IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 168 OF 2016

(Originating From Commercial Case No. 36 of 2016)

CMA CGM (TANZANIA) LIMITED ..... APPLICANT

VERSUS

INSIGNIA LIMITED ..... RESPONDENT

1st December, 2016 & ..... February, 2017

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application filed by the applicant CMA CGM (Tanzania) Limited against the respondent Insignia Limited. The application stems from Commercial Case No. 36 of 2016 in which the applicant is the defendant and the respondent is the plaintiff. The application seeks the following orders:

1. That the names of both or either Shipper or Agent/agent be added to the above case as defendant(s) or as person(s) whose presence before the court may be necessary to order to enable the court to effectually

and completely to adjudicate upon and settle all the questions involved in the case aforesaid;

2. That costs of this application be awarded to the applicant in any event; and
3. That any other relief may be given to the applicant as to the Honourable court appears to be just and convenient.

The application has been proffered by way of chamber summons which has, essentially, been taken under the provisions of Order I rule 10 (2) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"). It is supported by an affidavit of Novatus Rweyemamu; an advocate of this court and courts subordinate hereto, except for the primary court.

The application was agreed to be disposed of by way of written submissions the learned counsel for the parties having been ordered to do so by this court on 14.11.2016. The court scheduled the submissions dates with which the learned counsel for the parties have timeously complied.

Arguing for the application, the learned counsel for the applicant submits that the plaint discloses a cause of action against the shipper. He submits that paragraph 5 of the plaint and paragraph 9 of the reply to the written statement of defence imputes breach of contract by the shipper. In the circumstances, the shipper, he argues, is a person whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit as dictated by the provisions of Order I rule 10 (2) of the CPC.

In respect of the agent, the learned counsel has simply argued that if the words in paragraphs 7, 8, 9, 11 and 14 of the plaint do not disclose the cause

of action against the agent, the details in those paragraphs disclose the agent also as being a person whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit referred to in Order I rule 10 (2) of the CPC.

Bearing in mind the extent of the agent's authority from the shipper, ratification by the shipper of the agent's acts, revocation by the shipper of the agency, the agent's duty to the shipper, *et cetera*, the learned counsel for the applicant prays that the shipper and agent be added to the case as defendants or as persons whose persons before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in this suit. He thus prays that the court be pleased to allow the application with costs to the applicant in any event.

Responding, the learned counsel for the respondent having confessed to have found difficulty in comprehending the submissions-in-chief, submits anyway that the applicant has absolutely and seriously failed to address the prayers fronted in the chamber summons. He states that the applicant wants the shipper and agent be added as defendants or as persons whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the case but has failed to show why.

In order to underscore the question whether the shipper and agent are necessary for the determination of the suit between the applicant and defendant, the learned counsel narrates the background to the present suit which I find apt to summarize at this juncture. This background can be

deciphered from the plaint which has been annexed by the Applicant to the affidavit in support of the application. It is this: following an arrangement with the respondent herein in October, 2014, the applicant had a duty to ship calcium carbonate from Alexandria, Egypt to Dar es Salaam Tanzania. It is very unfortunate that it was discovered during booking confirmation that the commodity declared are cement clinkers 15 x 20 containers in lieu of calcium carbonate. After realizing that, then, amendment was done and the bill of lading was prepared by the applicant herein. In due course, the respondent appointed Clear Service Tanzania Limited as an agent to clear the consignment, and in the due course it was observed that the commodity declared in the bill of lading was different from the commodity declared in the manifest.

Immediately, the respondent herein informed the Applicant but the Applicant did not act promptly in rectifying the anomalies thus the respondent was penalized by Tanzania Revenue Authority to pay USD 10,000.00. The respondent informed the applicant as to the penalty, the applicant authorized the respondent through the letter dated 23.02.2015 to pay the penalty and the same would be refunded by the applicant to the respondent. Having that in mind, the respondent paid the penalty to Tanzania Revenue Authority.

Given that background the respondent's counsel argues that the gist of the dispute arises from the act of the applicant through the letter dated 23.02.2015 to authorize payment of penalty by the respondent and that later-on the applicant would refund the same to the respondent. He argues that the shipper and agent were not part of such authorization. There is shown nowhere, he argues, that the respondent wrote the letter to the shipper and/or agent seeking refund of the money.

That being the case, he argues, there is no need whatsoever to join the shipper and the agent as they were not involved whatsoever in the issues or questions to be determined by this court in the suit.

