

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 369 OF 2021

(Arising from Civil Case No. 68 of 2020)

EQUITY BANK (TANZANIA) LIMITED..... APPLICANT

VERSUS

ABDULRAHMAN MOHAMED KWADU T/a

KWADU MIKOMA ENTERPRISES.....1ST RESPONDENT

YONO AUCTION MART & COMPANY LIMITED.....2ND RESPONDENT

RULING

Date of last Order: 22/02/2022.

Date of Ruling: 11/03/2022.

E.E. KAKOLAKI, J

This ruling is seeking to determine the applicant's application for two orders that; **firstly**, this court be pleased to order departure from the scheduling order in Land Case No. 68 of 2020 for the 1st Defendant to apply for an order to amend the Written Statement of Defence in Civil Case No. 68 of 2020 and **secondly**, that the applicant be allowed to amend her Written Statement of Defence. The application has been preferred under Order VI Rule 17, Order

VIII B Rule 23 and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] and supported by affidavit of Lucky Titus Kaguo, Applicant's principle officer. However, the same is challenged by the 1st Respondent who filed the counter affidavit dully affirmed by Abdulrahman Mohamed Kwadu to that effect.

Briefly before this court in Civil Case No. 68 of 2020, the 1st respondent sued the applicant and 2nd respondent for a declaration that the applicant's acts of recalling the loan facility amounting to Tshs. 901,308,312.00 is illegal, unjustifiable and both applicant and 2nd respondent are not allowed to exercise any right under the mortgage executed between the 1st respondent and applicant and other damages. As the matter had passed through mediation stage and when it was due for final pre-trial conference so as to frame up issues and proceed with hearing, the applicant filed this application seeking for the orders as herein above stated.

Both parties are represented as the applicant hired the services of Mr. Andrew F. Kombo, learned advocate from K&M (Advocates) while the 1st respondent enjoying the legal services of Mr. Chrispinus R. Nyenyembe, learned counsel from HexaLaw Attorneys. The 2nd respondent defaulted appearance in the main suit thus this matter proceeded ex-parte against her. When the matter came for hearing parties agreed to dispose it of by way of

written submission and both complied with the filing schedule orders save for the applicant who seemed to have waived her right to file rejoinder submissions.

It is trite law this court may at any stage of the proceedings allow either party to alter or amend his pleadings but upon proof that such amendments are necessary for the purpose of determining the real questions in controversy between parties. This legal stance is in accordance with the provisions of Order VI Rule 17 of the CPC which reads:

*17. 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 supplied)*

It is however to be noted that, for the court to allow amendment of pleadings must be satisfied of three conditions that, **one**, the application is made before the hearing starts, **second**, the amendment is necessary for the purpose of determining the real questions in controversy between the parties

and **third** that, such amendment can be made without causing injustice to the other party. The Court Appeal in the case of **George M. Shambwe Vs. Attorney General and Another** (1996) TLR 334 (CAT) when re-affirmed and restated the principle as stated by the Court of Appeal for Eastern Africa in the case of **Eastern Bakery Vs. Castelino** (1958) E.A 461, where the Court observed that:

*"We need also to reaffirm the principles upon which amendments to pleadings should be made. These were stated by the Court of Appeal for Eastern Africa in the case of **Eastern Bakery Vs. Castelino**(1). That Court stated at 462, It will be sufficient for the purposes of the present case, to say that **amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side.**" (Underline is mine)*

As regard to the powers of this court to depart to the scheduling conference orders, the law under Order VIII Rule 23 of the CPC states that, departure shall be made where the court is satisfied such departure or amendment is necessary in the interest of justice. And when the prayer for departure is

granted then applicant shall bear the costs unless the court sees and decides otherwise. The said Order VIII Rule 23 of the CPC provides thus:

*23. Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed **unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment,** unless the court directs otherwise. (Emphasis supplied)*

Now the issue for determination by this court is whether the applicant has met the conditions as stipulated in the above cited provisions and authorities. Submitting in support of this application Mr. Kombo, argued that the sought order for departure from the scheduling order is necessary since the applicant intends to file a counterclaim in respect of the claims raised by 1st Respondent in the main suit. And added the application is sought at this stage and after failure of mediation since before that, the applicant had sense of settling the matter out of court hence reluctant to apply for that departure to enable her seek for amendment of the Written Statement of Defence to include the counterclaim. As for the prayer for amendment of the plaint Mr. Kombo stated, the applicant is seeking to include her claim of

outstanding balance of Tshs. 528,263,463.00 arising from breach of credit facility agreement by the 1st Respondent which claim is necessary for this Court to determine parties' dispute conclusively and completely over the same subject matter under contest in the main suit. In his view, amendment of the WSD like plaint can be made at any stage as described under Order VI Rule 17 of CPC and well stated in the case of **Eastern Bakery** (supra) where the court held it is based on the discretion of the judge. He was of the submission therefore that this application has merit and the same be allowed by granting the sought orders.

