

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

AT DAR ES SALAAM

CIVIL CASE NO. 166 OF 2018

ECO BANK TANZANIA LIMITEDPLAINTIFF IN C/ CLAIM

VERSUS

SHANA GENERAL STORE LIMITED.....1ST DEFENDANT IN C/CLAIM

SIKUDHANI ABDALLAH MSHANAV & HUSSEIN

**ABDALLAH MSHANA (As administrators
of the Estate of the Late Abdallah**

Idd Mshana.....2ND DEFENDANT IN C/CLAIM

RAJABU MSHANA3RD DEFENDANT IN C/CLAIM

HASSAN JUMA HUSSEIN.....4TH DEFENDANT IN C/CLAIM

ARUSHA ROYAL COURT LIMITED.....5TH DEFENDANT IN C/CLAIM

ILAMBI COMPANY LIMITED6TH DEFENDANT IN C/CLAIM

SIKUDHANI RAJABU.....7TH DEFENDANT IN C/CLAIM

RULING

7th December, 2022 & 17th February, 2023

POMO, J.

This is a Ruling on preliminary objections raised by the 1st, 2nd and 7th defendants against the amended Counter claim. The objections were

brought to the recognizance of this Court at different instances which were to the effect that;

- (i) *The plaintiff's amended Counter Claim is incurably defective for contravening the rules of amendment as per Order VI rule 17 of the Civil Procedure Code, Cap 33 R.E: 2019 by making additional, alteration and substitution of the new fact and new evidences in paragraph 1, 2, 3, 4, 5, 7, 8, 9, 10, 11 and 14 to his amended counter claim without leave of the Court.*
- (ii) *The honourable Court has no jurisdiction to entertain the counter claim as the same is res judicata.*

For a better understanding of the salient issues embroiled in this matter, I deem it necessary to highlight, albeit briefly, the factual setting giving rise to this case. The plaintiff in this counter claim alleges to have extended a loan facility to the 1st defendant herein in two occasions. First, on 6th June, 2011 at a tune of TZS. 1,500,000,000/= for the period of six months after disbursement and second, on 12th July 2012 in which the plaintiff had enhanced the loan facility to TZS. 2,400,000,000/=for a period of 12 months. The properties alleged to have pledged as collateral were Plot No. 133, Block "A" Farm 181/82 under Certificate of Tittle No. 4612 and Plot No. 134 Block "A" Farm 181/82 under certificate of Title No. 4709; both

situated at Moshi municipality and registered under the names of 2nd defendant, First ranking fixed and floating debenture in the 1st defendant's name, Personal Guarantees and indemnity of the 2nd, 3rd and 4th defendants and chattel mortgages over different assets owned by the defendants.

It is apparent that, the 7th defendant and the late Abdallah Idd Mshana (2rd Defendant) were spouses and it appears the 7th defendant had instituted a land case in the High Court of Tanzania at Moshi against the plaintiff and the rest of the parties, purposely to challenge the validity of the mortgage executed between the plaintiff and her husband. Solely, the said case predestined to contest that there was no spouse consent given by the 7th defendant in respect of mortgaging the two mentioned landed properties. The said case was registered as Land case No. 7/2018 and it was deliberated in favour of the 7th defendant that, the said mortgage was voidable for lack of spouse consent and the plaintiff herein was ordered to surrender the title deeds of the said plots to the husband of the 7th defendant.

In this instantaneously matter, the Plaintiff herein has sued the Defendants jointly and severally vide a Counter Claim, among other things it prays for recovery of its loan facility and the interest thereof.

As alluded earlier, the case was met with two preliminary objections. In arguing the said objections, the defendants were represented by Messrs Jerome Joseph Msemwa and Emmanuel William Kessy, learned advocates while Mr. Zuri'el Kazungu, learned advocate represented the plaintiff. The hearing was conducted by way of written submissions. The confronting parties filed their rival submissions respectively in support and in opposition to the said objections.