The respondent argues further that even assuming the shipper and agent were involved by the applicant in such authorization through the letter dated 23.02.2015, the thing the respondent strongly disputes, it is not a proper way to seek this court to add the shipper and agent under Order I Rule 10 (1) (2) of CPC. In the respondent's view, if they were involved in such authorization, the applicant can join them by way of third party procedure as provided for under Order I Rule 14 of the CPC.

The respondent's counsel argues further that the shipper and agent should not be allowed to be added as defendants under the principle of *dominus litis*. He underlines that no person can be forced to sue the person whom he does not wish to sue and as such the person cannot be added as defendant without the plaintiff being willing. The learned counsel clarifies that it is the plaintiff who chooses who to sue; he cannot be forced to sue a person outside his wishes. To reinforce this proposition, the learned counsel cites ***Santana Fernandes Vs Arjan and Sons and Two Others*** [1961] EA 693. In that case the applicant who was the defendant applied to the court seeking the court to add the company as defendant. In seeking those prayers, the applicant cited Order I, Rule 10 (2) of the Indian Code of the Civil Procedure of 1908 which is *in pari materia* with Order I rule 10 (1) (2) of our CPC. The Court declined to grant those prayers, the reason being that, it is the plaintiff who chooses who to sue. The court stated:

> "The Defendant cannot be added under O. I, R. 10 (2) of the Indian Code of Civil Procedure of 1908 even if he be a willing party, in the fact of opposition from the Plaintiff in a suit in tort."

In reaching that decision, he argues, the East African Court of Appeal cited the case of ***Horwell Vs London General Omnibus Company Limited re London Tramways Co Ltd*** (1877), 2 Ex. D 365 in which the court had this to say:

> "It appears from the latter case that a Plaintiff, being the dominus litis cannot be compelled to sue a person, for damages in respect of a tort, whom, he does not wish to sue."

The learned counsel goes on support the proposition by quoting **Odunga's Digest on Civil Case Law and Procedure**, Vol. III at page 3055:

> "The law regarding the situation of this kind, where an application is made to add someone to a suit as a co-defendant against the Plaintiff is that a Plaintiff being the dominus litis, cannot be compelled to sue a person, for damages in respect of a tort, whom he does not wish to sue."

The learned counsel thus submits that the application is misconceived and misplaced altogether and should be dismissed with costs.

In a short rejoinder, the applicant's counsel argues that the doctrine of *dominus litis* is not applicable in the present instance as it has been overtaken

by the provisions of rule 4 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") which urge this court to administer the Rules having regard to the need to achieve substantive justice in a particular case.

As for the cases cited by the learned counsel for the respondent, the learned counsel for the applicant contends that they are distinguishable in that they dealt with tort which is not the case in the present case. In the case at hand, the case is about contract, he argues.

Having stated the above, I should now be in a position to determine the question at issue in the present case; and this is, whether the shipper and agent should be joined as defendants in the present case under the provisions of Order I rule 10 (2) of the CPC.

I should start by saying that the court, pursuant to the provisions of Order I rule 10 (2) of the CPC, has unlimited powers to, *inter alia*, join any person as defendant whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit. This course may be taken *suo motu* or by an application by a party to the suit or by a third party. However, it is apt to point out here that the guiding principle in taking such a course of action is anchored in the doctrine of *dominus litis*; that is, the plaintiff is *dominus litis* which is simply interpreted to mean the plaintiff is the one to decide who to sue. He should therefore not be forced who to sue. Discussing the provisions of rule 10 (2) of Order I of the Indian Code of Civil Procedure, 1908 which is *in pari materia* with rule 10 (2) of Order I of our CPC, **Mulla: the Code of**

Civil Procedure by Sir Dinshah Fardunji Mulla, 18th Edition, 2011 has this to say at p. 1521 on the doctrine of *dominus litis*:

> "Plaintiff is the dominus litis. He cannot be compelled to sue a person against whom he does not claim any relief ... The theory of *dominus litis*, however, should not be overstretched in the matter of impleading parties, because it is the duty of the court to ensure that if for deciding for the real matter in dispute, a person is a necessary party, the court can order such person to be impleaded".

The learned author goes on at p. 1522 referring to the case of ***Fateh Raj Vs Suraj Roop AIR 1969 Raj*** 252 in which it was held:

> "... a person cannot be impleaded merely to see the suit is properly defended, where the defendants were already impleaded."

