

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC.CIVIL APPLICATION NO. 354 OF 2022
(Arising from Civil Case No. 131 of 2019)

ASSEMBLE INSURANCE TANZANIA LIMITEDAPPLICANT

VERSUS

DELOITTE & TOUCHE.....RESPONDENT

RULING

Date of last Order: 6th Dec 2022

Date of Ruling: 10th Feb, 2023.

E.E. KAKOLAKI, J.

By way of chamber summons preferred under Order VIII Rule 23 and order VI Rule 17, of the Civil Procedure Code, [Cap 33 R.E 2019], the applicant has filed an application in this Court for the following orders; **firstly**, that this Court be pleased to depart from scheduling order made on 17th July 2020 to allow the applicant/ plaintiff to apply for leave to amend the plaint. **Secondly**, leave be granted to the applicant/plaintiff to amend the plaint in Civil Case No. 131 of 2019 for the purposes of determination of the real issue in controversy between the parties by attaching the following:

- (a) the engagement letter between the applicant and the respondent for the year 2014.
- (b) the full financial statement for the year 2013, 2014 and 2015 and the Forensic Investigation Final Report dated July 25,2016 with a cover/forwarding letter

And **thirdly**, for any other reliefs this Court may deem fit to grant.

The application is supported by three affidavits dully affirmed by Ms. **Tabia Masudi**, the applicant's General Manager and others sworn by Mr. **Focus Lutinwa**, the managing partner to the applicant's company and Mr. **Albert Lema**, applicant's advocate. Nevertheless, the application is strenuously challenged by the Respondent who filed the counter affidavit to that effect dully sworn by Mr. **Juvenalis Joseph Ngowi**, Respondent's advocate.

Briefly as gathered from both affidavits and the record in the main case in which this application is stemmed, before this Court in Civil Case No. 131 of 2019, the applicant sued the respondent for the payment of money Tsh. 2,291,327,684.01, being compensation for the loss suffered due to breach of contract and professional negligence. Upon completion of pleadings on 15/07/2020 scheduling orders were entered before the applicant on 08/09/2021 prayed for amendment of the plaint for the purposes of

determination of the real question in controversy amongst parties, the prayer which was cordially granted and effected by filing amended plaint pleading the years in which the alleged professional negligence occurred and attaching the necessary annexures. The suit was therefore set for final PTC on 21/04/2022, issues framed and hearing date set in which upon leave of the Court granted parties were ordered to proceed with production of evidence in Court by way of witness statements, as the applicant was ordered to file the said witness statements and serve the respondent 5 days before the hearing date which was set to be on 24/08/2022. The applicant's advocate couldn't file the witness statements as order as it appears on 12th August 2022, when invited the applicant and his fellow witnesses for witness preparations they discovered that, annexure CRB 4 (a) lacks the cover letter, and that, the financial statements for the years 2013, 2014 and 2015 attached in the amended plaint as annexure CRB 2(a), 2 (b), and 2 (c) includes only page No. 8 which is the opinion page, while the full financial statements for the year 2013 and 2014 has 45 pages and for 2015 has 47 pages. According to the applicant the said documents are necessary for proving the claimed negligence / breach of contract by the plaintiff/applicant in the main suit. Also, it is alleged the engagement letter for the year 2014

was not attached to the plaint. As the matter had passed through mediation stage and it was due for hearing, the applicant filed this application seeking for the orders as stated above, the application which is subjected to contest by the respondent as alluded to above.

The application was heard viva voce as all parties appeared represented. The applicant hired the services of Mr. Albert Lema learned counsel, while respondent enjoyed the legal services of Mr. Alex Mianga. It is Mr. Lema who staged on the floor first in submission in chief requesting the Court to adopt the affidavit of Tabia Massudi, Focus Lutinwa, Albert Lema to form part of his submission. Addressing the Court on the merits of the application he argued that, the request for the amendment and variation of the scheduling order is intended to enable the applicant to pray for amendment of the plaint. According to him, it is for the interest of justice that the scheduling order made on 19/07/2020 be departed since, under order VIII Rule 23 of the CPC the court has to grant first, the order for departure from the scheduling order for the applicant to be considered for her second prayer of amendment of the pleadings.

