

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL CASE NO. 374 OF 1999**

**TANZANIA PORTS AUTHORITY..... PLAINTIFF**  
**VERSUS**  
**REZA COMPANY LIMITED.....DEFENDANT**

**RULING**

*Date of last Order: 15<sup>th</sup> Dec, 2022*

*Date of Ruling: 17<sup>th</sup> Feb, 2023.*

**E.E. KAKOLAKI, J.**

This ruling is seeking to address the concern raised by the defendant to the counterclaim (the plaintiff), on the legality of the said counter claim raised against the plaintiff in Civil Case No. 374 of 1999 by the defendant. For better understanding of the gist of this matter, I find it imperative to narrate albeit so briefly the facts leading to this case. On 11<sup>th</sup> October 1999, Plaintiff herein above (formerly Tanzania Harbours Authority) filed a suit against the above-named defendant in which the defendant contested by filing a Written Statement of Defence together with a counterclaim. It appears on 30<sup>th</sup> October 2007, the defendant successfully raised an objection to the effect that, Tanzania Harbours Authority was a non-existing entity in which on

22/10/2014 an order was entered by Court for the plaintiff to amend the plaint by 23/10/2014 and the defendant to file a reply on or before 31/10/2014 as hearing of the suit on merit was set for two consecutive days from 3-4/11/2014.

In compliance with the Court's orders, on 23<sup>rd</sup> October, 2014 the plaintiff filed the amended plaint including changes of plaintiff's names from Tanzania Harbours Authority to Tanzania Ports Authority. However, before the defendant could file her WSD, on 27/10/2014 the suit was struck out by the Court, following expiry of the scheduling order since 30/03/2001 , after parties were heard on that issue raised by the Court suo motu. Unpleased with the decision, the plaintiff (defendant in the counter claim) successfully appealed to the Court of Appeal, whereby the Court ordered the file to be remitted to this Court and for continuation before another Judge from where the successor Judge had ended up on 22/10/2014. On 05/05/2021, almost 1 year and 7 months after the file was remitted to this Court, the plaintiff prayed to withdraw her suit, the prayer which was granted. Following that order, the defendant prayed and was granted with an order to be heard on her counter claim, the order which gave birth of the issue, subject of this ruling, on the legality of the plaintiff/ defendant's counterclaim.

Both parties were then invited to address the Court on the raised issue and the same was disposed by way of written submission. The Plaintiff/defendant to the counterclaim was represented by Erigh Rumisha, learned State Attorney, while the defendant enjoying the services of Capt. Ibrahim Mbiu Bendera, learned counsel.

Supporting the raised issue, Mr. Rumisha started by quoting the case of **The Registered Trustees of Roman Catholic Archdiocese of Dar es Salaam Vs. Sophia Kamani**, Civil Appeal No. 158 of 2015, in which the Court of Appeal held that, in civil litigation, it is through pleadings where parties establish their cases before adjudication. In that context therefore, pleadings are road map which should show the destination in which parties to the case intended to reach. He then referred to the background of this case as stated above on the initial names of the plaintiff (defendant in the counter claim) before and after amendment as well as the filing of the WSD accompanied by Counterclaim by the defendant (plaintiff in the counter claim) on 24/01/2000, before the amended plaint that was filed on 23/10/2014. According to him, that presupposes that, the WSD and the counterclaim filed were filed and responded to towards a non-existing entity. Arguing further Mr. Rumisha had it that, after submission by parties on the

non-existence of the plaintiff (defendant in counter claim), the Court ordered parties to amend their pleadings, whereas the plaintiff was supposed to file the amended plaint on 23/10/2014, and the defendant to file her defence not later than 30/10/2014. Mr. Rumisha said, in compliance with the Court's order, on 23<sup>rd</sup> October 2014, the plaintiff filed the amended plaint changing the name of the plaintiff from THA to TPA. That, before the defendant had her defence filed as per the court order, parties were ordered by the Court to address it on the legality of the suit following expiry of the scheduling order, the result of which the suit was struck out. Following that development he was of the view that, from there nothing remained in the court's record except the amended plaint. He argued that, since the plaintiff was aggrieved with the decision, and appealed to the Court of Appeal whereby the file was remitted back and later on prayed to withdraw the suit, it is undoubtful that she was praying to withdraw the amended plaint which was the only document in court's records as the previous order of the court to the defendant (plaintiff in the counter claim) for filing the reply to the amended plaint was not yet to be complied with by her. It was his view that, there is no counterclaim present before this court as it was yet to be filed.