The learned author also cites ***Bernasi Dass Durga Prasad Vs Panna Lal Ram Richpal Oswal***, AIR 1969 P&H 57 in which it was emphasised:

> ".. the plaintiff is the *dominus litis* and he is master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not wish to claim any relief."

Thus the foregoing is the underlying principle. It is important to recall here that our CPC was imported from India. In the premises decisions from there on the provisions of the law which are in *pari materia* with ours are of paramount relevance. It is an elementary principle of statutory interpretation that similar statutes must be interpreted similarly.

In the case at hand, it is the applicant's view that the shipper and agent (whose names have not been disclosed and no reasons why have been stated by the applicant) should be joined as defendants so that the court can effectually and completely adjudicate upon and settle all the questions involved in the suit. To the contrary, the respondent who is the plaintiff in the main suit is of a firm view that the shipper and agent are not necessary parties to the suit as she has no claim against them. I have subjected the question whether the shipper and agent are necessary parties to the suit as to make me order their being joined as defendants under the provisions of Order I rule 10 (2) of the CPC. I have not been able to glean any reason to support my granting the order sought by the applicant who is the defendant in the main suit. As stated by the respondent, and seems to me rightly so, the suit is based on the communication between the applicant and respondent which stems from the letter of 23.02.2015. On top of that, the respondent who is the plaintiff states that she is the master of her own case; she should not be compelled to sue a person she does not wish and against whom she has no claim. I think the respondent is right. The plaintiff is at liberty to sue a person she wishes to and against whom she feels she has a cause of action. She has stated that she has no cause of action against the shipper and/or agent. Conversely, she is of the view that she has a cause of action against the applicant. In the premises, she is comfortable to proceed

against the applicant without joining the shipper and/or agent. Let the will of the plaintiff prevail.

I wish at this juncture to react to Mr. Rweyemamu's contention that the cases cited by the learned counsel for the applicant are distinguishable as they concerned application of Order I rule 10 (2) of the CPC in tort. Mr. Rweyemamu is right in his contention that the authorities cited by the learned counsel including **Odunga's Digest on Civil Cases and Procedure** dealt with tort. However, having read the cases and **Odunga's Digest on Civil Cases and Procedure** in the light of **Mulla: the Code of Civil Procedure** (supra) as shown above, I am of the considered view that the principle stated therein holds true in respect of cases based on contract like the present one.

The foregoing is sufficient to dispose this matter.

However, I wish to briefly touch on the second prayer in the chamber summons in which Mr. Rweyemamu raises a rather interesting prayer: that costs of this application be awarded to the applicant **in any event**. That prayer has been repeated in the written submissions as well. I must confess to my being surprised by Mr. Rweyemamu's prayer. I will however, not burn a lot of fuel in explaining the principle behind costs. I should only state that in the adversarial system of adjudication to which our country belongs, the position is that costs are awardable at the discretion of the court and the general rule that an unsuccessful party must be condemned to pay costs in favour of the successful party. That principle can be gleaned in section 30 (1) of the CPC and under sub-section (2) thereof, where the court directs that any costs shall not follow the event, it shall state its reasons in writing. As for what "costs shall follow the event" means, was stated by this court (Biron,

J.) in ***Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co.*** Ltd [1967] 1 EA 287 at pp 289 – 290 at which, relying on **Mulla** [supra (12th Edn.)] at p 150, His Lordship observed:

> "The general rule is that **costs shall follow the event** unless the court, for good reason, otherwise orders**. This means that the successful party is entitled to costs** unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation".
> [Emphasis supplied].
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> See also: ***In The Matter Of Independent Power Tanzania Ltd And In The Matter of a Petition by A Creditor For An Administration Order By Standard Chartered Bank (Hong Kong) Ltd***, Miscellaneous Civil Cause No. 112 of 2009 [Utamwa, J. - unreported].

Thus, on the basis of the above, Mr. Rweyemamu's prayer, to say the least, is strange at law and not maintainable. It is therefore refused.

In the upshot, I find no evidence to suggest that the shipper and/or agent ought to have been joined as defendants in the suit from which this application stems. Neither do I find any sufficient reason to suggest that they (the shipper and/or agent) are necessary persons whose presence before the

court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit as to order them being joined as defendants. I would, and hereby, dismiss this application with costs.

Order accordingly.

DATED at DAR ES SALAAM this 6th day of February, 2017.

J. C. M. MWAMBEGELE
JUDGE

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION