

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 248 OF 2018

(Arising from Commercial Case No.186 of 2017)

KAWA APARTMENTS.....1ST APPLICANT

NATIONAL FURNISHERS LTD.....2ND APPLICANT

NATIONAL FURNISHERS INVESTMENT LTD.....3RD APPLICANT

BALDEV NORTHERN VARMA.....4TH APPLICANT

SUDESH KUMAR VARMA.....5TH APPLICANT

VIKAS VARMA.....6TH APPLICANT

VERSUS

EXIM BANK (TANZANIA) LTD.....RESPONDENT

RULING

B.K.PHILLIP, J

This application is made under the provisions of Order VIIIA Rule 4 of the Civil Procedure Code, Cap 33 R.E 2002 (the "CPC") and Rule 24 (1) and (3) (b) of the High Court (Commercial Division) Procedure Rules, 2012 (Henceforth " the Commercial Court Rules"). The applicants are praying for the following orders.

- i. That the honourable court may be pleased to order departure from the scheduling order in Commercial Case No. 186 of 2017 for

the defendants to apply for an order to amend the written statement of defence in Commercial case No. 186 of 2017.

- ii. That this honourable court be pleased to make an order allowing the defendants to amend their joint written statement of defence in Commercial Case No. 186 of 2017.
- iii. Costs be in the course.
- iv. Any other orders that the court may deem fit and just to grant.

The respondent's claims against the applicants in the aforementioned Commercial case No 186 of 2017, (henceforth "the case") is payment of USD 3,062,464.86 being balance due and payable to the plaintiff as at 1st October 2017 by virtue of the loan granted to the 1st applicant ,secured by among others the 2nd applicant's property situated on plot No. 1353 and 1354 Msasani Peninsula having certificate of title No. 41285 and 41332 respectively. The 2nd to the 6th applicants have been sued as guarantors to the aforesaid loan granted to the 1st applicant .The respondent prays for judgment and decree against the defendants as follows:-

- i. An order for payment of USD 3,062,464 being the balance due and payable by virtue of the loan facilities agreement offered to the 1st defendant and secured by the rest of the defendants as at 1st October 2017.
- ii. Interest on item (i) above at the rate of 14.5% from 2nd October 2017 to the date of judgment and thereafter at the court rate to the date of final settlement of the decree.

- iii. An order that by virtue of the fact that the 2nd defendant guaranteed the 1st defendant loan and mortgaged its property in favor of the 1st defendant, it is jointly and severally liable to pay the amount due and payable as per prayer (i) and (ii) herein above.
- iv. An order that the plaintiff is entitled to set off the balance from the decree amount in land case No. 210/2015 to settle the amount due and payable to the plaintiff as per prayer (i) to the tune of USD 1,925,132.12.
- v. That the amount deposited in court from the proceeds of sale in execution of the decree in Land case no. 210/2015 that is Tshs. 2,253,813,750.00 (USD 1,001,250) be paid to the plaintiff by virtue of set off.
- vi. General damages, costs and any other relief that the honourable court may deem it fit to grant.

The applicants filed their defence against the case on 29th December 2017.

This application is supported by an affidavit affirmed by Mr. Vikas Varma, who is the 6th applicant and the principal officer of the 1st, 2nd, and 3rd applicants. The deponent narrated in detail the facts surrounding the case. Briefly, the background and facts surrounding this matter are as follows; In 2015, the 2nd applicant herein filed Land Case No. 210/2015 against the respondent, challenging the loan recovery process that was initiated by the respondent herein, by way of public auction of the mortgaged property belonging to the 2nd applicant that is, properties situated on plot No.

1354, CT No.41285 and plot No.1353,CT No. 41332, Msasani Peninsula, Kinondoni, Dar Es Salaam, which were securities for the loan granted to the 1st and 2nd applicants. Land Case No. 210/2015 was settled amicably basing on the terms of the deed of settlement signed by the parties in which the 2nd applicant agreed to pay the outstanding loan amount by installments. However, the 2nd applicant failed to pay the debt as agreed in the deed of settlement, consequently the respondent herein moved the wheels of execution of the court decree in motion, consequently, the mortgaged properties on Plot No 1353 and 1354, Msasani Peninsula Dar es Salaam, held under Certificate of Title No.41284 and 41285 were sold by Public auction. By the leave of the Court the respondent participated in the auction and emerged as the highest bidder, at the purchase price of USD 4,005,000/=.

