IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL APPL. NO. 121 OF 2022

(Arising from Commercial Case No 25 of 2021)

EQUITY BANK TANZANIA LIMITED ..... 1ST APPLICANT

EQUITY BANK KENYA LIMITED..... 2ND RESPONDENT

VERSUS

TSN OIL TANZANIA LIMITED .....1ST RESPONDENT
TSN SUPERMARKET LIMITED ..... .2ND RESPONDENT
TSN LOGISTICS LIMITED .....3RD RESPONDENT
TSN DISTRIBUTORS LIMITED .....4TH RESPONDENT

Last order: 14th JULY 2022
Ruling: 26th AUGUST 2022

RULING

NANGELA, J:.,

This ruling commences with an open question. Having commenced the hearing of the Plaintiff's case in **Commercial Case No.25 of 2021** and, having almost reached at the stage of closure of cross-examination of the sole Plaintiff's witness, should this Court entertain a prayer to depart from its earlier Scheduling Orders and consent to a prayer for amendment of the Defendants' (Applicants) pleadings so as to start this case afresh? This is the main issue teasing the mental faculty of this Court, alongside other minor questions or issues associated with it.

Briefly, the current application is premised under the provisions of Rule 2 (2), Rule 4 and Rule 24 (1),(2) and (3) of

the High Court (Commercial Division) procedure Rules, 2012 GN No. 250 of 2012 as amended by GN No.107 of 2019 (**the Commercial Court Rules**), Order VIII Rules 10 (1) and 23 and section 23; section 3A (1) and (2); section 3(B) (1) (a) of the Civil Procedure Code, Cap.33 R.E 2019 and any other enabling provision of the law.

At the heart of this application are three prayers by the Applicants, to wit, that:

1. This Honourable Court be pleased to depart from its Scheduling Conference Order made on the 28th June 2021 so as to hear and determine the Applicants' application for prayers that the Honourable Court be pleased to grant the Applicants leave to amend their written statement of defence and counterclaims so as to join/include and make claim against Barak Fund SPC Ltd, acting on behalf of Barak Structured Trade Finance Segregated Portfolio a company duly registered and incorporated in accordance with the laws of Cayman Island Monetary Authority ('Barak Fund'), as a Defendant in the Applicant's Counter Claim in Commercial case No.25 of 2021;
2. Costs of this Application to follow the events in Commercial Case No.25 of 2021 and

3. Any other relief(s) this Honourable Court may deem fit and just to grant.

The chamber summons filed by the Applicants in this Court is supported by two affidavits. The first affidavit is that of Mr Moses Ndirangu, a resident of Nairobi Kenya and the deponent of the second affidavit is Mr Edward Mwakingwe, one of the learned counsels for the Applicants. In this application, the Respondents did not file counter affidavit. However, the learned counsel orally applied to reserve their Respondent's right to respondent on matters of law which they consider pertinent to respond to at the time when the hearing of this application was set in motion.

The hearing of this application was set in motion on the 14th day of July 2022. The Applicants enjoyed the services of learned advocate Mr Mpaya Kamara who was assisted by learned advocates Mr Deusdedith Mayomba Duncan, Mr Edward Mwakingwe and Mr Emmanuel Sagan. On the other hand, Mr Frank Mwalongo and Mr Raphael Rwezahula, learned advocates as well, represented the Respondents.

Submitting in support of the application, Mr Kamara adopted *in extenso*, the two supporting affidavits mentioned earlier here above as forming part of his submissions. He informed this Court that, the prayers contained in the chamber application are twine in nature. In the first place, he submitted that, the Applicants are praying for an order of this Court to depart from its earlier Scheduling Order, dated 28th June 2021.

Secondly, it was his submission that, the Applicants are seeking for leave to amend their pleadings.

As regards the first prayer, he submitted that, the provisions of Order VIII Rule 23 of the CPC Cap.33 R.E 2019 apply while Order VIII Rule 10(1) of the CPC applies in respect of joinder of a person not a party to the suit. As for amendment of the Pleadings, he contended that, Rule 24 (1), (2) and (3) of the Commercial Court Rules, 2012 (as amended) applies.

Mr Kamara submitted that, the CPC is brought to the scene because there is a lacuna in the Commercial Court Rules and, hence, the Applicants' recourse to Order VIII and their citing and reliance on Rule 2 (2) of the Commercial Court Rules and section 3A (1) of the Civil Procedure Code, Cap.33 R.E 2019 in relation to the overriding objective principle.

