

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE ARUSHA DISTRICT REGISTRY]

AT ARUSHA

MISC. CIVIL APPLICATION NO. 119 OF 2022

(C/F Civil Case No. 13 of 2022)

M'RINGA ESTATES LIMITED.....1ST APPLICANT
DONOUGH JOHN MAHON.....2ND APPLICANT
DIANA JULIAN MAVIS BANNISTER.....3RD APPLICANT
SALLY JUNE MANN.....4TH APPLICANT
CHRISTOPHER JOHN BANNISTER5TH APPLICANT
DAWN FRANCES BUNTING6TH APPLICANT
ROWENA MARGRETH GRIFFITHS.....7TH APPLICANT
CATHRYN ELIZABETH HOWARD8TH APPLICANT
AMANDA LOUISE FRISBY.....9TH APPLICANT
SARAH GAYE BANNISTER.....10TH APPLICANT
DENISE LUCINDA BANNISTER.....11TH APPLICANT
STEPHEN PATRICK MANN.....12TH APPLICANT
LIZA JOY MANN.....13TH APPLICANT

VERSUS

RUWAICHI JOHN KERETH..... RESPONDENT

RULING

08th November & 08th December, 2022

TIGANGA, J.

This application is in respect for leave to amend the written statement of defence. It has been brought by the defendant under the provisions of Order VI rule 17, Sections 3A (1), 3A(2), 3B(1)(a), 68(e) and 95 all of the Civil Procedure Code, [Cap. 33 RE 2019]. It is made through chamber summons supported by an affidavit sworn by Denice Lucinda Bannister (the 11th Applicant) for all applicants.

The application was opposed by the respondent, Ruwaichi John Kereth through the counter affidavit sworn by himself. According to the affidavit particularly at paragraph 4 with its sub-parts, the applicant seeks for leave in order to be allowed to consolidate the two written statements of defence filed in the main suit (Civil Case No. 13 of 2022) to have one composite defence involving all 13th defendants unlike the current status.

The application was heard through written submission. Messrs Deusdedith Duncan Mayomba, Peres Seneto Parpay and Henry Simon Katunzi, leaned Advocates represented the applicants. Whereas Messrs Eric Sikujua Ng'imaryo and Boniface Joseph, leaned Advocates appeared for the respondent.

In the submission in chief filed in support of the application, the applicants via their Advocates were of the view that they should be allowed to amend the written statements of defence because the law gives them such a right. To fortify on it, they reproduced the provisions of Order VI rule 17 of the Civil Procedure Code (supra) which is to the effect that the court may, at any stage of proceedings allow either party to amend or alter the pleading in such manner and such terms as may be just and also that the manner necessary for the purpose of determining the real questions in controversy between the parties.

They argued further that, the affidavit sworn by the 11th applicant clearly shows that the factual matters leading to the application are just and the intended evidence will enable the just determination of the dispute between the parties. Pilling on it, the so called raw proposed amended written statement of defence was attached to the application for the purpose of satisfying the court that the amendment sought is not an abuse of the court process.

Furthermore, the learned Advocates for the applicants argued that, the intended consolidated written statement of defence aims at enabling the Court to ensure speedy determination of the suit as required under the provisions of Section 3A (1) of the Civil Procedure Code.

Learned Advocates went on saying that, if they will be given the leave to amend the written statement of defence they will include therein, the counterclaim against the respondent and attach thereto some documentary evidence which lately came into the knowledge of the applicants after filing their respective written statements of defence. Therefore, they ask for the leave so that the applicants can plead and file the recent discovered facts deduced from the documents which came into their knowledge lately after filing the respective written statements of defence. That, so long as the application has been made at the earliest stage before hearing of the main suit, the respondent will never be prejudiced anyhow and in the counter affidavit the respondent had not pleaded any fact demonstrating that he will be prejudiced in case, the leave is granted.