On another separate move for recovery of the outstanding loan amount the plaintiff herein, exercising his powers under the mortgage, sold by public auction the mortgaged property on Plot No. 124, Mbezi, Dar es Salaam with CT No.24442 in the name of 1st applicant and by the leave of the court , the same was bought by the plaintiff at price of USD 7,000,000/=

Following the aforesaid auction of the property on Plot No. 124, Mbezi, Dar es Salaam, the 1st and 2nd applicants herein filed Land Case No 413/2016 at the High Court of Tanzania , Land Division against the respondent and a court broker, namely Kische Auction Mart Limited praying for the following order;

- i. A declaration that the credit facilities purportedly advanced to the 1st applicant by the respondent was done fraudulently and hence null and void.
- ii. A declaration that the deed of settlement entered on 20th April 2016 and the decree that ensued in land case no. 210 of 2015 in recovery of the said credit facilities was procured under misrepresentation and/or fraudulently and hence null and void.
- iii. A declaration that the purported sale of the mortgaged property registered under certificate of title No. 24442, Plot No. 124, Mbezi Beach, Dar es Salaam done by the respondent herein and Kishe Auction Mart Limited to the respondent, was tainted with illegalities and/or fraud and hence null and void.
- iv. That in the alternative to prayer (iii) hereinabove, a declaration that the respondent having sold to itself the mortgaged property under certificate of Title No. 224442, Plot No. 124, Mbezi Beach Area, Dar es Salaam, the same has liquidated and/or cleared all outstanding amounts owed to the 1st applicant herein from the respondent has been fully paid by 20th August, 2016.
- v. A declaration that by 20th August, 2016 no interests had been accruing as against the 1st and 2nd applicant herein since the pending loans with the respondent herein had been discharged off by the said auction done by the respondent herein.
- vi. Payment of United States of America Dollars 5,297, 488.00 being the balance of the sale proceeds of the mortgaged property under

certificate of Title No. 224442, Plot No. 124 Mbezi Brach Area, Dar es Salaam, sold by Kishe Auction Mart Limited to respondent.

- vii. Payment of general damages as may be assessed by the honourable court and cost of this suit be paid by the defendants.
- viii. Costs of the suit.
- ix. Any other relief this honourable Court may deem fit and just to grant.

Upon being served with the plaint in Commercial case No 186 of 2017, the applicants raised a point of Preliminary objection that this case is *res subjudice* on the ground that the matter litigated in the case are substantially the same to the matters litigated in Land case No. 413 of 2016. The point of preliminary objection aforesaid was dismissed.

The deponent in this application has deponed that the 1st and 2nd applicants' claims in Land Case No.413 of 2016 are in effect that the 1st and 2nd applicants are not indebted to the respondent on account of the credit facilities granted to them. Moreover, the deponed states that , he has been advised by his Advocate Mr. Malimi, that the claims in this suit are dealing with the same subject matter, subject of the court's decision in Land case No 413 of 2016, and in order for this court to conclusively and completely adjudicate the dispute between the parties in this case, the applicants have to amend their defence in order to raise a counterclaim.

A counter affidavit sworn by Mr. Edmund Aaron Mwasaga, the senior legal Manager of the respondent has been file in opposition to the application. Briefly, Mr. Mwasaga has deponed that , the matters pertaining to the

auction of the property on Plot No 124 Mbezi which was auctioned for USD 7,000,000 /= is *res subjudice* in Land Case No.413 of 2016. That after the Preliminary objection raised by the applicants was dismissed by this court, then this court is *functus officio*, it cannot deal with any matter raised in Land Case No. 413 of 2016 pending at the High Court Land Division, thus the intended amendment of the written statement of defence is aimed at circumventing the ruling of this court in respect of the points of preliminary objections, by bring in this case matters which are pending for determination in Land Case No.413 of 2016. The deponent further states that allowing the intended amendment which aims at raising a counter claim on matters which are *res subjudice* in Land Case No.413/2018 will lead to a creation of parallel proceedings on the same matter.

