in several occasions held that written submissions and its annexures do not form part of pleadings and the same are not intended to submit new facts or evidence but only to elaborate on the facts and/or evidence already indicated in the pleadings. To buttress his submission on this point he cited the case of Luhumbo Investment Limited v. National Bank of Commerce Limited and Two Others, Civil Appeal No. 503 of 2020, Court of Appeal of Tanzania, at Dar es Salaam, [2022] TZCA 738. He urges, the Court to disregard the alleged payment of TZS 234,013,820.45 by the Applicant, since it is not substantiated by any proof. He considers the same as an admission on the party of the Applicant that she is obliged to pay the first Respondent unremitted members' contributions. In such circumstances, he is of the view that there is no necessity for the Applicant to be granted leave to defend the suit for recovery of the unremitted contributions and penalties claimed in the Plaint. He cited the case of Tanzania Traditional Energy and Development Organization v. The Board of Trustees of National Social Security Fund, Misc. Civil Application No. 794 of 2017, High Court of Tanzania, at Dar es Salaam, to back up his arguments. The Respondents counsel opposed the Applicants assertion that the suit was wrongly preferred under summary procedure. He highlighted the reasons advanced by the Applicant in reaching to such a conclusion and argued that, they are merely a result of misconception. 8 On the issue whether the First Respondent is covered by the provisions of Order XXXV Rule 1(e) he submitted that, the unremitted members' contributions are considered as debt due to the Government. The learned counsel argued that, funds and monies in the account of the first Respondent are held by the first Plaintiff in trust for the Government of the United Republic. In support of this argument he cited section 70 of the NSSF Act and the case of Msasani Peninsula Hospital Limited vs. Board of Trustees of Nationa/Social Security Fund and Attorney General, Misc. Civil Application No. 347 of 2022, [2023] TZHC 22009, High Court of Tanzania, at Dar es Salaam in which the Court

ruled to the effect that unremitted members' contributions are considered to be debt due to the Government thus, they can be recovered via summary procedure under Order XXXV Rule 1(e). The learned counsel conceded that sections 18(1) and 74A (2) of the NSSF Act are not coached in mandatory terms but they also don't limit the first Respondent from recovering unremitted contributions via summary procedure. On the third issue, the learned counsel for the Respondents argued that the Applicant's claims are not born by pleadings. Citing the case of *Swilla Secondary School v. Japhet Petro*, Civil Appeal No. 362 of 2019, Court of Appeal of Tanzania, at Mbeya, [2021] TZCA 169, he argued that, the claims have been raised in contravention with a well-established principle that, parties are bound by their pleadings. Despite such observations, the learned counsel challenged the alleged claims by the Applicant for lack of proof. He argued that, the law, sections 110 and 112 of the Evidence Act, 9 requires whoever alleges to prove his allegations. He concluded that, the Applicant's counsel should not be considered by the Court since they were not pleaded nor were they anyhow proved. In his brief rejoinder, learned counsel generally reiterated his submission in chief. I have considered submissions made by the parties, pleadings in the main case and the application at hand and relevant legal provisions regarding summary procedure. I will start with the second ground upon which leave is sought in which the Applicant alleges that the suit against the Applicant Company was wrongly preferred under summary procedure. I understand that the Applicant wishes this issue to be determined as one of the issues in the main case if leave will be granted for her to defend the same. However, since the issue has been raised in this application and submitted extensively by the parties I find it prudent to determine it in this application albeit, briefly. Summary suits are not new in our jurisdiction and the Courts have echoed the main purpose of summary suits. In the case of the *CRDB Bank Limited versus John Kagimba Lwambagaza* [2002] TLR 117 the Court highlighted the objective of summary procedure as follows; The purpose of order XXXV: Summary procedure is to enable a Plaintiff to obtain judgement expeditiously where the Defendant has in effect no substantial defence to the suit and prevent the Defendant from employing delaying tactics. 10 The main issue that need to be considered in determining whether a suit for recovery of unremitted NSSF members' contributions may be recovered under summary procedure is whether the amount claimed is covered under Order XXXV Rule (1). As correctly submitted by the Respondents' counsel, unremitted NSSF contributions are considered to be debt due to the Government that is why they are in most cases recovered via Summary procedure. The NSSF Act under its section 70 provides that the beneficiaries of NSSF Contributions are the insured persons and the Government. Since the Government is the beneficiary of NSSF contributions, then the unremitted contributions can be considered as debts due to the Government. With such understanding the suits to recover the unremitted contributions may be instituted via summary procedure provided under Order XXXV of the Civil Procedure Code, [Cap.33 R.E 2022]. For a person to understand why the Government is also a beneficiary of the contributions, he needs first to understand the duties and responsibility of the Government in ensuring welfare of its people together with the dangerous of poverty and other economic difficulties that may