In opposition to the applicant's submission Mr. Nyenyembe resisted the contention that, failure of mediation is a genuine fact that triggered this application by the applicant terming it an afterthought, as she could not have forgotten to include counterclaim of such a huge amount when filed her WSD on 17/06/2020. According to him if the issue as the necessity of the application basing on the proper time when the applicant was supposed to make it is determined it will be concluded that the reason advance is without justifiable cause. The learned counsel referred the court to the case of **Mohamoud Ameir Muhidin Vs. People's Bank of Zanzibar and Two**

Others (1999) TLR 28 HC-Zbar (Unreported) when the court reaffirmed the principle in the application for leave to amend the plaint and observed that:

- (i) *Both in law and equity an advocate is required to take proper steps at the earliest time to apply for leave to amend pleadings;*
- (ii) *The advocate of the Appellant was in possession of the plaint for a long time and was required to apply for leave to amend the pleadings;*
- (iii) *The delay in applying for leave to amend the plaint meant the Advocate had elected to proceed on the plaint as originally drafted.*

Basing on the above cited authority Mr. Nyenyembe was of the submission that despite of the law and precedents providing for amendment of pleadings before the hearing date, the issue of time before which an application for leave to amend is made must be considered by the court as parties are to act promptly. In this matter he submitted the applicant remained in possession of the pleadings for quite a long time since 17/06/2020 without seeking the alleged amendment something which amounts to negligence and inaction and afterthought on her part. Thus invited the court to dismiss the application with costs.

Having gone through the contesting submissions from both parties as well as the affidavit and counter affidavit in support and against the application, it is undisputed fact that this court has discretionary powers to grant the prayers as sought by the applicant in the chambers summons upon satisfaction that, she has met the stipulated conditions. To start with the prayer for an order of departure from the scheduling order in Land Case No. 68 of 2020, so as to allow the applicant to apply for amendment of her WSD, this court is satisfied that, in the interest of justice such departure is necessary to enable the applicant to apply for amendment of her WSD for the purposes of raising a counter claim. I so find since if the intended counter claim against the claims by the 1st Respondent is not raised now by the applicant in the main suit in which the subject matter under contest between parties is the same, there will be no other avenue for her to so do, so as to allow this court determine their dispute once and conclusively. It is true as submitted by Mr. Nyenyembe, the prayer has been brought after lapse of time. However, in my opinion that is not one of the factors to be considered when determining whether to grant the prayer or not as the law does not set time limitation within which the party to apply for departure from the scheduling orders. The applicant has therefore demonstrated sufficient

reasons to warrant grant of the prayer for departure from the scheduling orders.

On the second prayer for amendment of the WSD to include applicant's counterclaim to the 1st respondent's claims it is Mr. Nyanyembe's submission that the prayer is unwarranted as it ought to have been brought earlier when the applicant filed her WSD on 17/06/2020, as to bring it after failure of the mediation is an afterthought and calculated to delay disposal of the suit. I disagree with Mr. Nyanyembe's proposition that, the applicant's prayer is unwarranted as in my opinion the applicant has passed all the three tests as alluded hereinto above, for the court to grant the prayer for amendment of the WSD. **Firstly**, the prayer has been made before the hearing could take off as well stated in the case of **George M. Shambwe** (supra). Secondly, the fact that the applicant is intending to raise her counterclaim against the 1st respondent's claims over the outstanding balance of Tshs. 528,263,463.00, arising from breach of credit facility agreement by the 1st Respondent in which the later is challenging and seeking to restrain the applicant from exercising her right of realising the mortgaged property, raises a real issue for determination by this court. Thus it is necessary that, amendment be done so that the real question can be determined

conclusively, as to whether the 1st respondent owes the applicant the claimed amount and whether the applicant has the right to realise the due credit if any from the mortgaged property. Thirdly, there is no evidence that the 1st respondent will be prejudiced anyhow if the amendment is allow, since he has not indicated so in his counter affidavit. In the circumstances I find the amendment can be made without prejudice to any party as was rightly stated in the case of **George M. Shambwe** (supra) as one of the condition precedent for the court to grant the prayer of amendment of plaint or WSD. I say either plaint or WSD as the provision of Order VI Rule 17 of the CPC is without ambiguity categorically stating that the court may allow either party to alter or amend his pleadings meaning the plaintiff or defendant.

In the premises and for the fore stated reasons I am satisfied that the applicant's application has merit and the same is allowed. I proceed to grant the order for departure of scheduling orders in Land Case No. 68 of 2020 dated 13/04/2021 which is hereby departed to allow the applicant to apply for amendment of her WSD. Further to that the second prayer for amendment of the applicant's WSD in Land Case No. 68 of 2020 is hereby granted as prayed. The applicant is ordered to so amend her WSD to include

the counterclaim within fourteen (14) days from the date of this ruling. I order the amendment to be effected with costs on the applicant's side.

It is so ordered.

DATED at DAR ES SALAAM this 11th day of March, 2022.



E. E. KAKOLAKI

JUDGE

11/03/2022.

The Ruling has been delivered at Dar es Salaam today on 11th day of March, 2022 in the presence of Mr. Cristabela Madembwe, advocate for the applicant, Mr. Cripinius Nyenyembe, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

11/03/2022

