

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 213 OF 2022**

*(Arising from Commercial case No. 38 of 2022)*

**EAST AFRICAN FOSSILS CO. LTD .....1<sup>ST</sup> APPLICANT**  
**VEDSTUS MATHAYO MANYINYI .....2<sup>ND</sup> APPLICANT**  
**STEPHEN MARWA MATHAYO .....3<sup>RD</sup> APPLICANT**  
**MATHAYO SONS ENTERPRISES LIMITED .....4<sup>TH</sup> APPLICANT**

**VERSUS**

**ECOBANK TANZANIA LIMITED.....RESPONDENT**

**RULING**

Date of last order: 08/12/2022.

Date of ruling: 24/02/2023

**AGATHO, J.:**

This ruling was prompted by the Applicants' application:

- (a) That the Court may be pleased to order departure from the scheduling order in Commercial Case No. 38 of 2022 for the Respondent, the Defendant in the said suit to apply for an order to amend the Written Statement of Defence (WSD) in Commercial Case No. 38 of 2022

- (b) That this Court may be pleased to make an order allowing the Defendant to amend her WSD in Commercial Case No. 38 of 2022 to correct some averments and raise counterclaim.
- (c) Costs be in the Course
- (d) Any other orders that the Court may deem fit and just to grant.

Both sides in this application were under legal representation. Whereas the Applicants were represented learned counsel Seni Malimi, the Respondent was under representation of learned counsel Joseph Nuwamanya. On 08/12/2022, it was mutually agreed that the application be disposed by way of written submissions. Pursuant to that consensus the Court drew schedule for filling of submissions. Appreciatively, the parties filled their submissions timely.

The application at hand is an outcrop of the main suit in which the Applicants are Defendants, and the Respondent is the Plaintiff. It is a case filed by the Respondent claiming repayment of the credit facilities advanced to the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> – 4<sup>th</sup> Applicants were guarantors. I should mention at this juncture that the case was at hearing stage. I am saying so because, the Plaintiff has already filed her witnesses' statements and have served upon the Defendants. That stage in the trial is called examination in chief.

The present application gives rise to three issues: 1<sup>st</sup> whether the order of departure from the scheduling order in Commercial Case No. 38 of 2022 should be granted? 2<sup>nd</sup> whether the conditions for granting such order have been met? And 3<sup>rd</sup> whether an order allowing the Defendant to amend her WSD in Commercial Case No. 38 of 2022 should be granted? These issues can be determined by examining the affidavits and counter affidavits, submissions of the parties and the law.

To begin with, the 1<sup>st</sup> and 2<sup>nd</sup> issues are merged because they are interrelated. While the 1<sup>st</sup> issue is whether the order of departure from the scheduling order in Commercial Case No. 38 of 2022 should be granted, the 2<sup>nd</sup> issue is whether the conditions for granting such order were met? It is trite law under Order VI of the Civil Procedure Code [Cap 33 R.E. 2019] that amendment of pleadings may be done at any stage of the proceedings. Hence Order VI Rule 17 of the Civil Procedure Code [Cap 33 R.E. 2019] provides:

*"The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of*

*determining the real questions in controversy between the parties.”*

See also page 3 of the ruling in **Equity Bank (Tanzania) Limited v Abdulrahman Mohamedi Kwadu T/a Kwadu Mikoma Enterprises & Another, Misc. Civil Application No. 369 of 2021, HCT Dar es salaam Registry at Dar es salaam** at pages 3-4.

Moreover, granting of the order for amendment of pleadings has certain conditions. These have been concisely pronounced by the Court of Appeal Tanzania in **George M. Shambwe v. Attorney General [1996] TLR 334** in which the CAT reaffirmed what was stated by the defunct Court of Appeal of Eastern African in **Eastern Bakery v Castelino (1958) E.A. 461** that:

*"We need also to reaffirm the principles upon which amendments to pleadings should be made. These were stated by the Court of Appeal of Eastern Africa in the case of **Eastern Bakery v Castelino (1)**. That Court stated at 462, It will be sufficient for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side."*

What is deduced from the above authorities is that before granting the order of amendment to pleadings the Court must be satisfied that:

- (1) The application is made before hearing.
- (2) The amendment is necessary for the purpose of determining the real questions in controversy between the parties; and
- (3) Such amendment can be made without causing injustice to the other party.

These have been restated in case of **Equity Bank (Tanzania) Ltd**, (supra) at pages 3-4.

