

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A. AND MANDIA J.A.)

CIVIL APPEAL NO. 117 OF 2007

ALBEILA INTERNATIONAL LIMITED..... APPELLANT

VERSUS

THE PEOPLES BANK OF ZANZIBAR LIMITED..... RESPONDENT

**(Appeal from the decision of the High Court of Zanzibar
at Vuga Zanzibar)**

(Mbarouk, J.)

**dated the 26th day of June, 2006
in
Civil Case No. 50 of 2005**

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JUDGMENT OF THE COURT

19th March, 2010 &

MANDIA J.A.:

The appellant is a limited liability company carrying on business in Zanzibar. The respondent is a banker also carrying on business in Zanzibar. On an indeterminate date the appellant and the respondent entered into an agreement whereby the respondent issued the appellant with three letters of credit to import goods from abroad. The value of the letters of credit was USD 2,432,264.88.

The due date of the letters of credit was "twelve months from the date of bills of lading" but the pleadings do not show the date of issue of the bills of lading. Be it as it may, by the time the letters of credit had matured the respondent had made a part payment of USD 418,188.92 out of the outstanding amount of USD 2,432,264.88. The default by the appellant led to the respondent's overseas account being debited to offset the default by the appellant.

On 8/6/2005 the appellant and the respondent entered into two separate agreements. The first agreement was an agreement to restructure the appellant's liability arising out of the letters of credit into a term loan, and the second agreement was one in which the appellant hypothecated the goods ordered using the letters of credit. The goods were specified in Clause 10 of the agreement for hypothecation of goods. In both the agreement for the term loan and that for the hypothecation of goods the value of the goods is given as USD 2,048,100.75, and both agreements acknowledge the fact that there was an initial agreement for USD 2,432,564.88 which

the appellant honoured in default after making a part payment of USD 418,188.92 and reneging on the rest of the claim sum.

The term loan agreement stipulated in Article IV 1.3 that the appellant was to pay USD 500,000 by 30/6/2005 and thereafter pay the remaining balance in twelve equal monthly installments starting from July 2005 (Article IV 1.4). According to the repayment schedule, the last installment was to be paid by 30/6/2006 as stipulated in Article IV 1.6. The term loan agreement included a default clause, Article VI, which provided that any defaulted payment must be paid with extra interest before the next payment is due, and that three consecutive defaults entitled the lender to realize the security and any other property in full satisfaction of the debt.

On 22nd December, 2005, the respondent filed Civil Case No. 50 of 2005 in the High Court of Zanzibar in which he sued for the amount of the term loan in default with costs and interest. The appellant filed a defence to the claim on 25th January, 2006 in which he included a counter-claim. In the defence the appellant prayed for

the dismissal of the claim for failure to disclose a cause of action, and in the counter-claim the appellant claimed USD 756,000.00 being the value of goods seized and sold by the present respondent who had also locked in a godown goods imported by the appellant.

On 10th February, 2006, the respondent filed a Written Statement of Defence to the Counter-claim and also raised a preliminary objection that the counter-claim does not disclose a cause of action against the respondent. He therefore prayed that the same be struck out with costs to the respondent. On 11/5/2006 the High Court of Zanzibar took arguments on the preliminary point of law and in a ruling delivered on 26/6/2006, the court upheld the objection and struck out the counter-claim with costs. This led to the present appeal.

In this appeal the appellant is represented by Mr. Godfrey Ukwong'a, learned advocate, and the respondent is represented by Mr. Majura Magafu, learned advocate.

Mr. Godfrey Ukwong'a, learned advocate, filed a memorandum of appeal containing two grounds as follows:-

- 1. That the trial judge erred both in law and facts and therefore mishandled the appellant's counter-claim when he denied the appellant the right to be heard.*
- 2. The trial judge misdirected himself in striking out the appellant's counter-claim on the law and the procedure involved in handling issues of counter-claim and merits involved.*

Mr. Ukwong'a, learned advocate, argued the appeal generally. Midway through his argument, however, the learned advocate abandoned ground number one and was left to argue ground number two of the appeal alone. In summary, Mr. Godfrey Ukwong'a argues that the appellant had defaulted in paying back the sum of USD 2,432,264.88 offered to him through letters of credit, and to rectify the problem of non-payment the parties signed two agreements on 8/6/2005 – an agreement for repayment and an agreement for hypothecation of goods. Mr. Godfrey Ukwong'a goes on to say that

since the period of repayment of the loan was twelve months from 8/6/2005, and since the suit against the appellant in the High Court of Zanzibar was filed on 22/12/2005, the period for which the loan was due was not yet over. This makes the appellant's claim as shown in the counter-claim valid. Counsel, therefore, prayed that the appeal be allowed with costs.

