IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 49 OF 2020

PETER WEGESA CHACHA TIMASI.....1ST APPELLANT

MWITA CHACHA TIMASI.....2ND APPELLANT

IBRAHIM TIMASI.....3RD APPELLANT

VERSUS

NORTH MARA GOLD MINE LIMITED.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Rumanyika, J.)

dated the 20th day of September, 2018
in
Land Case No. 16 of 2016

.....

JUDGMENT OF THE COURT

8th & 17th February 2023

GALEBA, J.A.:

The appellants, Peter Wegesa Chacha Timasi, Mwita Chacha Timasi and Ibrahim Timasi, are registered occupants in common with equal shares, in Farm No. 190 containing 74.05 hectors, located at Nyakunguru Village in Tarime District within Mara Region (the Farm). In the year

2012, the first appellant entered into a contract for disposition of the Farm (or part of it) to the respondent, North Mara Gold Mine Limited.

According to the respondent, the contract for disposition of the whole Farm was written, and the full purchase price for it was Tshs. 2,648,287,983.00, which she paid to the first appellant on his own behalf and on behalf of the other two appellants. Payment was made *vide* cheque No. 000136 dated 24th March 2012. However, that was not the exact understanding of the appellants. According to them, the contract was oral and the said Tshs. 2,648,287,983.00, was not the full purchase price for the whole Farm. The amount was part payment for only 71.2 hectors, and the balance was Tshs. 498,000,000.00, as 2.8 hectors worthy Tshs. 112,000,000.00, was not paid for, and the unit price for one hector was agreed to be Tshs. 40,000,000.00. Thus, according to the appellants, for the entire Farm, the amount that remained unpaid by the respondent was Tshs. 610,400,000.00, being a sum total of the balance on the 71.2 hectors and Tshs. 112,000,000.00 for the 2.8 hectors.

Because the respondent was comfortable as having purchased the entire Farm at the above stated amount of Tshs. 2,648,287,983.00, she

started to carry out some operations in the Farm. The appellants were aggrieved by the respondent's workmen entering into the Farm. They caused a demand letter to be issued to the respondent and later, on 22nd June 2016, they lodged Land Case No. 16 of 2016 in the High Court of Tanzania at Mwanza. In that case, they were claiming; **first**, specific performance of the contract, that is, payment of Tshs. 610,400,000.00; **second,** payment of Tshs. 2,524,000,000.00, being the difference between the amount paid and the current market value of the Farm; **third**, interest at 23% per annum; **fourth,** general damages for breach of contract; **fifth**, payment of Tshs. 4,867,000,000.00 being the market price of the Farm at that time.

The respondent filed a written statement of defence, and for close to two years, the case was mentioned in the High Court, without any remarkable progress. However, on 5th April 2018, something significant to this judgment happened. On that day Messrs. Lubango and Kange, learned advocates appeared for the appellants and the respondent respectively, and the following transpired in court:-

> *"**Mr. Lubango:** My Lord, we pray for amendment to the plaint in view of the documents which I have*

received, but initially were not available so as to make this court be able to determine the matter for hearing.

***Mr. Kange**: I have no objection.*

***Order**:*

1. *Leave to amend the plaint granted.*
2. *Amended plaint to be filed within 14 days, by or on 18/04/2018.*
3. *Amended written statement of defence within 14 days, by or on 02/05/2018.*
4. *Reply to the amended written statement of defence within 14 days, by or on 08/05/2018 at 9.00 a.m.*
5. *FPTC on 23/05/2018 at 09.00 a.m.*

R. V. Makaramba
Judge
05/04/2018."

On 18th April 2018, an amended plaint was filed as ordered. In the amended plaint, the second and third appellants pleaded that they never sold their stake in the Farm to the respondent. They pleaded that the amount which had been paid to the first appellant, was an advance payment in respect of that appellant's stake in the Farm, and not theirs.

In summary, the prayers in the amended plaint were; **one**, specific performance of the unfulfilled terms of the contract; **two**, a declaration that the respondent was a trespasser on the second and third appellants' part of the Farm; **three**, payment of 5,208,475,966.00 being the purchase price or value of the second and third appellants' stake in the Farm; **four**, payment of general damages for trespass by the respondent on the second and third appellants' part of the Farm or in alternative; **five**, a permanent injunction restraining the respondent or her workmen from entering on the second and third appellants' part of the Farm; **six**, costs and; **seven**, any other reliefs that the court would deem just to grant.

Upon being served with the amended plaint containing the above alterations, the respondent lodged a written statement of defence to the amended plaint disputing the claims of the appellants but also raising a preliminary objection containing three grounds. At the hearing in the High Court, the second ground of the objection was abandoned thereby retaining the following two grounds for determination: -

"(i) That the amended plaint be struck out as it raises new and distinct causes of action from those pleaded in the original plaint.

