IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 65 OF 2006

KENYA COMMERCIAL BANK (T) LTD.....PLAINTIFF

VERSUS

1. DEATA LTD
2. JAMES MAPALALA
3. BENJAMIN EMILIAN UNGELE
4. ALEX S. MAPALALA .....**DEFENDANTS**
5. FRANCIS MPALASINGE
6. EZEKIEL MCHUNGA
7. JOSEPH D. MKOMAGU

R U L I N G

Date of Hearing – 15/3/2007

Date Ruling – 16/3/2007

MASSATI, J:

The Present suit was filed on 21st September, 2006. On 16/10/2006 Mr. Galeba, learned Counsel for the Plaintiff informed the court that the Defendants had been served on 26/9/2006 and 6/10/2006. So I ordered that the Defendants file their written statements of defence by 27/10/2006 and reply (if any) by 7/11/2007. The first pretrial conference was fixed for 9/11/2006. On that day the Registrar adjourned it to 29/11/2006.

When the court convened on 29/11/2006 Mr. Galeba, learned Counsel for the Plaintiff informed the court that while M/s Maira & Co Advocates had filed a joint written statement of defence, raising therein some preliminary objections, the 6th Defendant had filed a separate written statement of defence and a separate notice of preliminary objection. I allowed the 6th Defendant to go his separate way, and set 1/12/2006 as the date for proceeding with the preliminary objections raised by both M/s Maira & Company Advocates and the 6th Defendant, whose statement of defence had been drawn and filed by Mr. Outa, learned Counsel.

On 1/12/2006 the Defendants (except the 6th) did not appear, neither did their Counsel, (except Mr. Outa for the 6th Defendant whose brief was held by Mr. Mbwambo). So I ordered the parties to argue the preliminary objections by way of written submissions, the latest whereof, was to be filed by 18/1/2007. I was to deliver a ruling thereon on 9/2/2007. However, on 30/1/2007 M/s Maira & Company filed an application for extension of time within which to file their written submissions. But this did not deter me from delivering my ruling on the 6th Defendant's preliminary objection. On 9/2/2007, I ruled that the preliminary objection having been filed outside the written statement of Defence, was incompetent and so I struck it out with costs. On 21/2/2007 the 6th Defendant filed an application to amend his written

statement of defence. The Plaintiff was allowed to respond to both the application for extension of time, and for amendment. Hearing for both applications was set for 15/3/2007. All the parties were to be notified.

On 15/3/2007 Mr. Galeba and Mr. Outa appeared in court ready for hearing of the application. Mr. Maira for the other Defendants did not appear. Mr. Galeba showed me a letter dated 5/3/2007 which they wrote to notify M/s Maira & Co. Advocates. Next to the addressee, an official stamp of Maira & Co. Advocates was fixed to show that the letter was received by their office on the same day – 5/3/2007. In a written submission on the Defendants' joint written statement of defence, Mr. Galeba had also attached a letter addressed to M/s Maira & Co Advocates dated 4/12/2006 also notifying them of my orders dated 1/12/2006 which appeared to have been received by the said chambers on 8/12/2006. In my ruling of 9/2/2007 I reserved my ruling on Ms. Maira's preliminary objection because they had already filed an application for extension of time. That application was to be heard on 15/3/2007. Mr. Maira did not appear. On account of this Mr. Galeba has prayed that the application for extension of time be dismissed for want of prosecution.

In considering whether or not to dismiss the application, I must first be satisfied whether M/s Maira & Co. were served.