Submitting on the factual matrix of this application, Mr Kamara relied on the depositions sworn in the two affidavits accompanying the chamber summons. He maintained that, as far as the affidavits are concerned, the deposition there in stand unopposed given that no counter-affidavit was preferred and, that, the Respondents' counsel is on record that, he has no issue with the stated facts in the Applicants' supporting affidavits.

In his submission, Mr Kamara contended that, the orders sought need to be granted so as to join **Barak Fund** to the main suit because, in the absence of **Barak Fund**, it may be difficult for the Court to determine the issues. Relying on paragraphs 8 to 11 of the affidavits of Mr Ndirangu, he observed that, the

intended party sought to be joined (**Barak Fund**) has featured therein prominently. For that reason, it was his submission that, the Applicants are faced with a situation where they expect to bump on a person who is not made a party to the pending suit, i.e., **Commercial Case No.25 of 2021**.

As regards paragraph 12 of Mr Ndirangu's affidavit, Mr Kamara stated that, none of the parties will be prejudiced and, that, since the Respondents have not taken any issue against that paragraph, it is clear that there is no prejudice suffered if the prayers are granted. He emphasized that, such a fact stands uncontested by the Respondent.

Mr Kamara has relied on the cases of **Kilombero North Safaris Limited vs. Registered Trustees of Mbomipa Authorities Association**, Civil Appeal, No. 273 of 2017 (unreported); **Central Kenya Limited vs. Trust Bank Limited and 4 Others,** [2000] eKLR; and **KENAFRIC Industries Limited vs. LAKAIRO Industries Group Co. Ltd and Another**, Misc. Commercial Application No. 37 of 2021, in support of his submissions.

Directing his mind to those authorities cited herein and their relevance, Mr Kamara submitted that, all of them go along well with the provisions of Rule 24 (1) of the Commercial Court Rules in respect of the principle that, amendment of pleadings must be freely allowed to allow the Court to determine the real dispute between the parties.

To further support the application, Mr Duncan who subscribed to the earlier submissions by Mr Kamara took the floor and submitted that, the **Kilombero North Safaris Case** (supra), is one of the few authorities of the Court of Appeal to have discussed the applicability of Rule 24 (1) of the Commercial Court Rules, 2012, in relation to amendment of pleadings. He contended, and citing page 11 paragraph 3 of the decision, that, in that case, the Court of Appeal was concerned with amendments which were to amplify the claims, a fact which he claimed to be similar to what the Applicants herein intend to do.

Mr Duncan submitted further that, the Applicants fall within Rule 24 (3) (a) and (b) of the Commercial Court Rules, 2012 which was authoritatively referred to in the **Kilombero North Safaris Case** (supra). He contended that, flowing from the said Rule 24 are two issues only: (1) whether the Application is intended to correct any error or defect in the proceedings and (2) whether the application is intended to determine the real question in controversy so as to achieve justice to the parties. In his view, the present application is geared towards that. He as well pegged is argument on paragraphs 8 to 12 of Mr Ndirangu's affidavit and that of Mr Edward Mwakingwe.

According to Mr Duncan, this Court has to take into account the fact that the current legal team representing the Applicants is a different team following the untimely demise of the earlier lead counsel who was handling the matter and, for that matter, being new to the case, the new legal team has

taken trouble to review it diligently and noted that, justice will be achieved if **Barak Fund** is joined to the case. He contended that, **Barak Fund** features predominantly in a number of documents and, that, without them as a party, this Court will not be able to substantively determine the real question or dispute between the parties.

Concerning the power to order amendments under Rule 24 of the Commercial Court Rules, Mr Duncan contended that, in the **Kilombero North Safaris Case** (supra), the Court made it clear, on page 9, that, such a power is discretionary and wide and must be considered within the principles governing exercise of discretion. In his view, therefore, there being no prejudice if the amendments are to be allowed, any question concerning time spent may be atoned by way of payment of costs, a fact which was also considered in the **Kilombero North Safaris Case** (supra). He maintained that, the Applicants are ready and willing to pay all associated costs in case the application is granted and the amendments are ordered.

Responding to the submissions by the learned counsels for the Applicants, Mr Frank Mwalongo submitted that, this Court should, in the first place, take note of the kind of orders sought by the Applicants. He contended that, the only order sought in this application is that of departing from the Scheduling Conference Order dated 28th June 2021, so as to hear and determine the applicants' application for amendment. He submitted that, the order for amendment of the pleadings is yet

to be made in the first prayer. He was of the view that, the issue of amendment is only mentioned in the first prayer as a reason for seeking departure from the Scheduling Order.

