

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT SUMBAWANGA

CIVIL CASE NO. 01 OF 2019

**THE BOARD OF TRUSTEES OF THE NATIONAL
SOCIAL SECURITY FUNDPLAINTIFF**

VERSUS

KATAVI AND KAPUFI LIMITEDDEFENDANT

Date of last Order: 16/02/2021

Date of Ruling: 05/03/2021

RULING

C.P. MKEHA, J

On 16th February, 2021, the defendant in this case, through Mr. Mkwikwini learned advocate argued three Preliminary Points of Objection regarding maintainability of the present suit. It was after obtaining leave to defend the suit under Order XXXV Rule 2 of the Civil Procedure Code. **See:** This court's ruling by his Lordship Mashauri, J dated: 14/11/2019. The three points of Preliminary of Objection argued by the learned advocate are the following:

- (i) That, the suit is bad for failure of the Plaintiff to join the Attorney General as a necessary party
- (ii) That, the suit is bad in law for being omnibus.
- (iii) That, the summary suit is time barred.

The learned advocate for the applicant argued in respect of the first Preliminary Point of Objection that the suit is unmaintainable for failure to join the Attorney General as a necessary party pursuant to section 3 (7) of the Executive Agencies Act as amended by Miscellaneous Amendment Act No. 1 of 2020. In view of the learned advocate for the defendant, the suit deserves being struck out.

The learned advocate argued the second point of Preliminary Objection by submitting that the suit is bad for being omnibus. According to the learned advocate, the plaintiff is suing on statutory contributions and penalties under section 18 (1) of the NSSF Act. In view of the learned advocate, under section 14 (3) of the said Act, penalties should be recovered as debts owing to the fund by the employer hence the same ought to be claimed by way of ordinary plaint and not by way of a summary suit. According to the learned advocate for the defendant, suing the defendant by way of a summary suit would deny the defendant an automatic right to defend in respect of a debt arising out of penalties. The learned advocate for the defendant urged the court to struck out the suit for failure to comply with what the law dictates. The learned advocate invited the court to follow the decision in the case of **BYTRADE TANZANIA LIMITED VS. BOARD OF TRUSTEES OF TANDAHIMBA FARMERS AGRICULTURAL INPUT TRUST FUND, COMMERCIAL CASE NO. 86 OF 2014, AT DAR ES SALAAM.**

As to the third point of Preliminary Objection, it was the learned advocate's submission that, the matter is time barred. The learned advocate's reasoning was that under the Law of Limitation Act, a suit to recover penalties is to be brought in court within two years. The learned advocate was of the view that, since the plaintiff is claiming penalties from the

year 2011 to August, 2017, by instituting the suit on 06/03/2019, the plaintiff was already time barred,

Mr. Kennedy Kasongwa learned State Attorney submitted in reply in respect of the first Preliminary Point of Objection that the law governing Executive Agencies is very clear. That, the NSSF is established under section 3 of the NSSF Act and not under the Executive Agencies Act. The learned State Attorney insisted that there is no requirement of the law that before NSSF opts to sue, it has to join the Attorney General as a necessary party. The learned State Attorney was emphatic that, all what the law says is that the Attorney General should be notified.

The learned State Attorney went on to submit in respect of the second Preliminary Point of Objection that under the NSSF Act, contributions and penalties are not distinct hence, they cannot be claimed distinctly. The learned State Attorney drawn the court's attention to section 14 (3) of the Act whereby a penalty is regarded as additional contribution. The learned State Attorney further referred the court to section 74 A (2) under which it is provided that every contribution and additional contributions due to the fund may be recovered by a summary suit under order XXXV of the Civil Procedure Code.

Lastly, the learned State Attorney submitted in respect of the third point of Preliminary Objection that, the claim for penalties is not time barred. According to the learned State Attorney, the NSSF Act provides for time frame for instituting actions and that a claim like the one in the plaintiff's suit is said to be time barred only when it is brought in court outside 12 years after the date on which it is due. Again, section 74 A(2) of the Act was referred to.

The issues for determination are the following:

- (i) Whether the NSSF is an Executive Agency
- (ii) Whether under the NSSF Act contributions and penalties, whenever due to the Fund, should be claimed distinctly i.e by preferring a summary suit in respect of contributions and ordinary plaint in respect of penalties.
- (iii) Whether the present suit is time barred.