On the conditional precedents necessary for granting the leave to amend the pleadings, the applicants' Advocates referred this court to the case of **George M. Shambwe versus Attorney General and Another** [1996] TLR 334 whereby the principles for granting leave to amend pleadings were stated. In that authority, the amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side.

Limiting the matter to what is necessary for the determination of the suit and bringing in the new case, the Advocates relied on the attached raw draft of the proposed amended written statement of defence as an indication that they will never make a substitution of the entire case but rather, comply with the position of the law. On it, the case of **Salum Abdallah Chacha t/a Rahma Tailors versus The Loans and Advanced Realization Trust and 2 Others**, Civil Appeal No. 49 of 1997 (unreported), was cited.

That, to ensure substantial justice is done, allowing the amendment is the duty of the court and not a really matter of power to it. Insisting on that position, the case of **Kilombero North Safaris Limited versus Registered Trustees of Mbomipa Authorities Association**, Civil Appeal No. 273 of 2017 CAT at Dsm (unreported).

Counteracting, Messrs Ng'imaryo and Boniface contended in the submission in opposition of the application that, applicants have not given any cogent reason for filing the application at late hours of the proceedings. That, the reason of coming across the documents or the person that had not been in the knowledge at the time of filing the written statement of defence is vague and not supported by any details of documents or a person who possessed them and the reasons why

they were not available to the applicants at the filing of written statement of defence.

They said, in accordance with Order VI rule 17 of the Civil Procedure Code, the leave can be granted basing on terms that are just and mandatorily for the purpose of determining the real questions in controversy between the parties and not substitution of a newly case as it was held in the case of **Salum Chacha t/s Rahma Taylors versus The Loans and Advanced Realization Trust & 2 Others** (supra).

Further, the Advocates contended that, neither the evidence in the affidavit nor the arguments in the submissions show what are real questions in dispute or how the amendments in the application will serve the purpose of determining the real questions in dispute between parties. They also said that, the application brings to the court the prospect of introducing a counterclaim which is entirely a new case.

On consolidating the written statements of defence, the Advocates were of the view that, there could be never a clear question in dispute between the parties. In their view, the applicants have failed to show if there is another question in controversy between the parties and how the amendment sought can bring that unknown question to the forefront of the controversy. To them, they consider the application

failing if the applicants do not state the real question in controversy between the parties. Not only that, but also in their further view the pleadings do not disclose it and how the amendment sought will disclose that the question or those questions in controversy between the parties will be dealt with. In their considered opinion, the grant of leave to amend pleadings is not a blank cheque in which the applicant can insert, amend or alter a pleading as he wishes.

The learned Advocates, further argued that, the affidavit sworn by Denise Lucinda Bannister on behalf of all applicants shows lack of seriousness for seeking amendment on the basis of the words used "work in progress" and "not comprehensive enough" used by the applicants. In their view, allowing the application on such self-confessed shortcomings would be against the provisions cited by the applicants and the tenets embodied in the Civil Procedure Code about serving the ends of justice. To them, the applicants have failed to give satisfactory reasons for the delay to apply for the leave to amend and therefore the application is unmaintainable. That, the granting of leave shall throw back the suit to square one because the plaintiff may also be forced to seek reply to the amended written statement of defence in terms of Order VII rule 13 of the Civil Procedure Code (supra). As regard to the

counterclaim they said, it will bring a brand new suit that will call for all the processes involved in a fresh suit and costly in time, money and court resources.

The Advocates went on arguing that, the intended counterclaim is frivolous and vexatious. They cited paragraph 4.3 of the affidavit sworn by Denise Lucinda Bannister which states the counterclaim to be on injunctions wrongfully procured and orders of arrest and attachment of the applicants' assets situated within Tanzania and including the arrest and attachment of the third party. They said, parties in a suit cannot be sued for suing. That, the remedy available is the award of costs. That the applicant should be left to file a fresh suit for those alleged wrongs without clopping the proceedings in the present suit in the form of counter claim. That, the intended counterclaim is nothing but a way to jam the proceedings in the present suit. In their considered view, it has nothing to do with the real question in controversy between the parties.