arise after retirement, termination of employment and other related risks. I cannot dwell much on the mentioned Government responsibilities but, it should be noted that, article 11(1) of the Constitution of United Republic of Tanzania provides for the Government's responsibility towards the welfare of its citizens. The article reads: " The state authority shall make appropriate provisions for realization of person's right to work, to self-education and social welfare at times old age, sickness or disability and in other cases of incapacity. Without ii " The state authority shall make appropriate provisions for realization of person's right to work, to self-education and social welfare at times old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every persons earns his livelihood." This establish why unremitted members' social security contributions are considered as debt due to the Government. Moreover, the nature of the contributions and its purpose reveal why the same may be recovered via summary procedure as provided under section 18 and 74A of the NSSF Act. The primary purpose of the social security services as those offered by NSSF is to secure its members from financial difficulties that may arise due to economic and social distress. Thus, the benefits need to be available immediately after the secured risk has taken place. Allowing employers to automatically contest suits for recovery of unremitted social security contributions, will defeat the primary purpose of the services and the entire policy of compulsory contributions for social security benefits. In such circumstances, I find the suit to have been properly instituted under summary procedure. In the third ground, the Applicant Company seeks leave so that she can file a counter claim against the first Respondent for unpaid members' benefits. The Applicant company alleges that it claims some considerable amount of money from the first Respondent. According to the learned counsel for the Applicant, the amount so claimed are social security contributions remitted 12 I am of a considered view that, this cannot be considered to be a ground for granting leave to defend a summary suit filed for purposes of recovering unremitted social security contributions of other NSSF members working in the Applicant Company. I reaching to a such view I considered the fact that, if such contributions were remitted to the first Respondent as members' contributions, then, the persons who are entitled to claim are the members themselves and not the employer unless there are other arrangements to the contrary. In such circumstances, leave cannot be granted solely on the basis of allegations of existence of a counter claim against the first Respondent which does not have direct connection with the unremitted members' contributions due to the Respondents. In the first ground, the Applicant alleges that she has partially paid the unremitted members contributions claimed in the Complaint thus the amount that appears therein need to be adjusted. I find this ground to be meritorious and capable of moving the Court to grant leave to defend since the Respondents do not expressly dispute such payments. They only allege that, there is no proof of such payments and that, the amount paid is not part of the amount claimed in the main suit to this application. Thus, the Applicant has established a triable issue regarding the amount of unremitted members' contributions due to the first Respondent. In such circumstances, it is in the interest of justice that the Applicant be granted leave to

defend the suit and have the amount of unremitted members' contributions ascertained. In upshot leave to defend in Civil Case No. 1385 of 2024 is granted to the Applicant with conditions that the Applicant's defence should be limited to the amount of unremitted contributions due to the first Respondent. The 13 Applicant may file a separate suit for other claims against the Respondents, if any. Given circumstances in this matter, I issue no order as to costs. Dated at Tabora this 28th day of February 2025 Z. D. MANGO JUDGE
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