In determining the Preliminary Points of Objection I start with the third issue which touches the third Preliminary Point of Objection. The controversy between the parties regarding this issue is not hard to resolve. It has its answer from section 46 of the Law of Limitation Act which provides that, where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of section 43, the provisions of the law of limitation Act should apply as if such period of limitation had been prescribed by the Law of Limitation Act. The learned advocate for the defendant did not demonstrate contrary intention of the legislature in enacting section 74 A(2) of the NSSF Act, rather than that of, amongst other things, prescribing time limitations for recovering debts due to the fund in terms of contributions and penalties.

Therefore, it is my holding that when the plaintiff instituted the present suit on 06/03/2019 to recover contributions and penalties between the years 2011 to August, 2017, it was not time barred. This is because, under section 74 A (2) of the NSSF Act, every contribution and additional contributions due to the Fund may be recovered at anytime within twelve years after the date on which it is due. The third Preliminary Point of Objection is held to be without merit. The same is dismissed.

It is true as it was held in the case of **BYTRADE TANZANIA LIMITED (supra)** that whenever there are two claims, an ordinary claim to be preferred by way of instituting ordinary plaint and the other which is recoverable by way of a summary suit, a case has to be filed as an ordinary suit. This was the basis for the learned advocate for the defendant to argue that, the present suit is bad for being omnibus having included claims for contributions and penalties in a summary suit. In his view, whereas contributions could be recovered through a summary suit, penalties could only be claimed by way of instituting a plaint.

The learned advocate for the defendant did not dispute however that, under section 14 (3) of the NSSF Act a penalty is treated as an additional contribution and that, the law provides under section 74 A(2) of the NSSF Act that contributions and penalties may both be recovered by way of a summary suit under Order XXXV of the Civil Procedure Code. Therefore, since an exception is provided under the very Act which the plaintiff seeks to enforce, the second Preliminary Point of Objection must fail. The same is dismissed for want of merit.

It is true that the NSSF is not an executive agency as correctly submitted by Mr. Kennedy Kasongwa learned advocate while replying in respect of the first Preliminary Point of Objection. This is because, the Fund is established under section 3(1) of the National Social Security Fund Act and not under the Executive Agencies Act, which was the learned advocate's view. I am also in agreement with the learned State Attorney that there is no express provision of the law which makes the Attorney General, mandatorily a co-plaintiff, whenever the NSSF opts to sue. The learned State Attorney submitted that, all what the

plaintiff was obliged to do was to notify the Attorney General. I agree. Did the plaintiff comply with what the law required it to do before instituting the present suit?

Under section 6 A(3) of the Government Proceedings Act it is provided that:

“Notwithstanding the provisions of any written law, a ministry, local government authority, independent department or other government institution shall have a duty to notify the Attorney General of any impending suit or intention to institute a suit or matter against the Authority.”

In terms of the above quoted provision, the duty imposed upon the plaintiff is obligatory one. It should be performed. The notification envisaged under section 6 A(3) of the Government Proceedings Act aims at avoiding or minimizing cases in which the Attorney General may find himself forced to join proceedings in which the government has interest, at later stages say, during appeal or execution stage without having been on record of the trial court at all. It also gives the Attorney General an opportunity of supervising well, interests of the government in litigations. It is important to appreciate the fact that in the event the plaintiff fails in this case, an order for costs in favour of the defendant will inevitably be executed against the Attorney General as well. That is possibly why, the legislature considered it mandatory, that, whenever a government institution contemplates of suing, the Attorney General be notified.

Upon rereading the plaintiff's pleadings nowhere is it indicated that the Attorney General was notified before the filing of this suit. It is possibly because of the fact that, the present suit was instituted in court on 06/03/2019 before the coming into force of the Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019. It is the said Act that brought in the mandatory requirement to notify the Attorney General of any impending suit or intention

to institute a suit by all ministries, local government authorities, independent departments or other government institutions through amending section 6 of the Government Proceedings Act thereby adding to it, section 6 A(1), (2) and (3). Since the said amendment affected the Government Proceedings Act which is a procedural law, the same acts retrospectively. It affects even suits instituted in court before the 19th September, 2019, the plaintiff's case inclusive. **See: SHEAR ILLUSIONS LIMITED VS. CHRISTINA ULAWE UMIRO, CIVIL APPEAL NO. 114/2014.**

For failure of the plaintiff to adhere to a mandatory provision of the law as demonstrated hereinabove, I hold the suit to be incompetent. The same is hereby struck out. I make no order as to costs.

Dated at **SUMBAWANGA** 05th day of March, 2021.




C.P. MKEHA

JUDGE

05/03/2021

Court: Ruling is delivered in the presence of Mr. Mkwikwini leaned advocate for the defendant and Mr. Titus Paul, Fund Inspector for NSSF - Rukwa Region.




C.P. MKEHA

JUDGE

05/03/2021