In support to the 1st point of objection, the defendants' counsels accentuated in generality that, on 28th May 2021 before the predecessor Judge (Hon. Banzi, J), the plaintiff had prayed and was granted a prayer to amend its counter claim by only removing the name of the 2nd defendant, one Abdallah Mshana (deceased) in lieu thereof to insert the names of Sikudhni Abdallah Mshana and Hussein Abdallah Mshana as Co-administrators of the estate of the late Abdallah Mshana. However, according to the learned counsels, the plaintiff exceeded the limit and went beyond the respective order of the Court by amending the substance of the Counter claim without leave of the Court.

The learned counsels for defendants itemized the paragraphs which reflects such a mischief including; paragraphs 1,2,3,4 and 5 which introduces address of the parties, paragraph 6 which was added the word "and further",

paragraph 7 introducing a new letter dated 6th June 2011 and annexure "Ecobank-1", paragraph 8, a debenture deed which is annexure "Ecobank-3", paragraph 9, the entire arrangement of paragraph 10, annexure "Ecobank-5" which are copies of mortgage deeds while in the original "Ecobank-5" contained copies of bank statements. Annexure "Ecobank-6" contains debenture deed while the former's "Ecobank-6" was a land form 54A dated 26.09.2018. Annexure "Ecobank-7" contains joint personal guarantees which was not pleaded, Annexure "Ecobank -8" contains copies of charges of properties which did not appear in the former. Paragraph 11, 12, 13, 14 and 15 are new matters not pleaded in the original.

It was their preposition that, the plaintiff ought to have only amend to the extend the order directed. To bolster their argument, they cited the case of **MHAMAL & CO. (T) LIMITED vs. ADIL BANCORP LIMITED & OTHERS**, Civil Case No. 102 OF 1999 (Unreported) to which this Court had this to say while relying in the case of **AMIN vs. PATEL** (1968) H.C.D 256, that: -

"When Courts gives limited rights of amendment, the said amendment should always be limited to the authority given by the Court. The amendment should not be allowed to introduce new things...this leads me to conclusion that, the amendment in

the plaint had exceeded the authority given by the Court and such amendment must relate only to the motor vehicle TZJ 3698 as per the order of the Court made on 13th August 1999.”

In reliance to that, the learned counsels for the defendants prayed for the Court to struck out the Counter claim with costs as it is the appropriate remedy. To buttress their point, they cited the case of **Mariam Shamte and 70 Others vs. Alpha Educational Center Limited**, Land Case No. 74 of 2021.

On another limb of objection, it was the defendants’ counsels view that, the matter is *res judicata* basing on the ground that, the loan facility which is the subject matter of the claims has already been determined by the High Court of Tanzania at Moshi in Land case No. 7 of 2018. They then cited section 9 of the Civil Procedure Code, [Cap 33 R.E: 2019] which restricts suits from being reopened once they bears similar parties, subject matters, once heard and finally decided with a competent Court. To cement on that the cited the case of **The Registered Trustees of Chama Cha Mapinduzi vs. Mohamed Ibrahim Versi and Sons, Ali Mohamed Mohamed Versi**, Civil Appeal No. 16 of 2008 (Unreported) which explain on the same.

To address on the elements of *res judicata*, the leaned brothers explicated that, *one*, in the present counter claim the parties are similar with the former suit instituted at Moshi, save that Albert Gasper Msando and Joseph Nuwamanya in a former counter claim were sued as receiver and agents of the plaintiff. *Two*, the subject matter is the same with that of the former case (land case No. 7/2018) as both claims originate from the loan facility granted by the plaintiff to the 1st defendant to which the two landed properties were put as security. *Three*, the counter claim litigates under the same title as in the former land case No. 7/2018. *Fourth*, the former land case at Moshi has already been concluded and *Fifth*, the subject matter of the former suit was TZS. 3,900,000,000.00 and the security was located at Moshi municipality thus the High Court of Tanzania at Moshi District registry had requisite jurisdiction to adjudicate.

On the other hand, Mr. Kazungu in respect of the 1st objection argued that, the plaintiff did comply with the Court order as there were no any material or substantial changes, other than normal changes. According to the plaintiff's advocate, the contents of paragraphs 1, 2, 3, 4 and 5 do contain addresses of defendants for services and not new facts.