Mr Mwalongo submitted that, the second order sought after is an order for costs and the last is any reliefs. He contended that, neither the order for amendment of the written statement of defence and the counter claim to include **Barak Fund** nor the order for joinder of party has been made in the chamber summons. He submitted that, although he will respond and submit on the prayer sought for amendment, this Court must take note and be pleased to confirm what he has submitted in respects of the orders sought in the chamber summons.

Mr Mwalongo submitted that, as regards Rule 24 (1) of the Commercial Court Rules, the Rule allows amendments at any time only for the purposes stated under Rule 24(3) (a) and (b). His concern, however, was the timing when the amendments are being sought. He submitted that, as per the decision of the Court of Appeal in **George Shambwe vs. Attorney General and Another**, [1996] TLR 334, the Court came out clear and audibly that, amendments can be allowed before hearing commences.

He contended that, that principle was also affirmed by the Court of Appeal in the **Kilombero North Safaris Case** (supra), at page 13. In view of that, he maintained a position that, the law constructively interpreted, is that, amendments can be allowed before the hearing starts. He castigated the generalized and sweeping statement that, amendments can be done at any

time without being specific to the timing point at which it may be inappropriate to allow amendments of the pleadings.

He submitted, further that, as correctly stated in the affidavits supporting this application, the suit from which this application arose, i.e. **Commercial Case No.25 of 2021**, is at the cross-examination stage and the Plaintiff is about to close its case. Mr Mwalongo submitted that, looking at paragraph 7 of the affidavit of Mr Moses Ndirangu, the reasons why the Applicants are pressing for amendments as disclosed therein are that, having heard from the testimony of Pw-1, one Mr Farouq Ahmed Baghozah, who denied that the Standby Letter of Credit (SBLC) took effect and having disowned Barak Fund's Agreement, the Applicants find it necessary to seek for an amendment of the pleadings to join Barak Fund. He contended that, that is a fact repeated as well in paragraph 7 of Mr Mwakingwe's affidavit.

From that deposition, Mr Mwalongo submitted that, it is clear that, the Applicants had no intention to join Barak Fund right from the very beginning, but only had an afterthought having heard the testimony in chief of Pw-1. From that perspective, it was Mr Mwalongo's submission that, the timing of seeking these amendments after hearing the testimony of Pw-1, stands to defeat the ends of justice. He contended that, the testimony of Pw-1 comes in to expand on what has been pleaded already. Consequently, it was Mr Mwalongo's contention that, the reasons advances do not qualify under Rule 24(3) (a) and (b) of

the Commercial Court Rules as a matter that will be helping the Court to determine the real controversy between the parties.

Besides, Mr Mwalongo submitted that, the reason disclosed in paragraph 9.1 of the affidavit of Mr Ndirangu does not qualify as well. He stated that, the deponent has stated so, because the Applicants do not have the original agreements, and they now want to bring in Barak Fund because they believe that, Barak Fund has that original. It was Mr Mwalongo's view, as well, that, such a belief on the part of the Applicants, cannot be a matter that is going to determine the real question or controversy between the parties. He submitted, in reference to paragraph 9.2 of Mr Ndirangu's affidavit as well as paragraph 9 of the affidavit by Mr Mwakingwe, that, the Applicants have stated that, it is Barak Fund who can answer the issues raised.

He contended further that, that mere assertion cannot be the basis for amendment since the Applicants have not been able to even show the Court what particular claim they have as counterclaim against Barak Fund and no facts constituting the cause of action against Barak Fund have been shown. He contended that, even if the Applicants have no such a duty, but it is vital given the stage of the hearing of this case. He also contended that, doing so would have helped the Court to determine whether there are at all possibilities of determining the real controversy between the parties.

Mr Mwalongo submitted that, thought the Applicants have not given the Court a snap shot of what the case against Barak

Fund will be, it is clear that, all annexure attached to the affidavit of Mr Ndirangu, form the pillar of it. Referring to **Exh.EBA-1** and **2**, he contended that, the annexures are contractual matters between the Applicants and Barak Fund and cannot be a basis of joining Barak Fund in the pending suit.

Moreover, he submitted that, looking at the applicable law to matters pertaining to annexures **EBA-2**, **EBA-3** and **EBA-4**, the applicable law is the English Law and, the Courts that can exercise jurisdiction are the English Courts. In view of what the term sheet indicates, he was of the view that, there can be no basis of joining Barak Fund in the pending proceedings. He also contended that, annexure **EAB-5** cannot as well be the basis for joining Barak Fund.