On the other hand Mr. Majura Magafu argues that since the loan agreement provided for re-possession of the hypothecated goods in case of default, the trial High Court was right in striking out the counter-claim. He argues that the respondent did just what the contract between the two parties provided for so the appellant could not be heard to complain about the repossession. Consequently, Mr. Magafu argues, the trial court was right in striking out the counter-claim for failing to disclose a cause of action against the respondent.

The above resume of the arguments presented before this Court shows that on 8/6/2005 two separate contracts were entered between the appellant and the respondent. One was for a term loan,

and the second contract was for hypothecation of goods bought with money advanced through the term loan agreement. Each one of the contract had all the ingredients of a valid contract i.e. an offeror, an offeree and consideration. The record shows that there was a plaint and a written statement of defence in respect of the term loan, and there was also a counter-claim and an answer to a counter-claim in respect of the hypothecation agreement. In both situations, therefore, Order VII Rule 1 and Order VIII Rule 6 of the Civil Procedure Decree, Chapter 8 of the Laws of Zanzibar, were complied with. It can be said that in both situations pleadings were complete. It is trite law that a counter-claim is a cross – suit for which the rules of pleading have to be followed. Order VIII Rule 6 sub-rules 1 to 4 of the Zanzibar Civil Procedure Decree, Chapter 8 of the Laws of Zanzibar provide for counter-claims. Rule 6 sub-rule – 4 provides thus:-

(4) Where a defendant by his written statement sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to

the title of his written statement a further title similar to the title in a plaint, setting forth the names of all the person who, if such counter-claim were to be enforced by cross-suit, would be defendants to such cross-suit and shall deliver copies of his written statement to such of them as are parties to the suit within the period which he is required to deliver it to the plaintiff."

This quote means the rules of pleading as regards plaints must be followed. Order VII Rule 1 of the Zanzibar Civil Procedure Decree lays out the contents of a plaint, and Rule 11 provides for the return of a plaint to a party who files a suit in the wrong court. Order VII Rule 12 provides for the rejection of a plaint in certain circumstances. To quote the rule in full:-

"12. The plaint shall be rejected in the following cases –

a) Where it does not disclose a cause of action.

- b) Where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;*
- c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the court, fails to do so;*
- d) Where the suit appears from the statement in the plaint appears to be barred by any law;*
- e) Where the provisions of rule 3 have not been complied with."*

The remedy for a plaint which does not disclose a cause of action, appears in our view, to be **rejection** under Order VII Rule 12 (a) of the Zanzibar Civil Procedure Decree. A counter-claim as defined under Order VIII Rule 6 (4) of the Zanzibar Civil Procedure Decree is in essence a plaint, and should therefore be rejected if it does not disclose a cause of action for reasons given for such rejection. Such

a rejection does not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, as provided in Order VII Rule 14.

Mr. Majura, learned advocate, contends that the trial judge was right in striking out the counter-claim because the contract for the loan provided for realization of the security. Indeed this is the reasoning adopted by the trial court which went on further to say that the hypothecation agreement provided for possession of hypothecated goods so the appellant had no claim over the seizure of the hypothecated goods. With due respect, we are of the view that this is an incorrect statement of the law. We hold this view because going so far means determining the relative merits of the respective parties. Determining the merits of a suit cannot be done unless and until evidence is adduced and a decision made. What the trial judge had in front of him were the pleadings of the two parties which did not entitle him to rule on the merits of the suits before him. Apart from this, there is the specific provision of Order VII Rule 12 (a) which puts down the consequence of a suit failing to disclose a cause

of action as **rejection**, not striking out. The order of the High Court clearly offends Order VII Rule 12 (a). We may further add that since in law a counter-claim is a cross- suit, in determining whether or not the same discloses a cause of action the court has to look at the counter – claim only. The court need not, indeed should not, look at the plaint in aid. In our respectful opinion, had this trite principle of law been observed by the learned High Court judge, he would not have ruled that the counter – claim did not disclose a cause of action. In our considered opinion, looked at in isolation, the counter-claim does indeed disclose a cause of action, assuming the allegations therein are true.

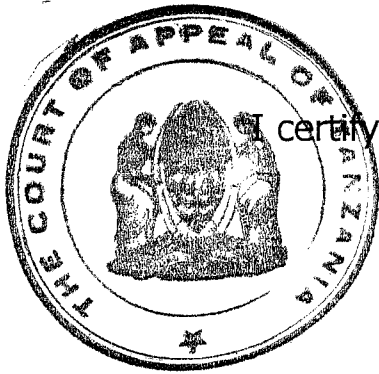
We therefore allow the appeal with costs. We set aside the ruling and order striking out the counter – claim. Since the pleadings were complete at the time the offending order was made, the suit should proceed to trial on merits.

DATED at DAR ES SALAAM this 13 day of May, 2010

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL



I certify that this is a true copy of the original.

A handwritten signature in black ink, appearing to read "J.S. MGETTA", with a stylized flourish at the end.

J.S.MGETTA
DEPUTY REGISTRAR