**IN THE HIGH COURT OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR - ES -SALAAM**

**COMMERCIAL CASE NO 3 0F 2010**

**VODACOM TANZANIA LIMITED- PLAINTIFF**

**VERSUS**

**AFRICAN BANKING CORPORATION- DEFENDANT**

**RULING**

**8.11.2011&18.11.2011,**

**Nyangarika, J.,**

On 11th day of January 2010, the Plaintiff filed a suit against the defendant, claiming, *interalia* , for payment of five hundred million Tanzania shillings(Tshs 500,000,000/=), alleging that the defendant and its employees had fraudulently and perpetuated or erroneously and wrongfully, collected, and or converted a cheque in respect of the claimed amount and converted or/ and remitted the same to unknown third parties, thus, breached a duty of care as a collecting bank.

Thereafter, the defendant filed a defense alleging that the fraudulent transaction, if any, was a result of a hatched plan by the plaintiff as holders of the cheque or by a person known to the plaintiff, to abate fraud by way of side tracking the defendant's system of checks and balances, in order to surreptitiously infiltrated the cheque into its system or side step the system by inducing the defendant's employees to subvert the defendants internal due diligence system.

After completion of pleadings and efforts to mediate had failed, the trial of the case commenced where the plaintiff's case was heard and finalized on 1.3.2011. On 20.6.2011, the defense case was then opened and DWI one, Asha Ally Ismail, partly testified in court, but the defendant's counsel, Mr. Pesha, sought and was granted an adjournment by this court,( Mruma J.) to enable him to organized defense.

On 1.08.2011, the defendant brought an application, the subject of this ruling, seeking for the following orders.

(1) That this Honorable court be pleased to depart from the original scheduling order on the basis that all documentary evidence involving the plaintiff presentment of the cheque, which were not in possession of the defendant at the time of filling the written statement of Defense, be brought in, to enable the court to evaluate all relevant evidence in the interest of justice.

(2) That the Honorable court be pleased to grant leave to amend the written statement of Defense dated 11th day of February 2010.

(3) Costs of the application.

(4) Any other relief (s) as the Honorable court may deem fit and just to grant.

The application has been made under the provisions of **Order 6 rule 17 and Order 8A rule 4 and Section95 of the Civil Procedure Code (Cap33 R.E 2002)** by way of a chamber summon supported by the Affidavit of Rugambwa Cyril John Pesha, an Advocate who also represents the defendant.

There is also a counter- Affidavit filed by Gaspar Nyika, counsel for the Plaintiff, opposing the application. The same has been countered by a reply filed by Rugambwa Cyril John Pesha.

When the application was called on for hearing, Mr Rugambwa Cyril John Pesha, learned counsel, appeared for the defendant and Mr. Sipemba, Learned counsel, appeared for the Plaintiff.

The main contention of Mr.Pesha is that since the Plaintiff were not co operative with the defendant in the investigation of the fraud at the very beginning, especially when the fraud was reported to them by the defendant, the defendant has now discovered new material evidence (i.e bank pay in slip and submission sheets recording transaction between the Plaintiff and Citi Bank as on 5.9.2008), Annexture CRB/ABC/CH.AP/1, regarding the Standard Chartered Bank cheque NO. 01163 for Tshs. 500,000,000.00, allegedly presented for collection. Further Mr. Pesha, alleges that the new evidence which have been discovered by the defendant contradicts the testimony of PW2,( Florence Kwayu) and Exhibit P3.

Thus ,Mr. Pesha, is of the view that the new evidence will in fact afford this court an opportunity to determine the real issue in controversy between the parties as to why the alleged cheque was not regularly presented to both the collecting and receiving banks as alleged by the Plaintiff.

Mr. Pesha, therefore, invited me to depart from the scheduling order and grant him leave to amend the defense as prayed .He said that a draft of the intended amendments of the defence has been annexed in the Affidavit supporting the application as an annexure CRB/ABC/Ch/AD/2 in order to mitigate any delay, if any.

Mr. Pesha referred me to the case of **Eastern Bakery Versus Castelino (1958) EA 461 and Heritage A.I Insurance Company Limited V Ultimate Security Limited, High Court Commercial Case No.208 of 2002 (H.C) (unreported )**to fortify his arguments.

On the order dimension, Mr. Sipemba, has opposed the application sought saying that the introduction of the allegedly new evidence is irrelevant as the Citi Bank is not a party in this suit and its transactions is not an issue in the case. He submitted further that the issue in dispute is on the presentation of the cheque to the defendant bank and not to Citi Bank. Mr. Sipemba submitted that the amendment sought has not been made in good faith or *bone fide*, as there is great delay in seeking such an amendment, especially considering the fact that the Plaintiff has already closed its case, and, thus, the introduction of the new evidence will prejudice the Plaintiffs case.