Mr. Rumisha persistently contended that, Court's order remained valid and binding until vacated by the Court of law with competent jurisdiction. It was his further submission that, when an order for amendment of the pleadings is made by the court and effected by the parties, nothing remains in court record as the previous ones cease to exist. He fortified his stance by citing the case of **Warner Vs. Sampson & Another**, (1958) 1Q.B 297, quoted with approval in the case **of Tanga Hardware & Auto parts Ltd & Six Others V.s CRDB Limited**, Civil Application No. 144 of 2005, and the Court of Appeal decisions in **Morogoro Hunting Safari Limited Vs. Halima Mohamed Mamuya**, Civil Appeal No. 117 of 2011 and **General Manager, African Barrick Gold Mine Ltd Vs. Chacha Kiguha and Five Others**, Civil appeal No. 50 of 2017 (both CAT unreported) as cited in the case of **Ashraf Akber Khan Vs. Ravji Govind Varsan**, Civil Appeal No.5 of 2017, CAT at Arusha, page 8-9.

In winding up his submission he argued that, litigation should come to an end, and since there was only an amended plaint which has been withdrawn, followed by refiling of Civil Case No. 81 of 2021, the defendant is having another chance to present her counter claim while responding the said plaint. It was his prayer that this Court issue an order that, on record there is no

counterclaim at all, thus the defendant cannot continue with hearing if the suit that does not exist on record.

Responding to the above submission, Mr. Bendera admitted the position of the law that, pleadings is what parties establish their cases before adjudication of the matter. However, it was his contention that, the said position does not support the plaintiff's arguments at all. He referred the Court to Order VIII Rule 9 (2) which states that, a counter claim shall be treated as a cross suit and it has the same effect as a plaint. He fortified his argument by citing the case of **NIC Bank of Tanzania Limited Vs. Hirji Abdallah Kapikulila**, Civil Application No. 561 of 2018 (CAT-unreported) which supports the position that, a counter claim is substantially a cross suit which should be treated, for all purposes as an independent action. In his view, though the pleadings herein were amended and the suit be struck out all this do not affect the continuance of the counter claim as it should be treated as separate suit. He supported his stance by citing the case of **Biabana Limited Vs. CRDB Bank Plc and Abana Limited**, Land Case No 137 of 2015, (HC-unreported) stating that, even if the main suit is stayed, discontinued or dismissed, counter claim can be proceeded with independently.

He went on arguing that, following the ruling of the preliminary objection raised by the defendant, the plaintiff was ordered to amend her plaint, before the court called parties to address it on the legality of the main suit after expiry of scheduling order, the resulted of which was to strike out of the main suit. He took the position that, the main suit was initiated by the plaint while the cross suit was initiated by the counter claim which was never touched. He contended that, all court's orders including that of the Court of Appeal did not relinquish the existence of the counterclaim. It was his contention that, the plaintiff purposely is evading to state the fact that, the case was struck out before the time for filling the Written Statement of Defence to the amended plaint by the defendant came to an end. In his view, blaming the defendant as suggested by the plaintiff for not filing a Written Statement Defence, whilst the ruling which struck out the main suit came before the time for her to file a Written Statement Defence is tantamount to an attempt to mislead this Court.

Mr. Bendera then attacked the case of **Tanga Hardware & Autoparts Ltd** (supra) cited by the plaintiff claiming that, the same is highly distinguishable to the case at hand as the former is concerned with the main suit and did not say that while the main suit is struck out the cross suit also gone. He

added that the counterclaim has not been amended, thus cannot cease to exist. He contended further that, the case of **Ashraff Akber Khan** (supra) relied on by the plaintiff's counsel is also distinguishable from this case at hand as in that case, when the plaint was amended the defendant filed another Written Statement of Defence without putting a counterclaim, which means the amended plaint there had no cross suit. He admitted that there were no Written Statement of Defence filed in this matter after the amended plaint was filed, as the plaint was struck out 3 days before expiry of the time allocated for the defendant to file her WSD. In concluding, Mr. Bendera maintained that the counterclaim is valid and it ought to be heard after the plaintiff's withdrawal of the main suit.

I have dispassionately considered rival arguments by the two legal minds and thoroughly perused the pleadings as well as the law applicable. The issue that calls attention of this court for determination is whether the counter claim before this court is tenable.