In reaching at such decision I will take into account the available records. First, is the letter from the Plaintiff's Counsel dated 4/12/2006 addressed to the learned Counsel for the Defendants, on which I reserved my comments pending the hearing of the application. Then there is the letter of 5/3/2007. I have compared the two letters and the signatures appearing therein embossed on Maira & Co's official stamp. Exercising my powers under s. 75 (1) of the Evidence Act, I am satisfied that both letters bear the same signature and the same official stamp. This is further confirmed by the affidavit of service of one MICHAEL SIZYA which is attached to the counter affidavit of ZEPHRINE GALEBA. Secondly, paragraph 4 of the affidavit of MOSES MAIRA acknowledges receipt of the letter of 4/12/2006 although he alleges he received it on 14/12/2006. I believe that they received the letter in question but I do not believe that they received it on 14/12/2006 as alleged. I do so, because the letter which they said they received on 14/12/2006 (which according to their official practice ought to have been endorsed with the official stamp on which the date of receipt is indicated) was not produced for the inspection of the court. Secondly, there is no reply to refute the contents of the counter affidavit of Mr. Galeba. So, I would like to believe that M/s Maira & Co Advocates did receive the letter on 4/12/2006 as well as that of 5/3/2007. But what is more, it is clear that having filed their application for extension of time the learned Counsel did not exhibit any

diligence in following up their application. This smacks of either negligence or outright indifference to the interests of their clients. So even without the presence of the learned Counsel there is sufficient material on record to enable the court, decide the application on merit. And I hereby do proceed to find that on merits the application is lacking. For non appearance I am satisfied that the learned Counsel are not serious in prosecuting their clients' case. For these reasons, I agree with Mr. Galeba, that the application for extension of time does not deserve to remain on board. It is accordingly dismissed with costs.

After dismissing the application for extension of time, what is the fate of the preliminary objections raised by the learned Counsel? I would state the position of the law to be this. Where a party does not raise or fails to prosecute a point of law that would be in his favour if it succeeded he should deemed to have waived it, but such waiver cannot be presumed in matters of jurisdiction. This follows from the principle that neither the parties, nor the court can grant itself jurisdiction where it lacks one or by the consent of the parties. Whether or not, it is raised by any of the parties, the court reserves the power to consider any matters pertaining to its jurisdiction at any time before judgment. It is therefore with those reservations that I would dismiss the application for extension of time.

Coming to the application for amendment filed by Mr. Outa learned Counsel for the 6th Defendant, it was briefly submitted that the intended application was intended to introduce a point of law. Relying on **GEORGE SHAMBWE VS ATTORNEY GENERAL AND ANOTHER** [1996] TLR 334 Mr. Outa submitted that as a matter of principle, amendments should be freely allowed before hearing if no prejudice is caused to the other party. He submitted that the court was not functus officio since in its ruling of 9/2/2007 the objection was not struck out on merit. So he prayed that the application be allowed.

Mr. Galeba, learned Counsel for the Respondent, put up a four point resistance to the application. First, for amendments to be allowed, the point must be one in controversy between the parties. Whether or not the plaint was filed by a person or a firm of advocates is not such a controversy necessary for this court to determine because the real question in controversy is the unpaid loan advanced by the Plaintiff to the first Defendant of which the 6th Defendant guaranteed. Secondly, having struck out the preliminary objection in its ruling of 9/2/2007, this court is now functus officio to sit and determine the said matter again. Thirdly in so long as the amendment seeks to implead a matter of which it had prior knowledge, it is not proper because amendments

should only be allowed to allow parties to bring up matters which have only subsequently come to their knowledge. Fourthly amendments should not seek to introduce a new substantial course of action or defence.

The learned Counsel also sought to distinguish the facts in **SHAMBWE'S** case and pleaded that this was intended to delay the case and therefore an abuse of the court process. He urged the court to dismiss the application with costs.

In his reply, Mr. Outa, learned Counsel referred me to s. 58 of the Evidence Act on matters which the court could take judicial notice of, and that it was the duty of the court to first address itself on matters of law whether or not raised by the parties, and to resolve them first. On this court being functus officio, the learned Counsel submitted that as the objection was not decided on merit the court was not functus officio. Besides, the Plaintiff would no be prejudiced as he has already reaped his costs in that previous application. The learned Counsel further submitted that the application for amendment was being made before the hearing of the case as in **SHAMBWE'S** case, and it is not true that hearing of the interlocutory matters was a hearing on merit. So he reiterated his prayers for this court to allow the application.

