

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

MISC. CIVIL APPLICATION NO. 3639 OF 2024

(Arising from Civil Case No. 36 of 2022)

SAHARA MEDIA GROUP LTD..... 1st APPLICANT

**CONTINENTAL FOUNDRIES AND
FORGING COMPANY LTD.....2nd APPLICANT**

ANTHONY DIALLO MWANDU.....3rd APPLICANT

VERSUS

KCB BANK TANZANIA LTD.....RESPONDENT

RULING

7th & 18th March, 2024

ITEMBA, J.

Under Order VI rule 17 and order VIII rule 23 of the Civil Procedure Code (the CPC), the applicants are moving this court to vacate the scheduling order dated 13th July 2023 and grant the prayer for amendment of their Plaint.

When the application was set for hearing learned counsels, Messr. Boniface Sariro and Libent Rwazo entered appearance for the applicants and respondent respectively. Submitting in support of the application, Mr. Sariro told the court that the application is supported by an affidavit of

Anton Diallo Mwandu whereas they intend to include the following points which are also found under paragraph 12 thereof:

- i. Breach of banker's duties to customers and bankers' malpractice.*
- ii. There was a fictitious loan imposed and the facilities of the loan were not disbursed.*
- iii. Overcharging of interest and penalties.*
- iv. Illegal perfection of collaterals.*
- v. Non-existence of loan facility.*

That, the above facts were not pleaded in the plaint. He explained that the aim of the intended amendment is for justice to be done, that they aim to give the court and the respondent the wider notion of the case. He cited the case of **Jovent Clavery Rushaka v Bibiana Chacha** Civil Appeal 236/2020 CAT Dar es salaam page 16 the Court quoted **James Funke Ngwagilo v AG** which states that for any fact which a party want to include in its pleadings, it should be done through amendments, and that is what they have done.

Replying, Mr. Rwazo strongly opposed the application. Arguing in accordance with the counter affidavit, he stated that the applicant does not only intend to amend the plaint but to bring the whole new suit.

That, the alleged amendment does not seek to assist the court but to introduce the new case, therefore, it cannot be granted by under order VI rule 17 of the CPC. The respondent's counsel expounded that, the applicant aims at introducing issues of breach of bankers' duty, malpractice and overcharging and fictitious loan. That, these matters fall under the jurisdiction of the Bank of Tanzania (BOT) under Regulation 42 and 51(1)(a) and (b) of the Bank of Tanzania Consumers regulations GN 884/2019. He stressed that, issues involving the bank and its customers are to be determined by the BOT and it is premature to bring the same before the court. He submitted further that, in any legal dispute, a specific forum provided has to be exhausted before moving to the court. The learned counsel cited the cases of **Riziki Mwitum Kiondo and 29 others v Vodacom Tanzania PLC and 2 others** Civil Case no. 153/2022 HC Dar es salaam and **Salim O. Kabora v TANESCO and 2 others** Civil Appeal no.55 of 2014 CAT, Dar es salaam, where the High Court and the Court of Appeal respectively, deliberated issues regarding consumers complaints should be dealt with the BOT. He insisted that this court has no jurisdiction and the application should be struck out.

The respondent's counsel also cited the High Court case of **Adela Stanslaus Assey t/a Mount Kibo Pharmacy 2012 v Vodacom Tz and NMB bank**, Civil case no.8/2023 HC, Moshi where regulation 42 and 51 of BOT Consumers Regulations were discussed and the said court found that the dispute between parties therein was supposed to be referred to the BOT first before being lodged at the court.

He distinguished the cases cited by the applicants' counsel stating that the amendments sought are aimed at changing the case completely as opposed to the cited cases where the said amendments were just to include facts. He therefore prayed for the application to be dismissed with costs.

In his brief rejoinder, Mr. Sariro insisted that in terms of Order VI rule 17, the application is on track and the cause of action will not be prejudiced. He submitted that according to paragraph 4 of the affidavit, the 1st applicant has been asking the respondent for loan repayment schedule but the respondent has not responded for no known reasons.

That, under paragraph 7, the respondent stated that in 2016, the debt was about USD 2 million, but in July 2022, at paragraph 10 the debt has raised up to USD 34,911,761.12 and there is neither clarification nor

explanation. That, there is not even a bank statement of the applicant for clarification.

That, as regards the Regulation cited by the counsel for respondent, under Regulation 51(a) and (b) there is nowhere the jurisdiction of court is faulted and even Regulation 52, does not oust the court's jurisdiction and deciding otherwise, will be a wrong interpretation of the law.

He argued that the Civil Procedure Code is the 'overriding law' and Order VI rule 17 empowers the court to allow amendments at any stage. He distinguished the cited case of **Riziki Mwitw Kiondo and 29 others v Vodacom Tanzania PLC and 2 others** (supra) that apart from being the High Court case as a matter of *stare decisis*, the facts therein are quite different and it was not stated that the High Court has no jurisdiction. The learned counsel also insisted that the case of **Jovent Clavery Rushaka v Bibiana Chacha** (supra) is relevant because according to paragraph 12 of his affidavit, the applicant herein aims to amend the facts only.

Having detailed and considered the rival submissions from both parties, the issue is whether the applicant should be allowed to amend

the plaint. I will start by quoting the enabling provision which is Rule 16 of Order VI of the Civil Procedure Code 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.**' (emphasis supplied).*

I have gone through the applicant's affidavit and his submission and as mentioned above, the applicant is intending to amend the plaint to include the following; breach of banker's duties to customers and bankers' malpractice, a fictitious loan imposed and the facilities of the loan were not disbursed, overcharging of interest and penalties, illegal perfection of collaterals and non-existence of loan facility. I have considered the respondents' grounds in opposing the application mainly being that the applicant is intending to bring the new case. Going by the proposed contents of the plaint, I do not see if there is a new issue introduced which has the effect of changing the cause of action. The main complaint in the original plaint is around the credit facility which the applicant had with the respondent. The new facts brought by the applicant are aiming at

expounding those complaints in relation to the said loan. Without using many words, under rule 17 of Order VI, of the CPC, the applicant may amend his plaint if he believes that such amendments are necessary for the court to determine the controversy before the court. On the face of it, I find no injustice will be occasioned by these intended amendments.

In the second limb of his submissions, the respondent contends that the applicant would have referred his dispute to the BOT first before bringing it to court. The respondent is relying on Regulation 42 and 51(1)(a) and (b) of the BOT consumers regulations GN 884/2019. Much as the good timing of these opposition would be for the respondent bringing them as preliminary objections, after the amended plaint, if allowed, is already before the court, I will consider them. I will look at whether Regulation 42 and 51(1)(a) and (b) of the BOT Consumers Regulations GN 884/2019. oust the jurisdiction of the High Court to entertain this dispute. For ease of reference, I will reproduce the contents of Regulation 42 and 51 (1)(a) and (b) of the BOT consumers regulations GN 884/2019. They state as follows:

*'42. Every consumer **shall have the right** to file a complaint against a financial service provider upon dissatisfaction or being*

aggrieved by the conduct of the financial service provider contrary to the manner set out in these Regulations.

51.-(1) *Subject to regulation 49(1), a complainant may file a complaint with the Bank if-*

(a) the complainant has not received a response from the financial service provider as required under regulation 46 or his complaint has not been attended to in the manner provided under such regulation: Provided that a complaint shall be entertained in the case of non-receipt of notification under regulation 49(1) or the non-attendance to a complaint, at any time immediately upon the lapse of time of determination as stipulated in the First Schedule, but in any case, not later than fourteen days: (b) the complainant is dissatisfied with the decision of a financial service provider: Provided that a complaint shall be entertained in the case of dissatisfaction with the decision by the complainant, if it is lodged within fourteen days from the date of receipt of notification of the resolution referred under regulation 49(1). (emphasis supplied)

The key provision from these regulations is regulation 42 which reading from it, it is clear that every consumer has a right to file a complaint against a financial service provider. Having a right to file a complaint does not mean it is mandatory for an aggrieved consumer to refer his dispute to the BOT. I think the learned counsel for the respondent is reading a lot from the provision. It should be noted that Article 108(2) of

the Constitution of the United Republic of Tanzania stipulates that the High Court has unlimited jurisdiction. And, section 7 (2) of the CPC in order for decide whether the court has jurisdiction or not, there must be either express or implied provisions. The section states that:

*7.-(1) Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is **either expressly or impliedly barred. (emphasis supplied)***

I have also gone through **Salim O. Bora** (supra) which also inspired **Adella Stanslaus Assey t/a Mount Kibo Pharmacy 2012** (supra) and observed that, the dispute in **Salim. O. Bora** was related to payments of electricity bills payment and the relevant laws were the EWURA Act and Electricity Act. The provision which was mentioned to oust the jurisdiction of the High Court was section 28(3) of the Electricity Act of which its' content and implication are quite different from regulation 42 and 51 (1) (a) and (b) of the BOT regulations. Also, the case of **Adella Stanslaus Assey t/a Mount Kibo Pharmacy 2012** (supra) the relevant bodies involved were the BOT and the Tanzania Communications Regulatory Authority (TCCRA) established under Tanzania Communications Regulatory Authority Act; whereas **Regulation 5(4) of the Electronic and Postal Communication Act (EPOCA)** is very clear that, disputes should be filed

with the 'Authority'. The authority referred being the TCCRA. Therefore, these two cases are clearly distinguished from the present one.

As explained above, the exclusion of the High Court's jurisdiction must be expressly provided. The BOT regulations do not have any specific provisions for that. The provisions of section 42 of the BOT regulation cannot be interpreted to oust the High Court with jurisdiction to try the applicant's dispute against the respondent and this court has jurisdiction to determine the applicants' complaints.

Therefore, the application is allowed, this court vacate its scheduling order in Civil Case no. 36 of 2022 and the applicant is granted leave to amend the plaint to the extent explained in the chamber summons.

Cost to follow the main cause.



L.J. ITEMBA
JUDGE
18/03/2024

Ruling delivered via audio in the presence of Mr. Boniface Sariro and Libent Rwazo Learned Counsels for the applicant and respondent respectively and Ms. G. Mnj2ari, RMA.



L.J. ITEMBA
JUDGE
18/3/2024