Relying on the case of **Sunshine Furniture Co. Ltd vs. Maersk (China) Shipping Co. Ltd and Another**, Civil Appeal No.98 of 2016, he contended that, the law is settled, that, where parties have chosen a forum and the law outside Tanzania, the Courts in Tanzania, including this Court, will, under section 7 of the Civil Procedure Code and section 28 of the Law of Contract Act, Cap.345 R.E 2019, refrain from exercising jurisdiction.

He contended, therefore, that, on the basis of those annexure **EBA-1** to **EBA-4,** this Court is barred from exercising its jurisdiction. He also contended, that, the Applicants have not in real sense been able to demonstrated how by joining Barak Fund, this Court will be in position to determine the controversy between the parties.

To wind up his submission, Mr Mwalongo submitted that, allowing amendments at this time would mean that Commercial Case No.25 of 2021 had to start afresh, and all other processes must be set aside. He contended that, for all such to be justified, there must be better explanations or strong reasons than merely stating that it was the late senior counsel who had the conduct of the matter and a new team has come in. He submitted that, the reasons for seeking to amend the pleadings at this time are unavailable, not even weak reasons. He urged this Court to dismiss this application with costs.

In their rejoinder submissions, both counsels for the Applicant maintained that, Mr Mwalongo's submission in respect of the annexure to the affidavit of Mr Ndirangu are, for all intent and purpose, attempts to controvert the depositions made in the affidavits supporting the application, while he earlier took a position of not countering the facts. They contended, therefore, that, he is barred from doing that. Secondly, it was Mr Kamara's rejoinder that, in his preamble, he did make it clear that, the first prayer in the Chamber summons is twine in nature, containing a prayer to vacate the scheduling order and a prayer for amendment.

Mr Kamara was also vociferous, in his third line of reasoning, that, amendments are not confined to the pre-hearing stage as contented by Mr Mwalongo but can be allowed at any time or stage of the proceedings and, that, in the **Kilombero North Safaris Case** (supra), such a fact was well canvassed, at

pages 10-13 thereof. It was the Applicants' counsel submission that, the setting or vacating of the earlier scheduling orders is even a more stringent matter compared to an order for amendment since, generally speaking, an amendment order is only consequential to the granting of the order setting aside of the scheduling orders.

As regards the reasons for filing the application and bringing Barak Fund as a party to **the Commercial Case No.25 of 2021**, it was rejoined that, the affidavit of Mr Ndirangu has stated it all, including, how Barak Fund features in that case. For the Applicants learned counsels, other matters, including those regarding jurisdiction of the Court, are for Barak Fund to respond to or can be only raised once Barak Fund is joined as a party and counterclaims are made against her. Finally, the learned counsel for the Applicants prayed that the orders prayed for by the Applicants be granted.

I have carefully and dispassionately considered the submissions made by the two opposing sides in this application. It is a fact that, **Commercial case No.25 of 2021** is now at the stage of cross-examination of the sole witness for the Plaintiff. It is also a fact that the learned counsels for the Respondents herein took over the conduct of this matter following the untimely demise of the senior counsel who earlier represented the Applicants in the main suit.

In this application, however, this Court has been called upon, having gone to the extent of cross-examination of the sole

Plaintiff's witness to depart from its earlier scheduling order dated 28th June 2021 and allow for an amendment of the pleadings in respect of the Defendant in **Commercial Case No.25 of 2021** so as to bring to its ambit a new party in the name of **Barak Fund** to whom a counterclaim will be made by the Defendants (Applicants herein).

As I stated at the beginning of this ruling, the main vexing issue is whether the departure from the Scheduling Order dated 28th June 2021 is warranted at this time when the proceedings are at the stage of cross-examination of the Plaintiff's sole witness. With that main issue or question for consideration by this Court, however, is yet another set question which begs for responses of this Court as well.

The particular set of question is in the following order: whether the Applicant's chamber summons has included in it a prayer for amendment of the Defendants' pleadings in **Commercial Case No.25 of 2021,** and, if so, whether such a prayer should be granted at such a time as this, when the **Plaintiff's** case is almost at its closure to pave way for the Defence case to open. I will start with the issue of departure from the Scheduling Oder dated 28th June 2021.