Mr. Sipemba was of the view that if the defendants company wants to bring into picture the alleged new evidence, then; they ought to have sought further and better particulars from the plaintiff, rather than, bringing up the present application for amendment which, he alleges, will not support the defense. He referred me to a book titled **Mulla , Code of Civil Procedure, 16th Edition on pages 1837 and 1857** , where the learned author commented that " *an amendment sought should be refused where it will not help in support of the defense".*

In his short rejoinder, Mr. Pesha insisted that on the issue(s) framed, the word *"presented"* in the law of banking is a technical term and as such had to be proved by evidence in order to establish whether the cheque really parted from the plaintiff so as to make the defendant

liable. Therefore, according to Mr. Pesha, the new evidence is material in order to prove fraud and contributory negligence and show the court that the Plaintiff was not careful in handling the cheque.

Mr. Pesha, strongly argued that since the Plaintiff was not co – operative in joining hands with the defendant in the investigation process until the matter went in court, the delay, if any, was attributed by the Plaintiff, and this stage is exactly the earliest opportunity for seeking an amendment after discovery of the new evidence.

He said that even if the defendant would have decided to seek discovery and interrogatories as argued, such an exercise would have brought in, the same documents now sought to be introduced.

Mr. Pesha submitted that the application has been brought in good faith by the defendant who at the very beginning brought to the attention of the Plaintiff, the existence of the fraud, which is now the subject matter of this case.

I have carefully considered the arguments of both sides. There is no dispute that the proceedings in this case has reached a very advanced stage and the new facts intended to be introduced were not pleaded by either of the parties, but, only came into picture during trial especially when P.W.2 was cross examined.

I am well aware that the main principles in pleadings require the disclosure of all material facts intended to be captured during trial. This is in consonant with the well established principle of having a fair trial. This principle have many corollaries, including the rule that each party is entitled to have any or every particular or material fact brought on board or fronted. **(See Mulla's Code of Civil Procedure 8th Edition at page 1197)**

Both, Mr. Sipemba and Mr. Pesha, have argued on the issues of seeking further and better particulars, but, with respect, and as held in the case of **Hon.B.P.Mramba versus Leons S.Ngalai and the Attorney General (1986) T.L.R.182 ( C.A),** for a party to seek further and better particulars, the matters sought, must be matters of facts necessary to substantiate the relevant allegations already pleaded. The same applies to the application of **Order 18 rule 1, 2, 3 and 4 of the Civil Procedure Code (Cap.33R.E2002).** Therefore, since parties are bound by their pleadings, that procedure, can only be adopted or come into to play, where the facts which needs further and better particulars has been pleaded, which is not the case here. Evidence and arguments in legal proceedings should be confined to the pleadings. (See **Vidyarthi versus Ran Ralcha(1957)E.A.527)**

The argument by Mr. Sipemba that an order of amendment sought might prejudice the Plaintiff or delay the fair trial of the matter is tempting, but, in my view, the reasoning has no substance because of the following reasons.

**One**, the court can prevent such a delay by prescribing a specific period within which the amendment is to be affected and the period within which the Plaintiff is to file an answer.

The interest of efficacy of justice should be the rule rather than the exception .Therefore, once an order of amendment is made, then, a prescribed specific periods of compliance with court orders must be made. In my considered view, It must be pointed out here, that , no one can possibly doubt that speed is an important element in the dispensation of justice , but, however, good speed may be , justice is still better. The importance which lawyers attach to justice being such to be done cannot be sacrified on alter of

speed (see **Almasi Karumbeta versus Republic, Criminal Appeal no.175 of 1979 (Mbeya Registry) (H.C)(unreported) per Samatta, J( as he then was)**

**Second,** as held by **Brett. M.R., in Clarapele & Company versus Commercial Union Association [1883], 32 WR 262** "However negligent or careless, may have been, the first Omission, however late, the proposed amendment should be allowed, if it can be made without prejudice or injustice to the other side. There is not injustice, if the other side can be compensated by costs.

Again**, Bramwell, L.J** in **Tildeslay Versus Harper [1878] L.R.10 C.D 396,** held as follows: "My practice has always been to give leave to amend, unless, I have been satisfied that the party applying to be given leave to amend, was acting mala fide, that by his blunder he had done, some injury to his opponent which could not be compensated for costs or otherwise, would occur".