In rejoinder the applicants' Advocates had nothing novel to add rather than reiterating the position in chief and stressing some few points already submitted upon. Also, the authorities referred to, were the same as it was in submission in chief. I will therefore not go into

deep on it following the substantive part of it being touched and substantiated. However, I will consider them in this ruling.

After the deliberation thoroughly done, I think, the point of departure between the parties to be abridged in the form of ruling is, does this application stands merit?

As of the submissions from both parties' Advocates, there is no dispute that, granting leave to amend pleadings is a matter of law and the same can be made at any stage of the proceedings. See the case of **Jovent Clavery Rushaka and Devotha Yipyana Mponzi versus Bibiana Chacha**, Civil Appeal No. 236 of 2020 CAT at DSM (unreported) where it was held that:

"It is a 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."

In principle, all Advocates of both sides do agree that, Order VII rule 17 of the Civil Procedure Code (supra) is of such effect and not decorative one in the law book and it provides for powers of the court to allow amendment of the pleadings. The point of

divergence appears on the reasons for granting leave for the amendment of pleadings to be done. Suffices to grasp from their submissions that, despite the fact that amending the pleadings is a right of any party, it is subject to the leave of the court after it has been certain on conditions provided by the law to have been fulfilled. Otherwise, the applications would never be granted.

In my view, the cited case of **Kilombero North Safaris Limited versus Registered Trustees of Mbomipa Authorities Association**, Civil Appeal No. 273 of 2017 (unreported) CAT at DSM laid down the principle which laid the conditional precedents to be fulfilled by the applicants for the court to grant the leave for amendment of the pleadings. Of course, those conditions were all argued upon by Advocates in this application from both parties. The Court of Appeal said;

*"...there are two conditions that need to be satisfied for amendments of pleadings to be allowed. **Firstly**, amendments can be allowed when such amendments are necessary for the purpose of determining the real question in controversy between the parties and **secondly**, is when the amendments are aimed at achieving justice between the parties. The test applicable on both two conditions is the consideration*

whether or not the proposed amendment is likely to occasion any injustice to the other side."

Thus, the very thing to consider is whether the application filed by the applicants has met those conditions. If the answer is in negative, then, the application will be avoided. But if, the answer is in affirmative, the leave to amend the pleadings will be granted. That grant will as a matter of law be in appreciating the depiction of the provisions of Order VI rule 17 of the Civil Procedure Code (supra) which states:

"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."

However, even though the conditional precedents set in the above authority interpreting provision of the law all coexist, still the court before granting such leave for amending of the pleadings must satisfy itself that the proposed amendment must not have the likelihood to occasioning any injustice to the other party to the application. This means that, even if the two conditional precedents coexist if the grant might lead to occasioning of injustice, the leave will not be granted.

Therefore, the application will be tested in those parameters. Now, according to paragraph 4 of the affidavit and the submissions made by the applicants' Advocates, the amendment is sought on the following grounds: **One**, for consolidation of the first two written statements of defence with that of the overseas defendants' to have one composite written statement of defence for all defendants. **Two**, by pleading additional facts based on the documents which came into the knowledge of the applicants after filing of their respective written statements of defence in the suit and which were not available to the applicants at the time of filing their respective written statements of defence. **Three**, by adding a counterclaim against the respondent for wrongly procuring injunctions and orders of arrest and attachment of the applicants' assets situated within Tanzania, including the arrest of a third party, Mr. Gesso Bajuta and attachment of assets of a third party named and styled as Kimemo Holding limited. Those are the matters to be tested with the conditional precedents enunciated in the above cited case law.