I ordered this application to be disposed of by way of written submission. The learned Advocates Seni Malimi of K&M Advocates and Levina K.P Kagashe of Mnyele, Msengezi & Company Advocates filed submissions for the applicants and respondent respectively.

Submitting in support of the application and relying on the provisions of Order VIII B, Rule 23 of the CPC as amended by GN. No. 381, Mr. Malimi started his submission by point out that it is a trite law that once a scheduling Order is made, no departure is allowed unless the court is satisfied that such a departure is for the interests of justice. He cited the case of **Anche Mwedu Ltd and others Vrs Treasury Registrar (Successor of Consolidated Holding Corporation) , Civil Reference No.3 Of 2015**, (unreported) in which the court among other things said the following;

"...the term in the "interests of justice" is very wide. It is one of those which do not have a definite definition. In most cases it would depend, on the prevailing circumstances of the case"

Mr. Malimi was of the view that it is in the interests of justice that the applicants be allowed to raise the counter claim since, if the amendment of the written statement of defence will not be allowed , then the applicants stand to suffer irreparable losses and the claims intended to be raised in the counter claim will have to be raised elsewhere, thus creating multiplicity of cases, and in some circumstances raising the claims might be barred by constructive interpretation of the principle of *res judicata*.

It was the submission of Mr. Malimi that Rule 24 (1) and (3) (b) of the Commercial Court Rules gives powers to this court to grant orders for amendment of pleadings. Citing the case of **James Kabalo Mapalala Vs British Broadcasting Corporation (2004) T.L.R 143** , Mr. Malimi submitted that amendment of pleadings is allowed at any stage before the judgment. In addition to the above Mr. Malimi cited the case of **County Government of Kilifi Vs Mombasa Cement Ltd, Civil Appeal No.11 of 2016,(2017)** eKLR, in which the court made findings to the effect that a counterclaim is suit in its own. It helps to avert multiplicity of proceedings as both the suit and the counterclaim are disposed of in the same trial.

Mr. Malimi insisted that the amendment sought in this application is necessary since the counterclaim intended to be raised arises from the same transactions and /or facts that are grounds of the respondent's

claims in the plaint and also contended that Land case No 413 of 2016 was struck out on 17th September 2019 by Hon. Opiyo, J.

In rebuttal, the learned Advocate Kagashe started her submission by adopting the contents of her skeleton arguments filed in court pursuant to the provisions of Rule 64 of the Commercial Court Rules. Basically, the respondent is not opposing the prayer for departure from the scheduling order, but is objecting to the prayer for amendment of the written statement of defence with intent to raise a counter claim as indicated in the affidavit in support of this application. Expounding on the import of the provisions of Rule 24 (1) 3(b) of the Commercial Court Rules, under which this application is made, Ms. Kagashe submitted that the provisions of Rule 24 (3) (b) of the Commercial Court Rules are very restrictive on the amendment, since they provide that the amendment have to be for the purpose of determining the real question in controversy or to achieve justice between the parties. She submitted that amendment of pleadings is pure discretion of the Court. However, she contended that in the affidavit in support of this application it is not stated that the applicants are seeking leave to amend the written statement of defence so as to achieve justice between the parties. To cement her arguments Ms. Kagashe cited the case of **Agrovety and Construction Co Ltd Vs Salim Said Kleb (1995) TLR 168**, in which the court said the following;

"The import of the provision under Rule 17 of the Civil Procedure Code above quoted is that though the court has been vested with a discretion to grant an amendment as applied for by either party, such discretion may only be exercised where the amendment appears

necessary for the purpose of determining the real question of controversy between the parties”.

Moreover, Ms. Kagashe submitted that the case of **Anche Mweddu Ltd and others** (supra) which was cited by Mr. Malimi in support of this application is distinguishable from the facts of the matter at hand, on the ground that the amount claimed in the case of **Anche Mweddu** (Supra) was a colossal amount of money but were secured by the 2nd and 3rd applicants. Ms. kagashe contended that there is no need to grant the amendment since the counter claim intended to be raised is already under consideration in Land Case No 413/2016, thus there is no need to depart from the scheduling order.