Essentially, under the provisions of Order VIIIB Rule 23 of the Civil Procedure Code, (Amendment of First Schedule) Rules, 2019, GN. No. 381 of 2019 now cited as [Cap. 33 R.E 2019] as per GN, No. 140 published on 28/02/2020 provides that:

> "Where a scheduling conference order is made, **no departure** from or **amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice** and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise." (Emphasis is added).

Agreeably, as stated by Mr Duncan, departure from the scheduling order of the Court is a stringent matter meaning that it is not easily taken on board. That position is readily visible from the above quoted provision, which is couched in mandatory terms. The same can only be allowed if it is in the interest of justice to do so and any party seeking for such a departure must bear the costs.

In the case of **Bridgeways Logistics Limited vs. Triple "A" Haulers Limited,** Misc. Commercial Application No. 287 of 2017, [2018] TZHCComD 21; [09 February 2018TANZLII], a decision which I fully subscribe to, this Court stated that:

> "The purpose of holding pre-trial conference is to consider amongst other things the possibility of settlement of all or any of the issues in the suit or proceedings; to require

> parties to furnish to the Court with any information that the court give directions as to what the court considers fit; **to give direction as the court may consider necessary or desirable in order to secure just, expeditious and economical disposal of the suit or proceedings** and for settling of the speed track ....." (Emphasis added).

As it may be gathered from the above quotation and, bearing in mind the stringent nature of Order VIIIB Rule 23 of the Civil Procedure Code, it is clear that, what is envisaged in the law is that cases need to be heard and determined justly, expeditiously and with a sense of efficiency and economy. This foresight of the law entails, among other things, ensuring that the parties are placed on equal footing in terms of their treatment, and that, there are efforts to minimise time, expenses or resources, including Court's resources.

In the cases of **Gastech Enterprise vs. National Bank of Commerce Ltd**, Misc. Commercial Cause No.166 of 2018 and that of **Prashant Motibhai Patel and Another vs. Azania Bank Limited and Another**, Commercial Case No. 37 of 2020, this Court (Nangela, J.) did consider at length the issue of amendments and prayer for departure from the Scheduling Orders. In those cases, this Court stated as follows:

> "Essentially, the proposed amendments will only be inappropriate, and, thus,

rejected if it could be established that such amendments are being made in bad faith, or after an undue delay, thus prejudicing the opposing party, or that, such amendments are futile. The futility of such amendments will include amendments which would fail to state a claim upon which relief could be granted. All in all, at the end of the day, it is the consideration of prejudice to the opposing party that carries the greatest weight, and, even if the amendment will add causes of action or parties, such eventualities will not scuttle the liberality in granting leave to amend pleadings. Absent prejudice or a strong showing of any of the remaining factors, set out herein above, a presumption in favour of granting leave to amend exists."

In the **Gastech Enterprise's case** (supra), this Court stated, further, that**:**

> "to obtain an **amendment of the scheduling order**, a party must apply for such, and, **as a matter of necessity, must demonstrate "good cause"** for such amendment. In essence, a court's decision on **what constitutes the "good cause" will include focusing on the diligence (or lack thereof) of the party requesting for such**

> **amendment more than it does on any prejudice to the other party**. Otherwise, **a Court will disfavour prayers to amend whose timing prejudices the opposing party by let us say, requiring a re-opening of discovery with additional costs, a considerable deferment of the trial, and a likely major variation in trial strategy**." (Emphasis added).

Cases which also emphasised on the need to show '***good cause***' if the Court is to vacate its scheduling orders are the case of **Tanzania Petroleum Development Corporation (TPDC) vs. GAPCO (T) Ltd,** Commercial Case No.141 of 2001 (unreported) and **National Bank of Commerce vs. Vaginga Family & 3 Others,** Commercial Case No.125 of 2001 (unreported).

In those two cases cited here above, this Court made a position, which, in principle, and as it was stated in the case of **Equity Bank Tanzania Limited vs. Babuu & PKS Supplies Co. Ltd**, Comm. Case No.01 of 2020 (unreported), still holds as good law to date. In the TPDC case (supra), His Lordship Mr. Justice Bwana, J. (as he then was) made a point that:

> "steps already passed, cannot be reverted to unless there is **good cause**, such as if the dictates of justice require."

In the **NBC Ltd's case** (supra), Hon. Madam Justice Kimaro, J (as she then was) was of the view that:

> "an opportunity should not be left for the parties to come after the scheduling order to ask for orders for matters which were supposed to be presented before the court either before or during the first pre-trial conference."