Mr. Galeba, learned Counsel, has raised two important preliminary points of law which I have to determine first. First, he has submitted that since in my ruling of 9/2/2007, I struck out the preliminary objection, therefore the court is functus officio. Mr. Outa thinks not, because that ruling did not dispose of the matter on merit.

In my view, Mr. Galeba's argument may be attractive but incorrect. In my considered opinion not every decision that a court makes renders the court functus officio. On the contrary, it has been held that where the court merely strikes out a matter before it because it is incompetent the party can always rectify the error and refile it. If there is need for any authority, I would refer to the decision of **RAMADHNAI J.A. in PITA KEMPAP LTD VS MOHAMED I A ABDULLHUSSEIN (CAT)** Civil Application No. 128 of 2004 and 69/2005 (Unreported). On p. 5 of the ruling, the learned Appellate Justice made the following pertinent observation:

> *"When a court strikes out a matter that does not mean that the matter has been refused. All that the court says is that for some reasons the matter is incompetent and so, there is nothing before the court for adjudication. So, the proper course of action is to rectify the error and go back to the same court..."*

In the present case, in my ruling of 9/2/2007 I struck out the preliminary objection because *"the Notice of Preliminary Objection filed by the 6th Defendant is not properly before the court"*. This is the error which made the preliminary objection incompetent. What the Defendant has done is to try to rectify that error and on the principle in **PITA KEMPAP LTD'S** case, this court can still adjudicate the matter. It is not therefore functus officio. I will accordingly reject Mr. Galeba's argument on that limb.

The second point of law raised and argued by the parties is, at which point in time in the proceedings can an application for amendment be made? It was argued by Mr. Galeba and countered by Mr. Outa that an application for amendment cannot be made after the hearing had began, and according to Mr. Galeba, hearing includes hearing of preliminary objections.

I think the law as expounded by the Court of Appeal in Tanzania in **GEORGE SHAMBWE'S** case (supra) and in the spirit of O. VI rule 17 of the Civil Procedure Code Act, 1966, is that amendments sought before the hearing should be freely allowed, if they can be made without injustice to the other side. The Court of Appeal in that case followed the principle enumerated in the leading case of **EASTERN BAKERY VS CASTELINO** [1958] EA. 461.

As to when the hearing of a case begins, again, I think, Mr. Outa is right that hearing does not mean hearing of preliminary objections but it is when the parties begin to receive evidence. In **MULLA CODE OF CIVIL PROCEDURE ACT** Vol. 1 [1965] at p. 796, the authors considered the meaning of the words *"called on for hearing"* in O. IX rule 8 of the Civil Procedure Code of India which is in pari material with the Civil Procedure Code 1966 of Tanzania.

> *"The word "hearing" (is used to) mean a hearing in which the judge takes evidence or arguments on questions arising for adjudication on the rights of the parties in the suit, and not in which interlocutory matters are to be disposed of."*

Although the commentary relates to the provisions of O. IX rule 8 of the Civil Procedure Code 1966, I think it is equally applicable, wherever that word appears in the Civil Procedure Code 1966; especially so, as the word *"hearing"* itself does not appear in rule 17 of O. VI of the Civil Procedure Code 1966. It was just used in case law. Therefore with due respect to Mr. Galeba, I do not think that he is right in thinking that the hearing of preliminary objections was hearing of the suit. And in any case this does not derogate from the general principle that amendments may be allowed at any stage even as late as

at an appellate stage where no further evidence would be required (See **JUPITER GENERAL INSURANCE CO LTD VS RAJABALI HASHAM AND SONS** [1960] E.A. 592. So for all the above reasons, I would hold that the application for amendment is properly before the court. I will now turn to consider its merits.

