

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 462 OF 2022

(Arising from Civil Case No. 35 of 2021)

THE PEOPLE'S BANK OF ZANZIBAR LIMITED APPLICANT

VERSUS

LULUA INVESTMENT LIMITED.....1ST RESPONDENT

BARAGHASH GHALIB KHALID.....2ND RESPONDENT

RULING

19th December, 2022 & 10th February, 2023

MWANGA, J.

This ruling is in respect of prayer to depart from the scheduling order made on 9th September, 2022 for filing witness statement(s) in order to pave way for the applicant to make amendment of the plaint. That, the applicant is seeking such amendment to accommodate important facts that arose after

the suit had commenced ought to be necessary in determining the real controversy between the parties.

The facts agitating such a prayer were deposed under paragraphs 2 to 7 of the affidavit. It was stated by the principal officer of the applicant in his affirmed affidavit that, the applicant filed a main suit in Civil Case No.35 of 2021 before this court against the respondents claiming for, *interlia* payment of USD 673,424.72 as on 29th December, 2020 being unpaid balance on the facilities under the Islamic banking in favour of the 1st defendant. The facility was secured by the 1st defendant's interest on Plots No. 10 &11, Block 12 Kariakoo, Da es Salaam and house comprised in the certificate of land transfer by lease No. 001789 dated 17th March, 2014 situated at Bwejuu area, Unguja-Zanzibar in the name of the 2nd Respondent.

Upon completion of the pleadings, the scheduling order was made and on 15th September, 2022 parties were ordered to file respective witnesses' statements before commencement of the hearing which was fixed on 10th November, 2022.

By exercising powers under the mortgage, the plaintiff realised the mortgaged Unguja property for Tshs. 747,945,251.00 which was applied to

reduce the debt from the claimed amount of USD 673,424.72 to USD 348,950.75.

According to paragraph 6 and 7 of the affidavits, the applicant calls for amendment of the plaint to enable parties to litigate the actual facts in connection with the reduced claim which shall reshape and narrow down the issues to be decided. Further to that, the 2nd respondent having filed court proceedings in Zanzibar in Civil Case No. 48 of 2019 with respect to Unguja property, the grant of such order shall enable parties and the court to avoid dealing with matters being litigated and pending on another court.

The application is fenced under Order VI Rule 17 and Order VIIIA Rule 4 of the Civil Procedure Code, [Cap. 33 R.E 2019] and it is supported by affidavit of Attiye Mohamed, the principal officer of the applicant.

Per contra, the respondents filed a joint counter affidavit affirmed by Maulid Msana, the principal officer of the 1st respondent. In their counter affidavit, it was deposed at paragraph 4 that realization of the security of the applicant was done before institution of this suit and was done illegally and prematurely. Elaborating further at paragraph 5 and 6, it was deposed that, such institution of the suit was done in defiance of court order by the High

Court of Zanzibar in Civil Case No. 48 of 2019 and that, the grant of such order will pre-empt the counter claims raised by the respondent herein

At the hearing and in support of the application, Mr. Adronicus Byamungu, the learned counsel adopted the affidavit. He cited the High Court decision in **Kenafic Industries Ltd Vs. Lakairo Industries Group Co. Ltd & Another**, Misc. Commercial Application No.73 of 2021 whereby the court granted leave to amend the plaint on the basis that; **one** the sought amendment would not change the original cause of action but, how it would lead to effective adjudication of the case. **Two**, the grant shall aim at avoiding multiplicity of the suit which would be inevitable in case leave to amend is refused and **three**, where the application is made on good faith.

On account of further clarity, the learned counsel contended that no injustice shall be occasioned to the respondents in case prayer for the amendment is granted. It was his view that, it is fairly and in the interest of justice that the same claim shall not be adjudicated in two different courts at the same time, taking into account that the proposed amendment is not intended to change the nature and character of the case neither to bring a fresh claim.

The learned counsel Ms Christabella Madembwe strongly opposed the application and she adopted the counter affidavit. The learned counsel cited the authorities in **Kilombero North Safaris Limited Vs. Registered Trustees of Mbomipa Authorities Association**, Civil Appeal No. 273 of 2017 & **Equity Bank Tanzania Ltd Vs Abdulrahman Mohammed Kwadu Trading t/a Kwadu Mukoma Enterprises and Another**; Miscellaneous Civil Application No. 369 of 2021 (both unreported cases). According to the authorities, departure from the scheduling order needs satisfaction by the court that; **one**, the application must be made before the hearing starts, **two**, the amendment is necessary for determining the real questions in controversy between the parties and **three** that, such amendment can be made without causing injustice to the other party.

According to the learned counsel, allowing amendment of the plaint would not give the court opportunity to determine the real questions in controversy because the intended amendment seek to remove or deal with an issue in the main case concerning property in Zanzibar, of which the counter claim of the respondents seek order of the court to declare that such sale of the property be nullified. It was her submission that, such amendment will prejudice the interest of the respondent. Finally, the learned counsel

contended that, if the amendment is necessary the applicant shall opt to withdrawal his claim as he need to change the amount claimed.

The learned counsel for the applicant re-joined further that, there is a Civil Case No. 48 of 2019 instituted in Zanzibar prior to the filing of this suit and that parallel trial shall cause injustice to the parties. It was his contention that, the counter claim is an independent suit and the respondents are not prevented from pursuing it, if they so wish even if the call for amendment is granted.

From the above submission of both learned counsels, and after having considered the dispositions; the issue is whether it is appropriate for the plaint to be amended without violating the standard set by law. From the authorities cited by the learned counsel, that is (**Kenaftric Industries Ltd Vs. Lakairo Industries Group Co. Ltd & Another;(Supra) Kilombero North Safaris Limited Vs. Registered Trustees of Mbomipa Authorities Association, (Supra) and & Equity Bank Tanzania Ltd Vs Abdulrahman Mohammed Kwadu Trading t/a Kwadu Mukoma Enterprises and Another (Supra)**) one of the conditional precedent for the Court to allow amendment of the plaint is where the applicant has been made in good faith.

In the present application, the applicant is stating that the property in Bwejuu Unguja -Zanzibar has been realised by the applicant, the facts which is not disputed. It was also the applicant's fact that, there is a Civil Case No. 48 of 2019 pending in Zanzibar in respect of the same subject matter. In fact, in the respondent's counter affidavit at paragraph 4 and 5 subscribed to the facts, the application is made in good faith.

That goes without saying that, litigating on the same subject matter between parallel court system do not aim at effecting the rights of the parties but, rather entertain multiplicity of suits cause confusion not only to the parties but also to the two courts where this matter is being adjudicated. I do not find it judicially health to have such parallel cases in two different court system. It is my considered view that, it will not serve the ends of justice.

Again the application for amendment of the plaint should be allowed if such amendment is necessary, relevant and relate to the controversy involved between the parties and should not be refused on technical grounds. The court of appeal in **Kilombero North Safaris Limited Vs. Registered Trustees of Mbomipa Authorities Association(supra)** had this to say;

'... when issues in regard to pleadings arise, effort should be to see that the real issues in dispute are adjudicated. Refusing leave for a party to amend his pleadings where it is necessary and important to do so for the determination of the real question in controversy between the parties does not only stop the party from setting up his case, The duty of the court when dealing with settlement of disputes is always to determine the rights of the parties. This cannot be achieved if a party is not allowed to amend is pleadings aimed at bringing out more clearly the real question on controversy between the parties'

On top of that, this court in **Kenafric Industries Ltd Vs. Lakairo Industries Group Co. Ltd & Another (supra)**, emphasized on the amendment of the plaint if the same do not change the original cause of action and it would help effective adjudication of the case and avoiding multiplicity of suit which would inevitable in case the leave to amend is refused. It was the contention by the learned counsel for the applicant that, the proposed amendment is not intended to change the nature and character of the case neither to bring a fresh claim.

On the other hand, Ms. Christabella Madembwe argued to the contrary. She averred that, allowing amendment of the plaint would not give the court

opportunity to determine the real question in controversy because the intended amendment seek to remove or deal with an issue in the main case concerning property in Zanzibar, of which the counter claim of the respondents seek order of the court to declare that such sale of the property be nullified. I do not agree with her on that note, because, as rightly stated by the other learned counsel, counter claim is an independent suit separately from the main suit. And that, since the matter in the counter claim is being adjudicated in the High court of Zanzibar and the respondent alleges that there was defiance of court order issued at the High Court in Zanzibar, I do not see how the respondent's rights is going to be affected.

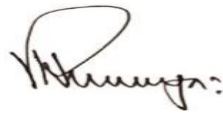
In fact, it is worthwhile noting that, the property in question is located in Zanzibar, it was sold in Zanzibar, the case was filed in Zanzibar. Under the circumstances allegations of defiance of court order made can effectively be dealt with by the Court in Zanzibar. Additionally the respondents are not prevented to pursue their counter claim independently from the suit filed by the applicant.

As a matter of law, and in consideration of the submission of the parties, I hereby allow departure from the scheduling order made on 9th September, 2021 and order of 15th September, 2022 for filing witness

statement(s) and I proceed to grant leave to the applicant to amend the
plaint to accommodate the important facts as prayed for with a view to
determine the real question in controversy between the parties.

In the event, the amended plaint shall be filed within 14 days from the
date of delivery of this ruling. The applicant to bear costs for the amendment.

Order accordingly.

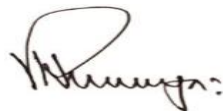


H.R. MWANGA

JUDGE

10/2/2023

ORDER: Ruling delivered in Chambers this 10th day of February, 2023 in the
presence of both learned counsels for the applicant and respondents.



H.R. MWANGA

JUDGE

10/2/2023