On the second prayer it was his submission that, the application is specific as it tends to amend the amended plaint in Civil Case No. 131 of 2019, so

as enable the court determine the real issue in controversy between the parties by attaching the engagement letter between the applicant and respondent in the year 2014, and final financial statement for the year 2013, 2014 and 2015, and investigation final report dated July 25th of 2016 with its cover or forwarding letter. He went on submitting that, as per paragraph 4 and 5 of the affidavits of Tabia Masoud, the financial statements for the year 2013, 2014 and 2015 were attached to the plaint as annexure CRB 2 A, 2B and 2C respectively, but the same included the opinion page only which is page 8, while the full statements for the years 2013, 2014 have 45 pages, and for the year 2015 has 47 pages which were not formally annexed to the amended plaint. The learned counsel went on submitting that, in making that second prayer, he is guided by Order VI Rule 17 of the CPC which requires such applications to be made only for the purposes of determining the real question in controversy. He was of the view that, as per paragraph 5 of the affidavit of Tabia Masoud and paragraph 6 of the affidavit of Albert Lema, the applicant has met the requirements of Order VI Rule 17 of the CPC as having the full financial statements of the year 2013, 2014, and 2015 in the amended plaint will enable this Court to determine the real question in controversy amongst the parties. According to him, there will be no

introduction of new cause of action because, the statements were pleaded by the plaintiff in the plaint filed in this court on 15/09/2021 specifically in paragraphs 8 and 9 of the plaint. He contended that the applicant's claim in the main suit is for year 2013 and 2014 audited financial reports, which were also attached by the respondent in the WSD and list of additional documents. Mr. Lema went on submitting that, another document touching amendment is the engagement letter between the applicant and respondent for the year 2013, in which the affidavit of Tabia Masoud states that, the same was not attached to the amended plaint. In his view, adding the said engagement letter will not amount to introducing new cause of action as the same was pleaded in the amended plaint filed on 15/09/2021 at paragraph 5. According to Mr. Lema, the same was the common document pleaded by both parties. He submitted that, the last document is Forensic investigation final report dated 25/07/2016 with a forwarding letter or cover letter. According to him, the report was annexed to the amended plaint without cover letter as annexure CRB 4 to paragraph 15 of the amended plaint. It was his prayer that the report be included and form party of the annexure. Mr Lema placed reliance on the case of Peter **Gembe and Another Vs. Abubakari R. Yusuph**, Misc. Land Case No. 29 of 2019, at page 10, where by this court

while citing the case of **George Shambwe Vs. Attorney General and Another** (1996) TLR (CA) stated that, amendments before commencements of hearing is allowed freely. Mr Lema further cited the case of **Kilombero Worth Safaries Ltd Vs. Registered Trustees of Mbomimpa Authorities Associations**, Civil Appeal No. 273 of 2017 at page 13 where it was stated that, amendments to pleadings sought before the hearing should be freely allowed if can be made without injustice to the other side.

Mr Lema expounded further that, in the above case while citing the case of **Central Kenya Ltd Vs. Trust Bank Limited** (2002) 2EA 365 the Court of Appeal said neither the length of the proposed amendment nor delay were sufficient grounds for denying leave to amend. He further referred the Court to page 14 of the same case where the court held that, efforts should be employed by the court to see that real issues in dispute are adjudicated by allowing parties to amend the pleadings where it is necessary and important to do so. Basing on the above submission Mr. Lema was of the view that, the amendment will not cause injustice to the respondent as most of the documents are common documents and she will have the right to file her amended defence if any in response to the said amendment. In winding up

he submitted that, should the court find out that costs be awarded the applicant is ready to so do.

In response, Mr. Mianga also started by seeking leave of the court to adopt the affidavit sworn by Juvenalis Joseph Ngowi to form party of his submission. He contended that, this application is incompetent since the applicant omitted to cite the provisions of order VII Rule 18 (1) of the CPC [Cap 33 R.E 2019], which according to him is the enabling provision for this court to grant the prayer for amendment of the plaint. According to him, failure of the applicant to cite the said provision of the law renders the application incompetent, and implored the court to so find.