(ii) (abandoned).

(iii) As the first plaintiff's claims are based on a transaction on land, the alleged oral contract between him and the defendant, if any, is not tenable and therefore the same cannot be a basis for the plaintiffs' claims without a written contract."

The above grounds of preliminary objection were heard, and on 20th September 2018, a ruling was delivered. In that ruling, the High Court upheld the first ground of the preliminary objection that the amended plaint introduced a new cause of action, thus it breached the amendment order. As for the second ground, the High Court also, agreed with the respondent that, as the suit was based on an oral contract for sale of land, then the same was not enforceable at law. Finally, the suit was dismissed with costs in its entirety, because according to the High Court, it was incompetent.

This appeal is challenging the above dismissal order of the appellants' suit. In that quest, the appellants lodged a memorandum of

appeal containing five grounds of appeal but for reasons that will become clearer as we proceed, we will only quote the first ground of appeal, which is as follows: -

> *"The trial court erred in law in dismissing the whole suit on the ground that the same was incompetent for contravening the order of amendment".*

In arguing the appeal, parties had, under rule 106 (1) and (7) of the Tanzania Court of Appeal Rules 2009 (the Rules), lodged their respective submissions in support of, and against the appeal. At the hearing before us, Mr. Charles Kiteja, learned counsel who was being assisted by Mr. Onyango Otieno, also learned counsel appeared for the appellants whereas Dr. Wilbert Kapinga learned counsel assisted by Mr. Waziri Mchome learned counsel, appeared for the respondent.

In clarifying the appellants' position, in terms of rule 106 (10) (a) of the Rules, Mr. Kiteja generally challenged the findings of the High Court on many grounds, the strongest being that the order permitting amendment of the plaint was not specific as to the areas of the original plaint which were to be amended. His argument was that, in amending the plaint in the manner they did, the appellants violated no order. Some

of the other points included the argument that there was no new cause of action, for in both the original and the amended plaint, the causes of action were two; trespass and breach of contract. He also complained that it was illegal for the court to dismiss the suit, for if the court found that the amended plaint offended its order, which, according to him was not the case, the appropriate remedy would have been to reject the plaint under Order VII rule 11 of the Civil Procedure Code chapter 33 of the Revised Laws (the CPC).

Briefly, learned counsel argued that, in the absence of an order specifying which matters or aspects to amend in the original plaint, the appellants cannot be said to have offended the order of the court by amending the plaint the way they did. In the circumstances, he submitted, the appropriate remedy is for this Court to quash all the proceedings of the High Court from when the order to amend was made, including the ruling challenged in this appeal. Having done so, he implored us to remit the case to the High Court with directions that the matter proceeds from where it was, immediately before the prayer seeking to amend the plaint was made. In short, the learned counsel for the appellants moved us to allow the appeal with costs.

Dr. Kapinga responded to the submission made in support of the appeal. When he took the floor and after having adopted the written submissions opposing the appeal, he submitted that it was true that the prayer to amend the plaint was general and did not specifically state what was it that the appellants wanted to amend in their plaint. The learned counsel conceded further that, like the prayer by the appellants, the corresponding court order permitting the appellants to amend the plaint was just as general and open ended. Before he could ascertain his position to us, Dr. Kapinga made key observations in respect of several features of the ruling challenged in these proceedings. Giving examples, learned counsel highlighted several instances including; a scenario where the court having indicated in its ruling that the appropriate remedy to impose, in case the amended plaint offended the order allowing amendment was to strike out the amended plaint, nonetheless in the same ruling, the court dismissed the suit in its entirety, apparently, without assigning any reasons. Giving another paradoxical scenario, learned counsel submitted that, although the court indicated that the new cause of action was not tenable at law, in the same ruling, the court

stated that the second and third appellants had a joint cause of action against the first appellant and the respondent, as joint defendants.

Despite the above concerns, Dr. Kapinga was generally in agreement with the final finding of the court, because according to him, the amended plaint introduced a new cause of action. That was so, he submitted, because the second and third appellants pleaded as having sold the Farm in the original plaint, but in the amended plaint, they changed their position by indicating that they never sold their respective stakes in the Farm. In the final analysis, the learned counsel observed that the High Court acted properly despite obvious inadequacies in its ruling.

Nonetheless, with a profound sense of fairness, impartiality and justice, Dr. Kapinga informed us that, although the case between the parties seems to have ended in the High Court in favour of the respondent, the fact is that the disputes between the parties are still bubbling beneath the surface; each party with outstanding legal issues unresolved in respect of the Farm. Essentially, he was of a clear stance that, this Court having heard the frustrations of parties to this appeal, this matter is a fit case for us to invoke this Court's powers of revision

and make appropriate directions, so that the unresolved disputes that were presented to the High Court for resolution, are heard and conclusively resolved.