Ms. kagashe was of the view that allowing the intended amendment will allow the applicants to raise a counterclaim which will lead to having two parallel proceedings on the same subject matter in this court and the High Court Land Division.

Ms. kagashe conceded that the case of **Jame Mapalala** (supra) is relevant as far as the issue of amendment of pleading is concerned. However, she pointed out that the same cannot be applicable in the matter at hand since the matters intended to be raised in the counter claim are subject of the decision of the High Court Land Division in Land Case No 413/2016.

As regards, Mr. Malimi's contention, that Land Case No.413/2016 was struck out in 2019, she submitted that ,Mr. Malimi's contention aforesaid should be ignored since the same is not pleaded. It is just a mere

statement from the bar. She contended that what is important is that at the time this suit was filed in court the said Land Case No. 413 of 2016 was pending for hearing in High Court of Tanzania Land Division.

In rejoinder, Mr. Malimi, submitted that the contention by the respondent's advocate that the matters intended to be raised in the counter claim if this application is granted will be *res subjudice* as they are subject of the decision of the court in Land case No.413 of 2016 is misconceived, since the said Land Case No.413 of 2016 was struck out on 17th September 2019.

Having examined the records as well as considered the submissions by both counsels, I have noted that the following issues are not in dispute; *i) That the grant of an order for amendment of the pleadings is under the court's discretion. ii) That the provisions of Rule 24 (3) (b) of the Commercial Court Rules under which this application is made provides that this court can grant orders for amendment of pleadings for the purpose of determining the real question in controversy or to achieve justice between the parties and iii) Land case was struck out on 17th September 2019.*

Before going further with the analysis of the submissions made by the learned advocates appearing herein, let me say outright here that by reading the affidavit in support of this application in its entirety, in my understanding it conveys a message that the amendment sought is for the purpose of determining the really matters in controversy and achieving justice between the parties. The affidavit in support of this application has narrated in detail the facts surrounding this dispute

between the parties herein. The deponent has deponed that there are some amounts of money obtained by the respondent through the auction of the properties belonging to the 1st and 2nd applicants and there are issues involving execution of the court decree in Land Case No. 210/2015, and set-off of the proceeds of the sales of the mortgaged properties. At the end the deponent has states that in order to conclusively and completely adjudicate the dispute between the parties herein, it is necessary for the applicants to be granted the orders sought in this application to enable them to raise their counterclaim. Thus, I decline to agree with the respondent's advocate that the affidavit in support of this application does not show that the amendment is for achieving justice between the parties.

Now , as regards the merit of this application, the major argument raised by the Ms. Kagashe against this application, is that the counter claim intended to be filed by the applicants upon being granted the leave to amend the written statement of defence will be *res subjudice* due to the existence of Land Case No. 413 of 2016 is no longer valid, following the striking out the same by my Sister Hon Dr. Opio, J. The copy of the ruling in which the said Land Case No 413 was strike out has been attached to the rejoinder to the submission in support of this application. I decline to agree with Ms. Kagashe's contention that since at the time of filing this application Land Case 413 of 2016 was pending in court then, the fact that the same has been struck out should be ignored. With due respect to Ms. kagashe, this court cannot opt to deliberately ignore a court decision in away contended by Ms. Kagashe. After all this court is supposed to take judicial notice of all judgments.

Without prejudice to my observations herein above, that the arguments that the counter claim intended to be raised will be *res subjudice* is no longer valid, upon perusing the court's ruling in Land Case No. 413 of 2016, I have noted that the prayers intended to be raised in the counter claim are similar to the ones which were raised in Land Case No. 413 of 2016. In its ruling the court made a finding that the claims which were raised by the National Furnishers Ltd (the 2nd applicant herein) in Land Case No. 413 of 2016 were partially or substantially the same to the ones which were raised in Land Case No. 210 of 2015 which was settled amicably by a deed of settlement. So, the court's decision is to the effect that the 2nd applicant herein, who was the 1st plaintiff in Land case No.413/2016 is estopped from challenging the execution of the court decree emanating from the deed of settlement in land case No 210 of 2015. Now, since according to the provisions of Order VIII Rule 9 (2) of the CPC, a counter claim is a suit in its own, allowing the 2nd applicant herein to raise the intended counter claim will be going contrary to the decision of the court in Land Case No. 413 of 2016.