Mr. Kazungu emphasized that, the contents of paragraph 7 refer to the credit facility to a tune of TZS. 1,500,000,000/= which is the content reflected at paragraph 2 of the original counter claim, annexure "Ecobank-1" is reflected at paragraph 4 of the original Counter claim. He insisted that, the facility letter dated 10th June 2011 was not mentioned as alleged by the defendant. Further paragraph 8 encompasses securities pledged to secure credit facilities reflected in the contents of paragraph 5 of the original counter claim, He excused annexure "Ecobank-3" that it appears for annexed debenture due to renumbering of annexures, Paragraph 9 of the amended Counter claim that it covers the facility letter of 12th July 2011 to a tune of TZS. 2, 400,000,000/= which according to him, the facts are reflected in the contents of paragraph 3 and 4 of the original Counter claim.

Furthermore Mr. Kazungu proceeded that, paragraph 10 of the amended Counter Claim reflects what was stated in paragraphs 5 and 6 of the original one. That annexure "Ecobank-7" in the amended is reflected in paragraph 5 of the original and it was annexed as annexure "Ecobank-2". About paragraph 10, the plaintiff's counsel, he stressed that the alleged additional words are mere assertions as the defendants' counsels have not pointed out such words.

Mr. Kazungu stiffly submitted that the contents of paragraph 11 of the amended counter claim are merely elaborative of the very restructuring arrangements for the credit facilities which is reflected under paragraph 4 of the original counterclaim. Moreover, paragraph 12 and 13 of the amended have been reflected under paragraphs 7 and 8 of the original Counter claim, paragraph 14 of the amended with paragraph 10 of the original both are in respect to statutory Notice of default, paragraph 15 of the amended with paragraph 11 of the original counter claim.

Mr. Kazungu eloquently submitted that, the case cited by the defendants' counsels of **Mhamal & Co. (T) Ltd vs. Adil Bancorp Ltd** (*supra*) is distinguishable since in the case at hand, there is no material or new things introduced through the amendments. He explicated that, the amendments made are permissible as they are necessary to determine the real questions in controversy and they do not occasion injustice. To cement, he cited the case of **M/S JUKA SECURITY vs. The board of Trustees of the National Social Security Fund**, Civil Case No. 210 of 2017, High Court of the United Republic of Tanzania, Dar es Salaam District Registry, at Dar es Salaam (Unreported).

The plaintiff's counsel also invited the Court to make reference to the decision in **Mwenge Gas and Lub Oil Ltd vs. University of Dar es**

Salaam, Civil Case No. 311 of 1999, High Court of Tanzania, at Dar es Salaam (Unreported) to which this Court, upon realising that the amendment done could not introduce new cause of action, it proceeded to consider the plaint intact.

On rearranging of paragraphs and annexures, Mr. Kazungu insisted that it does not contravene Order VI rule 7 of the Civil Procedure Code. His conclusive view point was that, even if this Court will find that, the plaintiff's amendments had contravened the Court order, the Court should use its discretion under section 95 of the Civil Procedure Code for the ends of justice, and proceed with the case since the defendants have responded to the counter claim.

On the second limb of objection, Mr. Kazungu technically was not subscribe to the defendants' preposition that this matter is *res judicata*. His grounds of denial were as follows; *one*, the dispute in the case No. 7 of 2018 was only in respect of mortgage which is one of the securities secured the exposure of the advanced credit facility which was not the subject matter of that suit but this suit. *Two*, in as far as section 9 of the Civil Procedure Code is concerned, as to the **first test**, the parties are not completely the same but he went further to state that, even if it is assumed the parties are the same still that isn't enough. He cited the case of **Gaming Management**

(T) Ltd vs. Gaming Board of Tanzania [2008] 1 EA 110, to which the Court at page 126 had this to say:-

"I have also held that, though the parties in the two cases could be the same, the issues are so dissimilar that even section 8 of the Civil Procedure Code Act could not be applied to stay the present suit, so that there can be no status quo to maintain. "

As to the second test, it was the plaintiff's argument that, the subject matter in land case No. 7 of 2018, was absence of spouse consent in creation of mortgage, while the subject matter in this instant case is in respect of breach of credit facility agreement, which resulted for the claim for repayment of outstanding credit facility.

Third test, it was his argument that, parties in this Counter claim are not litigating under the same title as that in Land Case No. 7 of 2018.

As to the fourth and last test, the learned counsel admitted that, the matter in Land case No. 7 of 2018 was heard and finally concluded by the competent court but the claim in it, does not have any nexus with the claim in this suit. According to Mr. Kazungu, Land case No. 7 of 2018 forms a small part of this suit as it has to do with one of the securities pledged to secure the advanced credit facility by the plaintiff. He concluded that, if the Court

considers the pleadings and the decision reached in the previous suit it may find only prayer No.5 of this case being affected which is an alternative prayer that does not even bearing if expunged.

Having digested the submissions of both parties, it is now prudent to address the points of objection raised by the defendants to see if they are worthy. Basing on the nature of the two, I choose to begin with the second point of objection in which the contention is premised on the protest that this case is *res-judicata*. I opt to do so basing on the reason to be apparent in the due course.

I need to emphasize that the doctrine of *res-judicata* can only be successfully invoked if key conditions set out under section 9 of the Civil Procedure Code (*supra*) are met. These conditions are:

- (i) *There must be records to show that the judicial decision was pronounced by a court of competent jurisdiction;*
- (ii) *That the subject matter and the issues decided were the same or substantially the same issues in the subsequent suit;*
- (iii) *That the judicial decision was final; and*
- (iv) *That it was in respect of the same parties litigating under the same title.*

See: Mulla, the Code of Civil Procedure, 16th Edn., Vol. I at p. 173; ***Umoja Garage v. NBC Holding Corporation*** [1997] T.L.R 109 (CA) and ***Esso Tanzania Limited v. Deusdedit Rwebandiza Kaijage*** [1990] T.L.R 102 (CA).

The narrow question arising from the foregoing is whether the subject matter and issues in the decided case are the same or substantially the same in the instant matter. The answer given by the defendants' counsels is that they both originate from a credit facility issued by the plaintiff to the 1st defendant. While the answer may sound correct, the truth of the matter is that, whereas the loan facility serves as the common denominator in both of the matters, its application in these matters is profoundly varied. The expression of merits in these two cases is different. The Land case No. 7 of 2018, its purely objective was to debarring the mortgage of the two plots basing on the very reason that, there was absence of a spouse consent. Whilst, this case at hand, the main purpose as depicted from the Counter claim itself, is for recovery of the amount advanced as credit by the plaintiff which involves a number of collaterals apart from the two plots which their status as to mortgage was in issue in Land case No. 7 of 2018. Henceforth,

It is my humble view that, the two cases involve two different subject matters and thus, this at juncture this test falls shot.

In the premises, I am fortified in my view by the holding that, testing the other grounds won't save any purpose but rather it will be an academic exercise as all elements itemized under section 9 of the Civil Procedure Code must co-exist for *res judicata* to stand. The fact that, the two cases were in respect of different subject matters as it has been propounded, I see it apt to end here to overrule the second Preliminary objection which in so far as one of it's element of proving, falls shot.

As to the first objection relates to the orders of this Court dated 28th May, 2021, the gist of it is that the counter claim is bad in law since the amendments therein are beyond the orders of this Honourable Court. I have given a look at the orders of this Court. It is indeed a fact that, on the 28th May 2021, this Court granted a prayer as requested by the counsel of the plaintiff in this Counter claim. The prayer made by the learned counsel for the plaintiff was in respect of substituting the name of the late Abdallah Idd Mshana with the names of the Co-administrators of his estate. The Court granted the prayers. It is undisputed fact that, the prayer to amend the

Counter Claim was specific, meaning that, the amended counter claim was to reflect the said changes as sought.

The plaintiff's counsel hasn't denied that the order of this Court of 28th May 2021 was in respect of inserting the names of the administrators of the estate of the late Abdalah Idd Mshana. For easier of reference and **ex tensio**, the following is an excerpt of the Court Proceedings of 28th May 2021 and the respective Order thereof:-

"Mr. Kessy, Advocate: Madam judge after consulting with the appointed administrators who are also the directors of 1st plaintiff, they have no interest to prosecute the suit following the death of the 2nd plaintiff. In that view , we pray to withdraw the suit and since we have no wasted court's time, we pray that the same be withdrawn without costs.

Mr. Msando, advocate: On our side we do not have objection of prayer by the plaintiff but since there is a counter claim, we pray to proceed with the counter claim. We also pray for amendment of the pleading so as to include the administrator of the estate of the 2nd defendant. We also pray to be availed with particulars of the administrators, to that effect, we pray to file our amended Counter Claim within seven days. Concerning the costs, we leave it to the Court.

Mr. Kessy Advocate: In respect of particulars, they are two administrators; Sikudhani Abdallah Mshana and Hussein Abdallah Mshana.

If the defendant is still interested with the Counter claim, let the matter come for 1ST PTC and necessary orders of amendment be issued,

Order:

Following the prayer by counsel for plaintiffs which was not objected by the defendant, the main suit is hereby marked withdrawn without costs. Nonetheless, since there is a counter claim the same shall be proceed with 1st PTC on 8/7/2021 at 0830 hours. The prayer by Plaintiff in Counter claim to amend their pleading is granted. The same to be filed on or before 4/6/2021. Amended WSD to be filed on or before 18/6/2021.

Signed

28/5/2021". End of quote

In my understanding, the changes were very much limited to the prayer the plaintiff had made. The plaintiff's counsel had succumbed that no any material or substantial changes, other than "normal changes" were made, but as I look at the changes made from the original Counter Claim to which the plaintiff's counsel had admitted to have done them, I hesitate to subscribe to his contention. Technically, I do agree with the learned counsels for the Defendants that the amendments to the Counter claim went overboard without leave of the Court. The prayer by the plaintiff was very specific and the order of the Court was in respect of the specific prayer by the plaintiff's counsel but the changes have involved paragraphs, annexures

and their re-arrangements without seeking first leave of this Court. Consequently, from this view point, I find all the cases cited by the plaintiff under circumstances are so distinguishable.

It is more than ever that this Court and the Apex Court of the Land have condoned the act of non-compliance to the Court orders. Imitating the wisdom of the learned judge Hon. Msafiri J, in **Isdory Joseph Mwepongwe & 5 Others vs. Ahamed Mohamed Soud (Administrator of the deceased estate of Omari Salum Soud) & 6 Others**, Land Case No. 167 of 2021, High Court of Tanzania-Land division, [TANZLII-25/10/2022] (Unreported), when confronted with alike circumstances upon noticing that a party had amended the pleading beyond the limited order without leave, had this to say at page 9:-

"The order of the Court of 07/12/2021 was specifically on the amendment of the plaint to add the Commissioner for Land as a defendant in this suit and nothing else. Later there was an order to amend the plaint when the then 3rd plaintiff one Peter Peter Junior prayed to withdraw from the suit. In the circumstances, I am forced to agree with the objection raised by the 2nd, 3rd, 4th and 5th defendants that, the plaintiffs have failed to comply with the Court's order dated 07/12/2021 and went beyond that order and make amendments on the plaintiffs, by removing some and adding new

ones without notifying the Court and seeking leave to do that. Going contrary to the Court's order is tantamount to Court contempt and cannot be tolerated. Basing on the above findings, I sustain the second limb of preliminary objection and I struck out this suit with costs.” End of quote

In the upshot of all these, I hold and find that the 1st objection is fertile of fruits and I sustain it. I proceed to struck out the Counter Claim with Costs.

It is so ordered.

Right of Appeal explained

DATED at **DAR ES SALAAM** this 17th day of February 2023.



MUSA K. POMO

JUDGE

17/02/2023