I prefer to start with the first one. It is apparent that the two written statements of defence sought to be consolidated in one are all related with the main suit, Civil Case No. 13 of 2022. This is to say, they all aim at defending the matter involving the parties. They will be used

in determining the matter in controversy also involving the parties of which without the question in controversy might be hard in determining and probably jeopardizing the right of the applicants. I am sure, keeping them as they are and consolidating them to make one, is the same if nothing new on the same controversy is impleaded. However, weighing against each other, between leaving the two defences segmentally or consolidating them it is my view that, consolidating them can make things easier when referencing for determination. It can also serve the time of the parties and of the court in adjudication. That being so, no injustice can be occasioned to the respondent. Therefore, the first one passes the test of warranting the court to grant leave for amendment of the written statement of defence.

The second as said is pleading additional facts basing on the newly documents came into the knowledge of the applicants after filing their written statements of defence. In the cited case of **Kilombero North Safaris Limited versus Registered Trustees of Mbomipa Authorities Association** (supra) the applicant sought amendment of the plaint so that the claim of financial losses and costs as well as the particulars of the said losses and costs pleaded therein could be amplified and substantiated by annexing and introducing a number of

receipts, invoices and other documents relevant to the said claimed losses and costs. The application was rejected by the High Court Judge.

In turning down the High court decision, the Court of Appeal considered the amendment to be justifiable as it was necessary for the purpose of determining the real questions in controversy between the parties. The real question in controversy between the parties in the instant matter is breach of contract. The applicants want to implead additional facts basing on those documents which came into their knowledge after filing the respective defences and attach those documents so that they can be used in solving the tilt between the parties. In the circumstance of this nature, denying them amendment is as good as determining just at their fate before the matter is being heard on merits. Thus, it is in the interest of justice to grant the application on this averment than refusing it because granting will never prejudice either party.

The respondent has submitted that, granting the application will make them to file the reply and therefore delay the disposal of the matter. It is true, granting the leave to amend the written statements of defence and consolidating them into one composite may enjoin the respondent to make reply for the newly pleaded facts basing on the

documents newly attached. But the evil of granting is lesser than that of not granting. Not granting may take permanently the right of the applicants than the disturbance the respondent may encounter on replying. By the way, justice hurried up sometimes may result into bullying the same which is difficult to revive.

The last thing is the amendment in order to file the counterclaim. In my settled view, counterclaim is not accommodated by the provisions of Order VI rule 17. Being applied through these provisions of the law is greatly misplaced. Counterclaim is a newly filed suit even though is filed within the pleadings aiming at defending the suit between parties. In law, in the counterclaim, the plaintiffs indirectly turn to be a defendant and the defendant turns to be a plaintiff when arguing the respective counterclaim. It is only there for serving costs, time and resources so long as it involves parties in controversy of the first claim. Counterclaim is the claim of the respondent against the plaintiff. Counterclaim can stand alone without the first claim. It does not constitute *res judicata*.

I have said all those in order to show that counterclaim does not aim at determining the real question in controversy between the parties. As I have said before herein, the controversy between the applicants and the respondent in the main suit is breach of contract. One can ask,

may counterclaim solve the rival of breach of contract between the parties while it is a new claim directed to the plaintiff? Obvious, the answer is no. It is so because it requires evidences different from that of the first claim as the two are distinct claims or disputes.

Up to this juncture I think, I have intricately considered both advocates' submissions at lengthy and accord them the wait they deserve. That being so, the leave for amendment of the written statement of defence is granted limited to consolidating the defences of overseas defendants and the first defence so as to have one composite and consolidated written statement of defence for all defendants and for pleading additional facts based on the documents which came into the knowledge of the applicants after filing of their respective defences of the suit. The inclusion of the counter claim is hereby refused because it is not covered under the provision used to move the court in this application.

This said therefore, leave is granted to the extent explained herein above. Consolidated written statement of defence be filed within 14 days from the date of this ruling. Costs to follow event. Parties to abide to the scheduling order of filing pleadings to be made in the proceedings of the main suit.

It is accordingly ordered.

DATED at **ARUSHA**, this 08th day of December, 2022



A handwritten signature in blue ink, appearing to read "J. C. Tiganga", is written over a horizontal line.

J. C. TIGANGA

JUDGE