On the merits of the application, Mr. Galeba has advanced two substantial objections. First, the amendment sought would not throw any light to the court as to the real substantial question between the parties because whether it is a person or a firm that drafted the plaint had nothing to do with the controversy between the Plaintiff and the 6th Defendant. Secondly the amendment seeks to introduce a new defence which is against one of the rules of amendments.

I would begin with the rule against introducing new causes of action or defences in amendments. The position of the law on this aspect is certainly not a smooth sail. In **AFRICAN OVERSEAS TRADING CO VS ACHARYA** [1963] EA. 468 an application for leave to amend a plaint was refused so far as it would introduce a new cause of action; and it was refused where a Plaintiff sought to add a new cause of action in consistent with his pleadings and evidence **PATEL VS JOSHI** [1952] 19 EA CA. 42. On the other hand, a proposed amendment was allowed to introduce an alternative defence

notwithstanding inconsistency with the original pleading. **BRITISH INDIA GENERAL INSURANCE CO LTD VS G M. PARMA & CO** [1966] E.A. 172. These apparently inconsistent decisions show no more than judicial discretion at work. Apart from the broad principles that amendments may be made to allow parties to determine the real question in controversy, the decision whether or not to allow an application for amendment remains largely at the discretion of the court to be exercised within the peculiar circumstances of each case.

In the present case, I do not think that it is right to argue that the intended amendment was intended to introduce a new defence. Even if it was not properly first introduced in court it is naïve of the learned Counsel to think that the court would believe that the Plaintiff would be taken by surprise by the intended amendment. I will also accordingly reject that argument.

The last argument is whether the amendment would introduce something distanced from the real question in controversy between the parties as argued by Mr. Galeba.

I have looked at the learned Counsel's affidavit in support of the application for amendment. According to paragraph 6, the purpose of the amendment is to allow the defendant tell

the court that the plaint was drawn by a firm of advocates and not a person, and this was contrary to s. 44 of the Advocates Act.

Mr. Galeba, learned Counsel was very forceful while presenting this argument but I did not get the requisite response from Mr. Outa.

The recommended practice is that the proposed amended pleading should have been attached to the application for amendment, and the purpose is to enable the court properly assess whether the amendment is necessary, before leave is granted. The Defendant did not do so in the present case. The court has been denied of that advantage.

The general rule is that all amendments which are necessary should be liberally allowed at any stage of the proceedings. But there are a number of in roads to that rule. These include: -

(a) No amendment should be allowed which amounts to or relates to defeating a legal right accruing to the opposite party on account of lapse of time.

(b) The court can reject the prayer for amendment if the same is not bona fide.

(c) Amendment of pleadings should not become a matter of hide and seek between the parties or an attempt to outwit the opponent.

(d) An amendment which is not necessary should not be allowed.

(e) An amendment to the written statement of defence would be allowed if it elaborates the defence.

(f) Courts would not allow amendments where the proposed amendments are irrelevant, unnecessary and not based on any bona fides.

(See **SARKAR ON CODE OF CIVIL PROCEDURE** 10th ed. Vol. 1 pp. 929 – 935.

Based on the above principles, and the circumstances of this case, and without deciding on the falsity or truth of the intended amendment I have come to the firm view that from the pleadings of the parties already in court the intended amendment is neither bona fide nor necessary and is intended to turn the suit into a matter of hide and seek and an attempt to outwit the opponent. It does not seek to elaborate the defence at all.

In the circumstances I would agree with Mr. Galeba that the proposed amendment is not necessary for the purposes of determining the real question in controversy between the parties to the proceedings. I would therefore accordingly reject the application. Costs shall be costs in the suit.

Order accordingly.

S.A. MASSATI

JUDGE

16/3/2007

3,117 words

I Certify that this is a true and correct of the original/order Judgement Ruling
Sign E. Boise
Registrar Commercial Court Dsm.
Date 16/3/2007