As can be depicted from the record, the first plaint was filed on 11/10/1999 and the Written Statement of Defence on 25/01/2000 accompanied with a counterclaim at issue. It is also uncontroverted fact by both counsel that, the amended plaint when filed on 23<sup>rd</sup> October 2014 by the plaintiff



(defendant in the counter claim) in compliance with the court's order of 22/10/2014, the defendant (plaintiff in the counter claim) never filed her Written Statement of Defence that would accompany the counter claim too. Further the record is unchallenged by both parties on the fact that, on 27<sup>th</sup> October, 2014, the main suit was struck out before the same was restored by the Court of Appeal and later on withdrawn by the plaintiff (defendant in the counter affidavit). And that, even after restoration of the main suit the plaintiff in the counter claim never sought leave of the Court for extension of time to file her amended WSD in compliance with the Court's order of 22/10/2014.

Now back to the issue as to whether the counter claim still exists or not, it is true and I embrace Mr. Bendera's submission that, as the law stand, specifically order VIII Rule 9 (2) of CPC, a counterclaim is the cross suit, thus even if the main suit is struck out or dismissed the counterclaim remains as it is treated as a cross suit. See the cases of **NIC Bank of Tanzania Limited** (supra) and **Biabana Limited** (supra). Such agreement aside, it is the well-established principle that, once the plaint is amended nothing remains as the previous ones cease to exist. The principle was enunciated in the case of **Morogoro Hunting Safaris Limited vs Halima Mohamed**

**Mamuya**, Civil Appeal No.117, which cited with approval the case of **Tanga Hardware & Auto parts Ltd and Six Others Vs. CRDB Bank Ltd**, Civil application No. 144 of 2005 (CAT-unreported) in which the latter case relied on the persuasive case of **Warner vs. Sampson & Another** [1958] 1 QB 297 in which it was held, inter alia that:

*"...once pleadings are amended, that which stood before amendment is no longer material before the court."*

See also the case of **Ashraf Akber Khan Vs. Ravji Govind Varsan** (unreported)

Applying the principle in above cited authority which I fully subscribe to, to the facts of this matter, it's my finding that, on 22/10/2014 when the order for amendment the pleadings was pronounced, all the documents on record ceased to exist. In other words both plaint and the WSD containing the counter claim by the defendant (plaintiff in the counter claim) ceased to exist.

Mr. Bendera tried to convince this court that since the main suit was struck out before expiry of the time for filling the Written Statement of Defence hence the counterclaim remained intact. With due respect to the learned counsel, I do not embrace that proposition. In my view it is fallacious to contend that the counter claim still exists simply because the suit was struck

out before the WSD was filed. The reason I am holding so is that, even if the suit was struck out before expiry of the time for filing the amended WSD, still defendant had ample time after the file was remitted to this Court to pray for extension of time to file the amended Written Statement of Defence in compliance with the Court's order of 22/10/2014, the right which she failed to exercise until when the main suit containing the amended plaint was withdrawn by the plaintiff on 05/05/2021. Her proposition cannot therefore derogate the long established principle of law that whenever the plaint is amended the former documents including the Written Statement of Defence and the Counterclaim cease to have any legal effect as they are as good as if never existed before. It is with immense respect I find Capt. Bendera's contention in this respect flawed and I choose to disassociate myself with it. The issue is therefore answered in negative as after Court's order of 22/10/2014 for amendment of the plaint which was fully complied with by the plaintiff (defendant in the counter claim) by filing the amended plaint without the amended WSD filed by the defendant or plaintiff in the counter claim, the formerly filed counter claim ceased to exist.

Before I pen off, I wish to take note and state though by passing that, as rightly submitted by Mr. Rumisha, the submission which was never

challenged by Capt. Bendera that, after withdrawal of her suit, the plaintiff (defendant in the counter claim) filed another suit in this Court Civil Case No. 81 of 2021 against the same defendant (plaintiff in the counter claim). That being the position, the defendant still retain the right to file the amended WSD with her Counter Claim in if so wishes, instead of pressing to continue with the non-existing suit (counter claim) in this matter.

In the event, it is the finding of this Court that, since there was no amended Written Statement of Defence filed before this court after the plaint was amended, there existed no counter claim by the defendant (plaintiff in the counter claim) to be entertained by this Court, as the withdrawal of the amended plaint (suit) by the plaintiff on 05/05/2021, brought to an end Civil Case No. 374 of 1999. Since there was no counter claim to constitute a suit as claimed by the defendant, I hold the present matter is incompetent before the Court hence is hereby struck out.

Each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 17<sup>th</sup> February, 2023

A handwritten signature in blue ink, appearing to be 'A. B. B.', with a stylized flourish at the end.

E. E. KAKOLAKI

**JUDGE**

17/02/2023.

The Ruling has been delivered at Dar es Salaam today 17<sup>th</sup> day of February, 2023 in the presence absence of both parties and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

17/02/2023.

