

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

COMMERCIAL CASE NO. 37 OF 2020

PRASHANT MOTIBHAI PATEL1ST PLAINTIFF
DARSHANA PRASHANT PATEL.....2ND PLAINTIFF

VERSUS

AZANIA BANK LTD.....1ST DEFENDANT
MARK AUCTIONEERS & COURT
BROKERS CO.LTD.....2ND DEFENDANT

Last order: 08th March, 2022

Ruling: 18th March, 2022

RULING

NANGELA, J.

This ruling is in respect of an oral application by the learned counsel for the Plaintiffs, Mr Edward Mwakingwe to amend the pleadings. He raised his plea for amendment under Order VI Rule 17 of the Civil Procedure Code, Cap.33 R.E 2019. The reason for his prayer for amendment was that the property which is the subject of this suit has already passed hands.

In line with the first prayer, Mr Mwakingwe has also asked this Court to be pleased to depart from the earlier scheduling orders. He submitted that, the Plaintiffs are

intending to file an application for injunction to prevent the transfer from being effected.

The learned advocate for the 1st Defendant Ms Pendael Mziray objected to the prayers by Mr Mwakingwe. She submitted that, she objects because it is wrong for the learned counsel to allege that he just became aware that the property had passed hands. Ms Mziray referred this Court to paragraph 14 of the 1st Defendant's Written Statement of Defence and submitted that, the paragraph was clear that, the property at Kipawa Industrial Area had been sold to Omari Packaging Ltd by the 2nd Defendant.

Ms Mziray contended that, in view of that fact, it is clear that the Plaintiff's counsel was very much aware of it even before the parties convened for the first pre-trial conference and attended mediation proceedings. She contended, therefore, that, the first prayer by Mr Mwakingwe was already overtaken by events. She did not object the second prayer.

Mr Mwakingwe made a rejoinder to the effect that, he was aware of paragraph 14 of the Written Statement of Defence. He contended, however, that, there has been a change of circumstance as time has lapsed and, that, as of now, there are a number of notices which the Plaintiff has received from other third parties other than the said

Omar Packaging Co. Ltd. He submitted, therefore, that, in the circumstance and interest of justice, it will be proper for the Plaintiffs to plead the new change of circumstances as there is even a threat to take possession of the mortgaged property.

I have carefully considered the rival submissions by the learned counsel for the parties. The issue to be resolved is whether Mr Mwakingwe's prayer for amendment of the pleadings at the time when the Court and the parties are on the verge of convening a final pre-trial conference is warranted.

Undoubtedly, amendment of pleadings is an act which can be done at any time before judgment. Order VI rule 17 of the Civil Procedure Code, Cap.33 R.E 2019, which is the basis upon which Mr Mwakingwe premised his prayer for amendment, is very clear to that effect. See also the case of **George M. Shambwe vs. AG and Another** [1996] TLR 334.

Likewise, Rule 24 of the High Court (Commercial Division) Procedure Rules, GN.250 of 2012 (as amended), which should have been the appropriate rule to rely on, provides that, amendment of pleading can be done at any time. However, there are some limitations as the door of amendment is only ajar.

In the case of **Gastech Enterprise vs. National Bank of Commerce Ltd**, Misc. Commercial Cause No.166 of 2018 this Court (Nangela, J.) had the following to say, and I quote:

"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 above cited case of **Gastech** (supra) this Court did point out that, "*the standard for granting such a prayer to amend is a bit elevated, especially when such a prayer comes after the Court's scheduling order*".

In this present case, the Plaintiff's advocate has prayed to amend the scheduling order as well. Well and good but in the case of **Gastech** (supra) this Court made it clear, and I quote, 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).

From the above excerpt, it is clear, therefore, that, even if amendment of pleadings is a right of a party, if a party, for being indiligent, fails to exercise that right, the Court will not condone that act. See the case of **Hague Plant Limited v Hague & ors** [2014] All ER (D) 134.

In the matter at hand, it has been Mr Mwakingwe's prayer that the Plaintiffs be allowed to amend the pleadings. The rationale for his prayer is that, the Plaintiffs have become aware that the property which forms the subject matter of the suit has already passed hands.

However and, as correctly pointed out by Ms Mziray, that alleged fact was fully disclosed in the 1st Defendant's pleading (the 14th paragraph of the Written Statement of Defence). Mr Mwakingwe has conceded to have been aware of that fact as well. Since the Plaintiffs' counsel was well aware of that fact and further allowed the suit to pass through all stages of pre-trial conference and up to mediation, it cannot be said that his alleged awareness of the need to amend the pleadings constitutes "good cause".

As stated here above, a court's decision on what constitutes "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. Looking at the circumstances and the reasons assigned in support of the prayer to amend the pleadings, I cannot hold that there was such diligence on the Plaintiffs' counsel.

It should also be noted, as per Order VIII 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 view of the above reasoning, I hereby reject the prayer for amendment of the pleadings since it has come unreasonably far late and with no good cause for all that delay while the Plaintiffs and their learned counsel was well aware of the facts that the property in question had changed hands.

As for the second prayer to file an application for injunctive orders, that is the liberty of the Plaintiffs to do so. The prayer for amendment is thus dismissed and the prayer to file an injunctive application is granted. The

same should be filed within 14 days from the date of this ruling.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS
18TH DAY OF MARCH 2022**



A handwritten signature in blue ink, appearing to read "Deo John Nangela".

**DEO JOHN NANGELA
JUDGE**