From the above cited cases, the issue that follows is whether there is any "**good cause**" to warrant this Court to vacate or depart from its Orders dated 28th June 2021. In the **Gastech Enterprise's case** (supra), it was the position of this Court that, a focus on whether an Applicant was sufficiently diligent in preparing his case or lacked such diligence, is pivotal in deciding whether to accede to a prayer to vacate from or depart/amend the earlier Scheduling Order.

It was stated in **TPDC's case** (supra) that, he who comes to Court must know exactly what he intends to request the Court to grant or do for him or her and from whom is it to be claimed. Besides, and as it may be observed herein above, a Court will disfavour such a prayer if its timing prejudices the opposing party by let us say, requiring a re-opening of discovery with additional costs, a considerable deferment to the trial, and a likely major variation in trial strategy.

In this present case, the Applicants have sought the amendment of the Scheduling Order dated 28th June 2021 by way of this application. Their learned counsels for the Applicants have admitted that, setting aside or vacating an earlier scheduling order is an inflexible matter. In essence, they do not

dispute that the Applicants' prayers that the Court should be pleased to vacate the scheduling orders are made by the Applicants after their case has gone past the 1st PTC, past mediation stage, final PTC, examination in chief and at the time when the Plaintiff's case is at the closure of cross-examination.

That being the case, it is clear, therefore that, the Applicants have a tall order, as I stated herein above, to demonstrate cogent reasons or "good cause" on their part, if this Court is to grant the prayer to amend or vacate from the Scheduling Orders dated 28th June 2021. Unfortunately, however, when addressing this Court, the Applicants' learned counsels have devoted much time and efforts on convincing this Court why it should grant their prayer for amendments of the pleadings than why this Court should vacate its scheduling orders dated 28th June 2021.

As Mr Duncan correctly stated, the issue of amendment of the Defendants' pleadings is consequential upon granting of an order to set aside or vacate the Scheduling Orders dated 28th June 2021. The Applicants ought to have, first and foremost, convinced this Court that, there are good reasons why it should depart from or vacate its earlier scheduling orders before any discussion regarding the prayer for amendment and joinder of a new party (if at all such a prayers were made, since, Mr Mwalongo has even disputed that such prayers were made in the chamber summons).

In their submissions, the learned counsel for the Applicants have been of the view that, it is the Applicants' need to amend the pleadings which prompts them to seek or apply for the amendment of the Scheduling Order since amendment of the pleading is consequential to the amendment of the Scheduling order.

Put otherwise, what they have submitted before me as their reasons for seeking a departure from the Scheduling Order, is that, their application for departure from the earlier order is premised on the need to amend the pleadings, in particular the Defendants' written statement of defence and counter claim by joining a new party, namely Barak Fund who features in the pleadings. This Court was also urged to take note of the fact that, the learned counsels' for the Applicants took over the conduct of the matter following the untimely demise of the counsel who was hitherto engaged to represent the Applicants. Besides, it has been contended that, bringing in Barak Fund is necessary if the Court is to determine the real question between the parties.

In his submission Mr Mwalongo has questioned the timing of the application stating that, as per paragraph 7 of the affidavit of Mr Ndirangu and that of Mr Mwakingwe, it is clear that, the reasons why the Applicants are pressing for amendments are floated because of what the Applicants heard from the testimony of Pw-1, one Mr Farouq Ahmed Baghozah, who denied a Standby Letter of Credit (SBLC) took effect. He contended, therefore,

that, because Pw-1 also disowned the Barak Fund's Agreement, the Applicants find it necessary to seek for an amendment of the pleadings to join Barak Fund.

I do understand that Mr Mwalongo did not file a counter affidavit and for that matter may not controvert the affidavits filed by the Applicants by way of submissions. However, that does not mean that this Court is not required to consider the merits of what the deponents aver in their affidavits in support of their application. Whether the Respondents have controverted the averments made by the Applicants or not, this Court has a duty to asses each and every factual averment to see whether there is any merit in such averments to warrant the granting of the prayers sought.

In view of that, I have carefully looked at the two supporting affidavits in their entirety to find out the kind of reasons disclosed therein as the basis for this application or what push the Applicants to bring the application to the forefront. My look at paragraphs 7 of the two affidavits in support of the application does tell me, and clearly so, that, the push for this application which calls upon this Court to depart from its earlier scheduling orders came from the pleadings and the testimony of the Sole Respondent's witness who is Pw-1. Paragraph 7 of Mr Ndirangu's affidavit reads, and I quote:

> "7. **Per the pleadings and <u>the testimony of the Respondent' witness one Farough Ahmed Bhagozah</u>**, the 1st Respondent is now reneging and disowning

> the Barak Agreement and further denies the SBLC took effect." (**Emphasis added**).