In this matter, we have carefully studied the grounds of appeal together with the written submissions lodged by the parties under the Rules. We have also had an opportunity to attentively watch and hear learned counsel for the parties arguing before us at the hearing. Having thoroughly considered all those pieces of material, particularly the passionate oral submissions made before us at the hearing by counsel for the parties, we are of the firm view that, the appropriate issue to be resolved in this appeal is just one; that is, whether the order of the High Court at page 67 of the record of appeal, issued on 5th April 2018, permitting amendment of the plaint was a valid court order, capable of being breached as complained by the appellants in the first ground of appeal.

We propose to start with the law on amendment of pleadings. The relevant law under which courts attending to civil matters may permit alteration or amendment of pleadings, is Order VI rule 17 of the CPC which provides as follows:-

"The court may at any stage of the proceedings allow either party ***to alter or amend his pleading in such manner*** *and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

[Emphasis added]

The bold text above, is directive or instructive of how an order of amendment of pleadings should be made. An order for amendment of pleadings should not be general or open ended. It must specify points that are going to be added or removed from the pleading sought to be amended. The risk of making a blanket order of amendment without specifying what is to be amended, is to expose a party in favour of whom the order is made to a temptation to include in the new pleading, matters of his own choice, and which may not be necessary for the purpose of determining the real questions in controversy between the parties. Matters to be included in the amended version of the pleading, according to the above law, must be known to the court for it to determine whether

they are necessary for determination of the dispute before it. Short of that, an open-ended order for amendment cannot be compliant with the above provisions of the law.

Discouraging open ended and unlimited orders for amendment of pleadings, this Court in the case of **Jovent Clavery Rushaka and Another v. Bibiana Chacha**, Civil Appeal No. 236 of 2020 (unreported), had this to say as the settled law of this country on that aspect:-

> *"It is settled law that a pleading can be amended at any stage of the proceedings* ***only to the extent allowed by the court*** *on such terms as may be just and such amendment should be limited to what will be necessary for determining the real question in dispute between the parties – see Order VI rule 17 of the Civil Procedure Code, Cap 33 R.E. 2019."*
>
> [Emphasis added]

The import of the above position is that, when permitting amendment, the court making the order must not only allow the amendment, it must also as a rule, specify the extent to which such amendment should be made. To say it differently, the order permitting

amendment is incomplete, if it only allows amendment without specifying the parameters of the amendment allowed.

Speaking on the significance of the court specifying the limits within which a particular pleading should be amended, in **Salum Abdallah Chande t/a Rahma Tailors v. The Loans and Advances Realization Trust (LART) and Two Others**, Civil Appeal No. 49 of 1997 (unreported), this Court emphatically observed: -

> *"We think it is clear that once pleadings have been filed, they can only be altered or amended with the leave of the court.* ***The court will set the parameters within which the alteration or the amendments will be made****, hence the manner and terms which ensure justice to the parties."*
>
> [Emphasis added]

In the case before us, as indicated above, the court just stated; "leave to amend the plaint granted," and proceeded to set a schedule for filing the amended plaint and other pleadings. It is our firm position that, the above order allowing amendment of the appellant's plaint, being general without specifying the points that would be contained in the amendment, was illegal and ineffectual for it contravened the provisions

of Order VI rule 17 of the CPC and the established principles in the above cited authorities. Notwithstanding that position, we are with respect, of the view that the High Court erred in dismissing the suit on the basis of the defects in the amended plaint. In the circumstances, we allow the first ground of appeal and hereby quash the impugned decision which dismissed the whole suit.

In addition, on the basis of the reasons stated above, we invoke the powers of revision vested in the Court by section 4 (2) of the Appellate Jurisdiction Act Chapter 141 of the Revised Laws 2019, and hereby nullify all proceedings and orders of the High Court issued from 5th April 2018 onwards, inclusive of the order for amendment of pleadings. As a matter of clarity, all amended pleadings are rendered ineffectual, for they were filed based on an invalid court order. We further direct that, the original record be remitted to the High Court for continuation of appropriate legal processes, according to law, starting immediately after the order dated 20th March 2018 at page 66 of the record of appeal.

Bearing in mind the above ultimate fate of this appeal, we find no usefulness in considering the other grounds of appeal raised to challenge

the nullified ruling of the High Court. Finally, considering the nature of the order we have made, we make no order as to costs.

Order accordingly.

DATED at **MWANZA**, this 17th day of February, 2023

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered on 17th day of February, 2023 in the presence of Mr. Castory Peja, holding brief for Mr. Charles Kiteja, learned counsel for the Appellant and Mr. Castory Peja, holding brief for Dr. Wilbert Kapinga, learned counsel for the respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL