

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO 45 OF 2003

**JAPAN INTERNATIONAL COOPERATION
AGENCYDEFENDANT/APPLICANT**

VERSUS

**KHAKI COMPLEX
LIMITEDPLAINTIFF/RESPONDENT**

RULING

Date of final Submission: February 28, 2007

Date of Ruling: March 19, 2007

MJASIRI, J.

The Applicant/Defendant is applying for the following orders:

- 1. The Honourable Court be pleased to depart from the original scheduling order on the basis that the*

proceedings under which they were made have since been nullified.

2. *The Honourable Court be pleased to grant leave to amend the Written Statement of Defence dated April 9, 2003 and filed on April 14, 2003 drawn on behalf of the Applicant by South Law Chambers (Advocates), Sukita Building, 2nd Floor, Lumumba Street, P. O. Box 11727, Dar es Salaam.*
3. *Costs of the application be in the cause*
4. *Any other relief that the court may grant.*

Hearing of the application was by way of written submissions. The Applicant has strongly argued that leave to amend the defence be granted. The Applicant cited various authorities on amendment of pleadings.

The following cases were among the cases cited by Counsel:

Agrovety and Construction Company Limited v Salum Said Kleb 1995 TLR 168 (HC).

General Manager, E.A.R &H.A v Thierstain 1968 EA 354.

Central Kenya Limited v Trust Bank Limited [2002] EALR 365.

Abdulkarim Khan v Mohamed Roshan [1965] EA 289.

Cropper v Smith [1884] 26 Ch D700.

According to the Applicant after a thorough research of the defence put up in the original suit and upon interviewing a number of key officials and witnesses of the applicant's agency, there are a number of discrepancies between the facts deposed in the Written Statement of Defence and key relevant facts obtained after research on the matter and interview of the said officials.

The applicant also sought leave from the court to depart from the original scheduling order in view of the need to amend the pleadings.

The Respondent opposed the amendment to the pleadings indicating that this matter went up to the Court of Appeal. The issue here is not pleadings. The matter

proceeded up to the final stage. The reason the Court of Appeal ordered a retrial was that some of the documents were relied upon by the trial court without having been admitted as exhibits. Amendment of the pleadings will embarrass the Plaintiff as the amendments proposed statements of facts which could be presented as evidence. Counsel for the Plaintiff stated that the Defendant cannot be allowed to amend the Written Statement of Defence in order to raise a new ground of defence making reference to I. H. Jacob in *Bullen and Leake and Jacobs' Precedents of Pleadings*, 12th Edition at p. 133.

With regards to the Counsel for the Defendant's submission that the Defendants were not properly advised in their previous pleadings Counsel for the Plaintiff cited the case of *Maulidi Hussein v Abdalla Juma*, Civil Application No. 20 of 1988 CAT (unreported) which held that negligence of Counsel cannot be a ground for granting his client a relief.

I am grateful to both Counsels for their submissions. Counsel for the Applicant has taken the court through various authorities on amendments of pleadings.

After having gone through the legal position and arguments made by both Counsels, I would like to make the following observations:

The legal position is quite clear. The law is very flexible on amendments. On a general basis the practice of the court is to allow amendments and there are instances where amendments of pleadings have been allowed even during the appeal.

In *Baker Limited v Medway & Company* 1958 1 WLR 123 CA, it was stated as under:

“It is a guiding principle of amendment that generally speaking, all amendments ought to be made for the purpose of determining the real question in

controversy between the parties to any proceeding or of correcting any defect or error in any proceedings”.

In **Chandan v Longa Bai** AIR 1998 MP1 (Sarkar p 296) it was held that amendments should be liberally allowed if they are necessary for the complete adjudication.

Order 6 Rule 17 provides as under:

“The court may at any stage of the proceedings allow either party to alter amend his pleadings in such manner and on such terms as may be just, and all amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties”

It is obvious from the above provisions that the law is accommodating on amendments. However in deciding whether the amendment should be allowed or not one has to look into the circumstances of the case and the type of amendments sought.

This matter was heard and finalised by the court and the appeal was lodged in the Court of Appeal. Upon hearing the appeal the Court of Appeal came to the conclusion that the trial court relied upon some documents which were not tendered in court as evidence. The Court of Appeal therefore ordered a retrial in view of this anomaly. Both parties were represented by Counsels in the proceedings in the High Court. The Applicant was represented by a different Counsel in the original suit

The applicant has attached to the application proposed amendments. Looking at the said proposed amendments, it is obvious that the applicant is seeking to overhaul and revamp the whole written statement of defence. The specified amendments are issues relating to evidence and therefore would be best introduced in court in evidence. This is in relation to the invitation to treat vis a vis negotiations and on the fact the Defendant received no demand for the performance of the alleged contract as stated by the Plaintiff in the plaint. Apart from this the Defendant has not stated the specific amendments sought to

be made. What the Defendant has done is to add statements of facts in each paragraph or change altogether or amend some clauses in the written statement of defence. In my view the proposed amendments by the Defendant would lead to an omnibus amendment.

The Counsel for the Defendant is proposing to present the written statement of defence as he would have drafted it. That is, Counsel wishes to overhaul and revamp the existing written statement of defence.

I am of the view that even though amendments are to be generally allowed but the court should do so when the said amendments are necessary.

Sabitri Devi v Ravin Chandra A 1985 Ori 245 (Sarkar on Civil Procedure 10th Edition p 932).

“An amendment which is not necessary must not be allowed”.

According to *Ajit Singh v Sohan Lal* AIR 1998 319, 321 and *Venilal v Ambaram*, 1998 AIHC p 4340:

“Where the proposed amendment was not essential for disposal of real controversy between the parties amendments should be refused.”

The power to amend is entirely discretionary to be used judicially on a consideration of the special circumstances of each case. The rule allows at any stage all amendments which satisfy the following conditions:

- (i) of not working injustice to the other side and*
- (ii) of being necessary for the purpose of determining the “real questions in controversy between the parties”.*

The written statement of defence which the Counsel for the Applicant is seeking to amend was drafted by an advocate. It is the same pleadings which were relied upon by the High Court and the Court of Appeal to finalise the

matter. I am of the view that the statement of facts which the Applicant wish to add to the pleadings could be presented in court by way of evidence.

Leave to depart from the schedule depended on the granting of the leave to amend the written statement of defence. It is in the interest of justice that the re-trial ordered by the Court Appeal should proceed with immediate effect.

In view of what has been stated here in above the Application for leave to amend the written statement of defence and to depart from the scheduling order is hereby dismissed with costs. Parties to proceed with the trial accordingly. It is so ordered.

Sauda Mjasiri

Judge

March 16, 2007

Delivered in Chambers this 19th day of March 2007 in
the presence of Mr. Nyika Advocate and in the absence of
Mr. Lamwai Advocate

Sauda Mjasiri

Judge

March 19, 2007.

1,388 words.

I Certify that this is a true and correct
of the original order Judgment Ruling

Sign Enbise

Registrar Commercial Court Dsm.

Date 20/3/2007 ✓