On the merit of the application, Mr. Mianga submitted that, on 17/07/2020 when the matter was called for the first PTC and scheduling orders entered, both parties reserved their rights to file a list of additional documents to be relied upon. He said, on 8/10/2020, the final PTC was conducted before the case was adjourned several times for hearing, where on 08/ 09/ 2021 when the matter was called for hearing and the same did not take of as plaintiff prayed to amend the plaint, the prayer which was granted. According to him the amendments touched the name of the plaintiff as well as changes in paragraph 8, 9, 10, and 11 of the plaints. And further that, it is during this

time all the sought to be annexed documents were all pleaded. He lamented that, the applicant is seeking to amend the plaint for the second time now, whereby in the first amendment the scheduling order were departed. He was of the view that, even by relying on the three affidavits relied on by the applicants advocate, the application has no merit. In further view of Mr. Mianga, since the applicant had reserved her right to file a list of additional documents to be relied on before the hearing date, he does not see the reasons as to why she failed to exhaust that right instead of coming up with the present application.

Mr. Mianga went on submitting that, Mr. Lema has just mentioned the documents to be annexed when the amendment is granted but has failed to justify to the court as to how are they important so as to enable the court exercise its discretion. He was of the view that, the applicant has failed to convince the court as to why she failed to file the list of additional documents since 08/09/2021 until 26/08/2022 when this application was filed before the court. According to him if the court will grant this application the same will drug the case, hence causing unnecessary delay. It was his prayer therefore that, the application be rejected as if the same is granted will defeat the court orders of 13/06/2022 in which the applicant failed to comply with for

failure to file witness statements as ordered by the court. He was of the view that, this application prejudices the respondent's interest by delaying the case. He submitted that, since the applicant failed to file the list of additional documents before the hearing date, then the application be dismissed with costs. Mr. Mianga rested his submission by attacking the authorities cited by applicant counsel. According to him, Civil Appeal No. 273 of 2017 cited by the counsel for the applicant is distinguishable and irrelevant under the circumstances of this case as in that case there is nowhere it is indicated that, there was prayer for amendment for the second time. Regarding Misc. Land case application No. 291 of 2020 (HC), he contended the same supports his arguments as at page 11, this court refused to grant the amendment since the case had dragged in court for a long time and therefore would prejudice the respondent. He then reiterated his prayer for dismissal of the application.

In a short rejoinder, Mr. Lema started by addressing the submission that the application is incompetent for failure to cite the provisions of Order VII rule 18 (1) of the CPC, it was his strong submission that the cited provisions in the chamber summons are relevant and sufficient enough to move this Court to grant the sought prayers. According to him Rule 18 (1) of the Order VII

of the CPC referred by the respondent has nothing to do with the sought prayers.

Concerning the submission on the first amendment, he admitted that, on 08/09/2021 the applicant/plaintiff prayed to amend the name of the applicant. However, he was of the firm view that Order VI Rule 17 of the CPC does not bar the party to amend the pleadings for the second time and the respondent did not mention any. He went on submitting that, it is not true that on 08/09/2021 when an order for amendment of the plaint was made a departure was made from the scheduling order, according to him the scheduling order on record is that of 17/07/2020 in which the applicant seeks to rely on.

Concerning the list of documents to be relied on, it was his submission that, the documents sought to be annexed in addition were pleaded but not annexed, to him the proper course to be taken is to seek for amendment and not to add them in the list of additional documents to be relied upon.

With regard to the argument that the applicant has failed to show how the sought amendments are relevant it was his submission that, he successfully demonstrated the same and that the same is also mentioned in the prayers in the chamber summons that it is for the purposes of determining the real

question in controversy. He added, that the same is reflected at paragraph 4 and 5 of Tabia Massudi's affidavit, paragraph 5 of Focus Lutinwa's affidavit and in paragraph 7 of Albert Lema's affidavit.

Concerning the argument that allowing the application will defeat this court's order of 13/06/2022, it was his submission that, this court directed that the said order should wait the result of this application. Regarding the authorities cited, Civil Appeal No. 273 of 2017, he was of the view that, the same touches on the conditions for the grant of the amendments. Concerning Misc. Land Case Application No. 291 of 2020, he contended, the same cannot favour the respondent as it was the counsel for the defendant who was praying for an amendment of the defence when the matter was at the hearing stage, but in this case the hearing is yet to start. Basing on the above submission he reiterated his prayer for the application to be granted.