Mr. Sipemba has not countered the argument raised by Mr Pesha, that, it is indeed the defendant who informed the Plaintiff, first, about the fraud, but, the plaintiff, nevertheless, refused to co-operate in investigation of the fraud in order to arrest the culprits.

In the case of **National Bank of Commence versus Perma Shoe Company (1988) T.L.R 224 (C.A)**, it was held*, interalia*, as follows:

(1) *"where a customer deposit a country cheque with a collecting bank and the cheque get lost, the bank owe a duty of care to the customer to inform him promptly of such loss so that the customer may take such*

*appropriates steps that might be open to him to avert any or further consequences resulting from such loss".*

*(2) That the duty exists whether the cheque was lost by the bank itself or by a third party having possession thereof.*

Therefore, I think the amendment sought by the defendant is *bona fide* in the circumstances of this case.

Mr.Sipemba has referred me to a book titled "**Mulla, Code of Civil Procedure 16 Edition on page 1837 and 1857"** to cement his arguments on the point that the amendment sought by the defendant be refused because such an amendment will not help in support of defense as the issue involved is one of the presentation of the cheque to the defendant and not to Citi Bank.

But, then, as rightly argued by Mr. Pesha, presentation of a cheque is a technical term in the Law of banking and therefore the new evidence, (i.e Bank pay in slip and submission sheet recording transactions between the Plaintiff and Citi Bank dated 5.9.08), which are alleged to have been discovered and are intended to contradict the testimony of PW2 one, Florence Kwayu , and exhibit P.3, might, in my view, assist this court in resolving the first three (3) issue (s), which reads;-

1. Whether the Plaintiff presented the cheque to the defendant
2. Whether the defendant was negligent in accepting and dealing with the cheque.
3. Whether the Plaintiff was contributory negligent in Presenting the cheque.

There is no dispute that the whole suit revolves on the allegations of fraud and if fraud is established then it can vitiate everything. I am well aware that when the question whether someone has committed a crime is raised in

civil proceeding, that an allegation need to be established on a higher degree of probability than which in ordinarly required in civil cases.(See **Omari Yusuf versus Rahma Ahmed Abdulkadir (1987) 169(C.A).**

In determining this application, the first reference is on the provision of **Order 6 rule 17 of Civil Procedure Code, ( CAP.33R.E2002),** which reads:

> *"The court may at any stage alter or amend his pleadings, 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 question (s) in controversy between the parties".*
>
> *(Emphasis added)*

As I take it, the import of the above provision is that though a court has been vested with discretion to grant an amendment as applied for by either party, but such discretion may only be exercised where necessary for the purposes of determining the real question in controversy between parties.

It is beyond dispute that a paying bank has a similar duty as a collecting bank to act in good faith and without negligence to see to it that a cheque is properly presented so as not to facilitate fraud. (See **Lipkin Corman versus Karpnale Limited and another (1992) 4ALL.E.R.409** and **Tournier versus National Provincial and Union Bank of England (1923) ALL.ER.550.**

Therefore, Lord Mansfield, in ordering amendment in the case of **Briston versus Wright [1981], 2 Doug.666,** held as follows:

> *"I am very free to own that strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated by formal*

*slip, which arises from the in advertence of gentlemen of the profession, because it is extremely hard on the party to be turned round, and put the expenses, from such mistakes of counsel or attorney he employ. It is hard, also, on the profession".*

Pollock, B., **in Steward V. Metropolitan Tramways Company [1885] 16 QBD 180,** held that: *"the test as to whether the amendment should be allowed is whether or not the defendant can amend without placing the Plaintiff in such position he cannot be recouped as it were by any allowance of costs or otherwise".*

I the circumstances, and for the foregoing reasons, I allow the amendment sought. The defendant shall file and serve an amended defense within seven days from today. Reply to an amended defense, if any; be filed seven days after service. Costs shall be in the cause.

Order accordingly.

K.M.Nyangarika,

Judge.

18th day of November, 2011.

Coram: Hon. K.M.Nyangarika, Judge.

For the Respondent/Plaintiff – Nyika, Advocate.

For the Applicant/Defendant – Pesha, Advocate.

CC: J.K.Bampikya Mrs.

Order:

1) Ruling delivered today in the presence of Mr. Pesha, learned counsel for the Applicant/Defendant and Mr. Nyika, learned counsel for the Respondent/Plaintiff.

2) Mention on 6.12.2011.

K.M.Nyangarika,

Judge.

18/11/2011

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