Paragraph 7 of Mr Mwakingwe's affidavit is also in the same wave length as that of Mr Ndirangu. It reads as follows, and I quote:

> "During my perusal of the Court file, **and specifically when perusing the testimony given by the Respondent's sole witness, one Mr Farough Ahmed Bhagozah, I noted several rejections and/or denials relating to the existence, execution and/or performance of a Stand By Letter of Credit Facility that was granted by the 2nd Applicant to the Plaintiffs (the SBLC) dated 29th March 2018 for USD 35,635,000 issued by the 2nd Respondent in favour of Barak Fund SPC Limited (Barak Fund)** ; and a Term Loan Facility Agreement (Execution Version) entered by and between Barak Fund, as the Lender, and the 1st Respondent, as the borrower, dated 29th March 2018 (the Barak Agreement)."

As the above two paragraphs from the two affidavits supporting this application reveal, the questions that follow out of such averments from the Applicants' supporting affidavits are: (i) *will it be proper and just for a party to wait until the Court receives the testimony/evidence of his/her opponent then, on the basis of what is said in that testimony come up with a prayer to amend the scheduling orders with a view to amend her*

pleadings? (ii) Put differently: *should a party wait to be moved by the testimony of his opponent's witnesses so as to apply to the Court to vacate its scheduling orders?* (iii) If that is to be allowed: *will it not be prejudicial to the other party?*

In my considered view, if one directs his mind with sobriety the appropriate response(s) to the question(s) raised here above will be that it will be improper, uncalled for at such time as this and quite prejudicial to the other party if this Court will grant the prayers sought by the Applicants. I will further explain why I hold it to be that way.

Essentially, as I discussed earlier here above, any amendments of or departure from the scheduling order, and mainly after the parties have crossed the lines from mediation to the hearing of the case, can only be entertained where "**good cause"** is shown and, focus must be on whether the party imploring the Court to do so had acted diligently in preparing his case or lacked such diligence.

As this Court stated, in the **Gastech Enterprise's case** (supra), there is **an elevated onus** which lies on a party seeking for belated amendments, especially those which are made past the mediation stage and final pre-trial conference. If such amendments are to be allowed, the Applicant must strictly justify them, as regards his own position, the position of the other parties to the litigation, and, even, that of other litigants in other cases before the court. This is where the need to demonstrate good cause lies.

In my view and taking into account what the affiants of the two affidavits state in what I reproduced here above, seeking or applying for a departure or amendment of the Scheduling Order because of what the Plaintiff's witness (Pw-1) had testified in Court, cannot, in any means possible, be said to constitute '**good cause**' and, that cannot, as well, amount to acting diligently. Likewise, neither is the fact that the Applicants have changed a team of advocates constitutes 'good cause' which warrants this Court to accede to the prayer to vacate its earlier scheduling orders.

If the Applicants were to act diligently, they should have assessed their case from the very beginning. As this Court stated in the **NBC Ltd's case** (supra), opportunity should not be left for matters which ought to have been diligently dealt with either before or during the first pre-trial conference. That will even be worse if the case has gone to the stage of mediation and final pre-trial conference to almost end of cross-examination stage. If such lines have been crossed, granting amendments of the extent required by the Applicants must be strongly supported by cogent reasons or grounds and not the kind of reasons given by the Applicants which are mainly based on the testimony of Pw-1.

One may even ask: *does it mean if Pw-1 or Pw-2 or Pw-whatever testifies, and, the Defendant senses that her/his case may be endangered should apply to amend the pleadings to accommodate whatever s/he considers to be a weakness of her/his case*? If that is to be allowed simply because there is a

room to do so, will that not be chaotic and prejudice even to other cases which this Court is assigned to handle? As it is well known, cases are given a span of time for a purpose and the scheduling orders were not for fan. That is why any departure must be for cogent reasons and not otherwise. In the **TPDC case** (supra), this Court was very clear that, 'in the absence of "good cause" and 'unless dictates of justice so requires', steps already passed, cannot be reverted to'.

For that matter, having assessed the supporting affidavits and considered the submissions offered by the learned counsels for the Applicants in respect of the prayer to vacate the earlier Scheduling Orders dated 28th June 2021, it is my considered view, in the first place, that, no 'good cause' was adduced or shown by the Applicants to warrant this Court to depart from or amend its earlier scheduling orders. But, what about the dictates of justice? Can such be the basis for this Court to grant the prayers?