I have dispassionately gone through the chamber summons, affidavits, counter affidavit and the fighting submission by the parties. Before going into the merit or otherwise of the application, I wish to respond to Mr. Mianga's contention that the application is incompetent for failure to cite Order VII Rule 18 of the CPC. In my humble view, the same need not detain this Court. The reasons I so hold is that, the said rule provides for

inadmissibility of documents not produced when the plaint is filed and tells nothing about amendment of pleadings. For clarity, Order VII Rule 18 of the CPC reads:

18. (1) *A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not without the leave of the court, be received in evidence on his behalf at the hearing of the suit.*

In view of the above exposition of the law, I am at one with Mr Lema's submission that, the above order has nothing to do with the sought prayers. Thus, this contention is baseless and I dismiss it.

Reverting to the merit of the application, I find it also apposite to review the law governing amendment or varying of scheduling orders and amendment of pleadings which is the subject of this application. It is trite law that, this Court may at any stage of the proceedings but before commencement of hearing of the case 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 premised on the provisions of Order VI Rule 17 of the CPC which states:

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.*

As per the above order, for the Court to allow amendment of pleadings two condition must be satisfied that, **one**, the amendment is necessary for the purposes of determining the real question in controversy between the parties and **second**, that, such amendment can be made without causing injustice to the other party. The above position is also expounded in the case of **Kilombero North Safaris Limited** (Supra), at page 10 where the Court of Appeal had the following to say:

*“The position of the law on amendment of pleadings is settled. Besides the cases from the neighborhood jurisdiction ... it has been repeatedly reiterated by courts in our jurisdiction that amendments of pleadings can be made at any stage of proceedings **provided such amendments are necessary and important for determination of the real question in controversy between the parties and also provided they can be made without injustice to the other side.**”*
(Emphasis supplied).

Further to that, the Court of Appeal in the case of **George M. Shambwe Vs. Attorney General and Another** (1996) TLR 334

(CAT) re-affirmed and restated the principle as enunciated by the Court of Appeal for Eastern Africa in the case of **Eastern Bakery Vs. Castelino** (1958) E.A 461, that amendment of pleadings can be freely made before the commencement of hearing of the case and only, if it is made without causing injustice to the other side. In so doing the Court observed thus:

*"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.**"*

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

Now with the above understanding of the law in mind of this Court, the issue for determination by the Court is whether the applicant has met the conditions as stipulated in the above cited provisions and authorities warranting this court to vary or amend the scheduling conference orders of 15/07/2020 and order for amendment of the amended plaint as prayed by the applicant. To start with, I am proposing to determine first the second prayer by the applicant for leave to amend the amended plaint, since its disposal no doubt will determine whether it is necessary and in the interest of justice to grant applicant's first prayer for an order of departure from the scheduling order in Civil Case No. 131 of 2019. It is uncontroverted fact as deduced from the main case record that, on 08/09/2021 this Court departed from its scheduling orders of 15/07/2020, when granted applicant's prayer and ordered for amendment of the plaint allowing her to change names of

the party, plead specific years in which the claimed professional negligence by the respondent was committed, for the purpose of establishment of the real question or issue in controversy amongst the parties for determination by the Court and attachment of all necessary annexures, the amendment which no doubt was effected before the suit was set for final PTC on 21/04/2022, issues framed and hearing date set. Now the sub issue here is whether the applicant has met the two conditions for the grant of a prayer for amendment of the amended plaint as set out in the case of **Kilombero North Safaris Limited** (Supra). Mr. Lema says the conditions have been met as the sought amendment is aiming at enabling the Court to determine the real issue in controversy amongst the parties and that, if the prayer is granted will not prejudice the respondent anyhow as the applicant is ready to pay for the costs suffered, if so ordered by the Court. Mr. Mianga is of the contrary views submitting that, the prayer is without justification as the applicant who had reserved her right to file a list of additional documents to rely on during the hearing of the case, without assigning any reason failed to exhaust that right, instead resorted to the prayer for amendment of amended plaint which is aiming at delaying the case, and further that, as such the prayer is prejudicial to the respondent's rights, since if granted will

affect the stayed ruling in the main suit in which the applicant defaulted to file the witness statement, as the same will be predetermined. Thus, to him the prayer should not be granted.