In addition to the above, I have also noted that the intended counter claim basically challenges the auction that was done in execution of the decree in Land Case No.210 of 2015 as well as claiming for the proceeds of the auction aforesaid. With due respect to Mr. Malimi, a claim for challenging the auction cannot be raised as a counter claim in this case, since the orders for auction were issued by the High Court Land Division where the decree that was executed emanates from. To my understanding, any complaint regarding the auction or proceeds of the auction has to be

lodged at the executing court. This court cannot be in position to issue any order regarding the proceeds of the auction done in execution of decree issued by the High Court Land Division. After all, the reports on the auction are not in this court and I think once one embarks on challenging an auction it is imperative that the court broker who conducted the auction has to be joined in the case, that is why in Land Case No.413 of 2016, Kishe Auction Mart was joined as the 2nd defendant.

I also wish to point out that upon perusing the written statement of defence filed by the applicants in this case at paragraph 19 of the same , the applicants have stated that the respondent herein lodged applications at the High Court Land Division, to wit application No.995 and 985 of 2017 challenging the order of the executing court which ordered that USD 923,883/-, the proceeds of the auction be deposited in court. Fortunately, I managed to get the hold of the decision of the High Court Land Division in respect of the said applications No. 985 and 995 of 2017, in which, Hon. Mzuna J, struck out application No.995 of 2017. He granted the prayers in application No.985 of 2017 and said the following;

"Court's powers cannot be abrogated. Without the fear of being contradicted, this court in exercise of its powers vested to it under section 95 of the CPC, hereby annul the ex parte order made by the District Registrar in Misc. Application No. 71/2016 that U\$ 923,882.12 be deposited in court. Parties should discuss among themselves how best they can deal with execution based on the consent judgment entered in Land case No. 210/2015.

Each party to bear its own costs."

Thus, from the foregoing it is evident that the parties have been dealing with the disputes arising from the execution of the aforesaid court decree at the High Court Land Division. All matters/complaint related to the proceeds of the auction aforesaid were lodged at the executing Court, that is the High Court (Land Division), which to my understanding was a correct and proper procedure.

I think it is also worth pointing out here that, the pleadings in the case show clearly that the issues in dispute in the case are all about the proceeds obtained from the execution of the court decree in Land Case No 210/2015. This explains the reason behind Mr. Malimi's contention that the plaintiff's case is related to the execution of the court decree in Land Case No. 210 of 2015 and that is why he is of the view that the counter claim intended to be raised if this application is allowed is proper, since the same is also concern with the proceeds of the auction in the aforesaid Land Case No. 210/2015. As correctly argued by Mr. Malimi, this is evidenced by the plaintiff's prayer to be granted permission to set off the allegedly outstanding debt of USD 3,062,464/= with the proceeds of the sale in execution of the court decree in Land Case No. 210/2015.

However, it has to be noted that section 38 and Order XXI Rule 82 of the CPC provides as follows;

"S.38(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be

determined by the court executing the decree and not by a separate suit."

Order XXI Rule 82 ;

" On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per centum on the amount of his purchase money to the officer or other person conducting the sale and, in default of such deposit, the property shall forthwith be resold.

(2) Where the decree holder is the purchaser and is entitled to set off the purchase money under rule 70, the court may dispense with the requirements of this rule".

In the light of what I have said herein above, having in mind the position of the law that this court has to exercise its discretion judiciously and the provisions of the laws pertaining to execution of court decrees and disputes/questions arising from the execution of court decrees, I am of a settled view that allowing the amendment of the written statement of defence is not proper before the law, since the counter claim intended to be raised is basically concerned with a dispute relating directly to the execution of the court decree in Land Case No.210/2015.

Since this ruling is an application for amendment of the written statement of defence, I think it is not a right place to make any findings on the appropriateness of the plaintiff's case in the light of the provisions of the law I

have cited herein above, thus the same will be dealt with accordingly in the case.

From the foregoing and for the reasons stated herein above, this court finds that this application has no merits. Consequently, it is hereby dismissed. Costs will be in course.

Dated at Dar es Salaam this 5th day of June 2020.




B.K. PHILLIP

JUDGE