

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 429 OF 2022

EURO COMMERCIALS LIMITED.....APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LIMITED.....1ST RESPONDENT

NAMPULA AUCTION MART AND COMPANY LIMITED.....2ND RESPONDENT

EMMANUEL MBUGA.....3RD RESPONDENT

YUSUFU AMRI MBARAKA.....4TH RESPONDENT

RULING

Date of last Order 06th Dec, 2022

Date of Ruling 10th February, 2023

E. E. KAKOLAKI J

This ruling seeks to address the preliminary objection raised by the applicant inviting this Court to strike out the joint Counter Affidavit by the 1st, 2nd and 3rd respondents and order the hearing of her application for temporary injunction or interim orders to proceed ex-parte against them, for contravening the Court's order dated 01/11/2022 as the same is not contested by the 4th respondent who opted not to file the Counter Affidavit. It was in the argument of Mr. Gideon Opanda, counsel for the applicant that, on the 01/11/2022 the 1st, 2nd and 3rd respondents prayed to the court and

were granted with leave to amend their counter affidavit by having it signed and dated in the verification clause. He said, contrary to the Court's order which was restricted to signature and dating of verification clause, the 1st, 2nd and 3rd respondent without Court's permission filed an amended counter affidavit annexing additional annexures such as Ruling in Misc. Civil Application No. 71 of 2022 before this Court and the plaint in Civil Case No. 242 of 2020 concerning the same parties as well as some statements of accounts with different figures. Further to that he complained they removed from the filed counter affidavit the formerly annexed copy of Civil Case No. 150 of 2021 before this Court between the same parties. It was Mr. Opanda's lamentation that, the respondents' act of adding annexures in the amended counter affidavit and removal of the formerly annexed document without leave of the Court is tantamount to taking by surprise the applicant and a total violation of Court's order which is to be rewarded by striking out the said counter affidavit. He relied on the case of **Onesmo Kulwa Vs. Ole Nangole** (CAT) which however he failed to offer full citation nor supply its copy. He thus prayed for an order striking out the said counter affidavit and order for ex-parte hearing against the 1st, 2nd and 3rd respondents.

In reply submission Mr. Jonathan Mbuga for the 1st, 2nd and 3rd respondents resisted the applicant's prayer submitting that even the way the said preliminary objection was raised is against the known practice of filing the notice before the date hence this Court should struck it out as the respondents have been taken by surprise. On the merit of the said objection he argued that, it is a settled principle that an amendment under Order VI Rule 17 of the CPC is allowable but should not introduce a new cause of action which principle the 1st, 2nd and 3rd respondent adhered to strictly as no new cause of action was introduced as no new averment were made by them as alleged by the applicant. He said the added annexures were mentioned in paragraph 7 of the former counter affidavit but not annexed thereto, and even when not annexed the applicant would still have written them asking for their supply to her. According to Mr. Mbuga the prayer by the applicant for striking out the counter affidavit is untenable as under the jurisprudence of overriding objective principle the remedy is to strike out the documents which appears to be foreign in the counter affidavit. In view of the above submission he prayed the Court to dismiss the objection as prayed before. Mr. Mbuga's submission was supported by Mr. Sylvanus Mayenga, counsel for the 4th respondent who stated that since the purpose of

amendment is to allow the party to plead facts relevant for determination parties' real issue in controversy, the added or skipped documents are necessary for the purposes of determination of parties' real issue in controversy. Further to that he argued the applicant has not stated whether the additional annexures prejudiced her or not, hence her prayer should be disregarded.

In a brief rejoinder Mr. Opanda on the contention that respondents were taken by surprise with the objection responded that, leave was granted by this Court to proceed with the same so it was not a surprise to the respondents. Regarding to whether the respondent's act of annexing additional annexures is fatal or not he insisted the same is fatal as it is inconsistent with the order of this Court which directed for amendment of the verification clause by signing and dating it and not otherwise. According to him since Mr. Mbuga conceded to have made additional annexure in violation of the Court's order then the prayer by the applicant is relevant and pressed this Court to strike out the counter affidavit and order for ex-parte hearing against the 1st, 2nd and 3rd respondents.

I have dispassionately followed and considered the submissions by the parties and made a thorough perusal of the impugned counter affidavit

against the formerly filed. From both parties' submission and court record it is undisputed fact that on 01/11/2022 this Court's order in favour of the 1st, 2nd and 3rd respondents was to the effect that, should amend their counter affidavit by signing and dating the verification clause as prayed and not make additional annexures. It is also undisputed fact that in the course of effecting Court's order record indicated the said respondents added three additional documents in the counter affidavit which are ruling in Misc. Civil Application No. 71 of 2022, Civil Case No. 150 of 2021 before the RM's Court of Dar es salaam at Kisutu and some statements of accounts, and not the copy of Civil Case No. 150 of 2021 before this Court, alleged to have been removed from the said counter affidavit. That being the position the only question to be answered is whether the 1st, 2nd and 3rd respondents' act of violating the Court's order by filing the additional documents without its leave is punishable by striking out their joint counter affidavit and order for ex-parte hearing against them as prayed by Mr. Opande for the applicant. In my considered view that is not the right course to be taken by this Court being a temple of justice as its overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the CPC. See section 3A(1) of the CPC. My understanding of

the law governing the amendment of pleadings under Order VI Rule 17 of the CPC is that amendment may be made by the party in a manner and just terms, and such amendment must be for the purpose of determining the real question in controversy amongst parties. The manner and just terms include non-introduction of new facts or averments in the pleadings without leave of the Court. In this matter it is noted, no new averments were introduced by the 1st, 2nd and 3rd respondents in paragraph 7 of their joint counter affidavit as alleged by Mr. Opanda but rather annex of three documents above mentioned which are referred therein. Since there is no new averment in the said paragraph there is nothing to render the counter affidavit fatally defective to the extent of striking out the respondents' joint counter affidavit as submitted by Mr. Opande. As rightly suggested by Mr. Mbuga and correctly supported by Mr. Mayenga both learned advocates the proposition which I embrace the remedy under the circumstances is to expunge from the pleading the alleged annexed documents. The issue is therefore answered in negative.

In the premises and for the fore stated reasons, I partly sustain the preliminary objection by the applicant and proceed to order that, the ruling in Misc. Civil Application No. 71 of 2022, Civil Case No. 150 of 2021 before

the RM's Court of Dar es salaam at Kisutu and some bank account statements not forming part of the formerly filed joint counter affidavit by the 1st, 2nd and 3rd respondents on 28/07/2022 are hereby expunged from the joint counter affidavit duly filed in Court on 02/11/2022. It is further ordered that, this application proceed with hearing on merit.

Costs to follow the event.

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. Geneon Opanda, advocate for the applicant, Mr. Hance Mrindoko, advocate for the 1st, 2nd and 3rd respondents and Ms. Asha Livanga, Court clerk and in the absence of the 4th respondent.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

10/02/2023.