Undisputedly the facts as gathered from the record in the main suit are that, when the matter was called for 1st PTC and scheduling orders adopted on 15/07/2020 both parties reserved their right to file a list of addition documents to be relied upon. It is also learnt from the second prayer by the applicant in the chamber summons as well as the submission by Mr. Lema that, the sought amendment of the amended plaint is for the purposes of attachment of the engagement letter between parties for the year 2014 and full financial statement for the years 2013, 2014 and 2015 as well as the Forensic Investigation Final Report dated July 25, 2016 and its forwarding letter, the documents which no doubt were pleaded in the amended plaint but not attached. In other words the applicant is seeking for amendment of the amended plaint to attach the documents only which were pleaded but not annexed therein on the pretext that the said documents are for determination of the real issue in controversy and not introduction of new facts. The law under Order VII Rule 14(2) read together with Order XIII Rule 1(1) both of the CPC, is very clear on the course to be taken when the party

seeks to rely on the documents which are in his/her possession or not to establish his/her case, that shall annex them to the plaint or list them in the list of documents to be relied upon and that, the said documents shall be produced at the first hearing of the suit. Rule VII 14(2) of the CPC provides:

*(2) Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, **he shall enter such documents in a list to be added** or annexed to the plaint. (Emphasis supplied)*

And Rule XIII Rule 1(1) of the CPC reads:

*1.-(1) **The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in court,** and all documents which the court has ordered to be produced. (Emphasis added)*

From the above exposition of the law and facts of this matter, I am satisfied and therefore of the agreement with Mr. Mianga's submission that, applicant's prayer for amendment of the amended plaint is unfounded hence untenable in law. The reason I am so holding is not far-fetched as **one**, all the documents sought to be annexed in the plaint by the applicant after grant of her prayer of amendment to the amended plaint, though not annexed were all pleaded and remained in her possession. **Second**, the

applicant having reserved her right to list them in the list of additional documents to be relied on during the hearing, without any justifiable cause failed to exercise or exhaust that right. **Third**, there is no mention by the applicant either in her prayer in the chamber summons or through the submission by Mr. Lema that, apart from attaching documents, in the intended amendment was intending to aver new facts in connection to the said documents for the purposes of determination of real issue in controversy between parties, warranting grant of the prayed order for amendment of amended plaint. With the above reasons I disagree with Mr. Lema's proposition that since the pleaded documents were not annexed to the amended plaint then the only available remedy to the applicant was to seek for amendment to attach them to the amended plaint as doing so is tantamount to going against the requirement of the law and applicant's reserved right of annexing the said documents in the list of additional documents to be relied upon as provided under Order VII Rule 14(2) of the CPC, and have them produced at the first hearing of the suit as provided under Order XIII Rule 1(1) of the CPC, which right as rightly submitted by Mr. Mianga was not exhausted. The issue is therefore answered in negative

as the applicant has failed to meet the conditions for the grant of the prayed order for amendment of the amended plaint.

With the above findings, I now move to the applicant's first prayer for amendment or varying of the scheduling orders of 15/07/2020 in the main suit Civil Case No. 131 of 2019, in which the issue is whether it is necessary and in the interest of justice to depart from the said scheduling conference orders to enable the applicant to apply for amendment of the amended plaint so as to enable this Court to determine the real issue in controversy between parties. I think with the findings above in the applicant's second prayer, this issue need not detain this Court much as the answer obvious is a **big no**. I so find as it is already held above that, the prayer for amendment of amended plaint is unfounded and therefore untenable in law, hence it is no longer necessary and not in the interest of justice to grant the first prayer. The issue is in negative response too.

In the event and for the fore stated reasons, I am satisfied that, the applicant's application is destitute of merit and the same is hereby dismissed with costs.

It is so ordered.

Dated at Dar es salaam this 10th day of February, 2023.



E. E. KAKOLAKI

JUDGE

10/02/2023.

The Ruling has been delivered at Dar es Salaam today 10th day of February, 2023 in the presence of Mr. Albert Lema, advocate for the applicant, Mr. Alex Mianga, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

10/02/2023.