Essentially, I do also hold a view that, even if one will look at the matter in the lenses of "dictates of justice", s/he will come to a conclusion that, even the dictates of justice approach do not blow its breath in support of the application taking into account the reason revealed by the Applicants in paragraph 7 of both supporting affidavits, which conceive and depict that the current application or move was/is prompted by the testimony of Pw-1. As I stated earlier, what is depicted in those paragraphs 7 of

each affidavit cannot at any rate support the ends of justice just as it fails to constitute "good cause".

In my considered opinion, if this Court will entertain such grounds and pursue the course which the Applicants want that it should pursue, that will not be in the interest of justice but will, definitely and so to speak, derail or defeat the ends of justice and set a bad precedent. I find it to be so, simply, because, parties will thereby be enticed and be at liberty to lodge applications for departure from the scheduling orders of the Court whenever a witness discloses or denies a fact which the other party thinks would require her to amend the pleadings if that fact is to be accommodated for the betterment of his/her case.

And, as I stated earlier, if that is to happen or be entertained, it will utterly defeat the rationale for scheduling orders and make it impossible for the Court to manage the proceedings in a manner that secures just, expeditious and economical disposal of the suit or proceedings. It is for such a reason that Courts will disfavour prayers to amend or depart from the scheduling orders, especially those made post the mediation and final PTC, whose timing prejudices the opposing party.

It is also worth noting, as I stated earlier here above, that, according to Order VIIIB rule 23 of the Civil Procedure Code, Cap.33 R.E 2019, whenever a scheduling order is made **no departure from or amendment of it shall be allowed**

unless the Court is satisfied that there is necessity, in the interest of justice to do so, and the party seeking for such a departure or amendment is ready to bear the costs.

In this case, much as Mr Duncan submitted that the Applicants are ready to bear the costs if any, and, that, there will be no prejudice on the part of the Respondents since the latter have not challenged the averments in the Applicants affidavits regarding whether the granting of the orders sought will be prejudicial or not, it is my view that, the decision regarding whether the granting will be prejudice or not is of the Court to make and not the parties, since the Court must weigh all the factors and circumstances surrounding the case. From the foregoing, I find that, the prayer to depart from the Scheduling Order dated 28th June 2021 cannot be successful.

In his submission, Mr Kamara contended that, the first prayer is intertwined with a prayer for amendment of the Defendants pleadings, in particular the written statement of Defence (WSD) and counterclaims. As I said, the learned counsels for the Applicants devoted much time and energy in their submission to justify why I should allow the Applicants to amend their pleadings.

On the other hand, Mr Mwalongo, the learned counsel for the Respondents, contended that, the only prayer in this application is that of departure from the scheduling order and, that, the Applicants are yet to make a prayer for amendment of the WSD and Counter Claim or joinder of a new party.

I have taken the liberty of looking at the Chamber Summons filed in this Court. In my view, notwithstanding Mr Kamara's submission, that, the first prayer contains two separate prayers, I tend to agree with Mr Mwalongo that, the prayer for amendment and joinder of a new party has not been made out clearly in the Chamber summons. What the Court has been asked is for it to be pleased to:

> "depart from its Scheduling Conference Order made on the 28th June 2021 so as to hear and determine the **Applicants' application for prayers** that the Honourable Court be pleased to grant the Applicants leave to amend their written statement of defence and counterclaims so as to join/include and make claim against Barak Fund SPC Ltd...."

The above caption envisages that, after granting the order of departure, the Applicants will be heard **on an application for prayers that the Court be pleased to grant the applicants leave to amend their pleadings**. That is clear if one looks at how the first prayer in the Chamber Summons was tailored. But even if one was to agree with Mr Kamara that the Applicants made a prayer for amendment, it is clear as well that, that prayer is/was predicated on the outcomes of the initial prayer, i.e., in case the initial prayer to depart from the scheduling order is granted.

Given that the initial prayer has been declined, I see no reason why I should go on with the discussion regarding the viability of that prayer to amend the WSD and Counter Claim by the Applicants.

In the upshot of the above considerations, this Court settles for the following orders:

1. That, the present application is hereby denied and dismissed out with costs.
2. That, parties are to proceed with the hearing of the Commercial Case No.25 of 2021 from where the Court ended its previous proceedings.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 26TH DAY OF AUGUST 2022

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DEO JOHN NANGELA
JUDGE