In **James Funke Gwagilo v Attorney General [2004] TLR 161**, the CAT stated the function of pleadings. It also touched upon on amendment of pleadings in the following:

*"If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative, and he is entitled to amend his pleadings for that purpose. The need to do so may arise at any stage in the trial and if the amendment is the one the Court can lawfully and conveniently accommodate, it would be obliged to consider the same even though not initially pleaded. In other words, in order for the issue to be decided it ought to be brought on record*

*and appear from the conduct of the suit to have been left to the Court for decision."*

The same is cited in **Jovent Clavery Rushaka and Other v Bibiana Chacha, Civil Appeal No. 236 of 2020 CAT at Dar es salaam** at pages 15-16 of. Looking at the above extract from **James Gwagilo's Case** (supra), a need for amendment of pleading may arise at any stage of the proceedings. But the Court is required to determine whether it is lawful and convenient to allow the amendment. If it is satisfied, then the amendment is allowed.

Two perquisites are observed here: first, lawfulness, and second, convenience. The latter depends on the circumstance of the case. It brings in discretion to the Court. The lawfulness here connotes the conditions prescribed in Order VI Rule 17 of the Civil Procedure Code and the case of **George M. Shambwe** (supra). ( In the present case, if we consider whether it is lawful to grant the order for amendment of the pleadings by matching the conditions found in Order VI Rule 17 of the Civil Procedure Code and in the case of **George M. Shambwe** (supra) and what is averred in the affidavit it is conspicuous that the application to amend the pleadings came a little too late as the hearing already commenced. The Plaintiff has filed her witnesses' statements. It means

examination in chief has begun. This contravenes the first conditions that the application should be made before hearing in the main suit commences. The Applicants have failed to acknowledge this fact in their affidavit and reply to counter affidavit.

Whether the Court should order departure to the scheduling orders? For the Court to order departure to the scheduling orders set forth it should be satisfied that the hearing has not commenced, the circumstances make it necessary for such departure and that the order is not prejudicial on the other party. It is surprising that the affidavit in support of application is not directed towards substantiating the conditions set in the law. Instead it is loaded with details on counterclaim and issues of breach of contract and allegations of fraud. These are alien to the conditions for granting the order for departure to the scheduling orders.

It is not far-fetched, that the Applicants (Defendants) seem to have fished the evidence of the Respondent (Plaintiff) that is why they would like to amend their WSD and bring in the counter claim. They had ample time to apply for the order of departure to the scheduling order and seek amendment of their WSD to include the counterclaim. They have neglected to do so timely. With due respect to the Applicants, and since the hearing of the main suit has commenced, a window for departing

from the scheduling order is closed. In my view, to grant the order for departure from the scheduling orders at the stage of hearing of the suit is a mockery of justice and prejudicial to the Respondent who has diligently done her examination in chief. It is tantamount to encouraging not only abuse of court process but also to embrace unfair trial. What the Applicants are trying to do is nothing but fishing of evidence from the Respondent (Plaintiff). Such treacherous practice cannot be condoned by this Court.

The issue of allowing amendment of pleadings though can be done at any stage of the trial, the power to grant such amendment is left to the Court. In doing so the Court has to consider the circumstance of a particular case. It is not automatic that amendment to the pleadings will be allowed.

Similarly, a departure to the scheduling orders as per Order VIII Rule 23 of the Civil Procedure Code shall be done when the Court is satisfied that such departure is necessary in the interest of justice. See also **Equity Bank (Tanzania) Ltd case** (supra) at page 4. It is the law that the costs in such application shall be borne by the Applicant (s).

Nevertheless, **the Equity Bank (Tanzania) Ltd** (supra) cited by the Applicants is distinguished from this case. The **Equity Bank**



**(Tanzania) Ltd case** concerned application for amendment of pleadings that was done prior to the hearing stage. In the present case the application was done after the trial has commenced. For that reason, the interest of justice will demand that the sought order for departure of scheduling orders be declined.

Applying for amendment of the WSD to include a counterclaim has to comply with the conditions stated in **George M. Shambwe's case** (supra). That the prayer has to be made before hearing commences. In the present case the hearing has already commenced. There is no dispute that the Plaintiff's witnesses' statements have already been filed and served upon the Defendants (the Applicants).

Unlike in **the Equity Bank (Tanzania) Ltd case** (supra), in the case at hand the Respondent (the Plaintiff) will be prejudiced because the Applicants have already read the witness statements from the Plaintiff's side. They have seen the Plaintiff's evidence as the examination in chief has already been done. Therefore, the Court refuses to grant the order of departure from the scheduling order. That said the second prayer of amendment of the WSD in Commercial Case No. 38 of 2022 is equally rejected.

In totality and for the reasons stated hereinabove the application is declined. The Costs for this application shall be borne by the Applicants.

It is so ordered.

**DATED at DAR ES SALAAM** this 24<sup>th</sup> Day of February 2023.



A handwritten signature in black ink, appearing to read "U. J. Agatho".

**U. J. AGATHO**  
**JUDGE**  
**24/02/2023**

**Date: 24/02/2023**

**Coram:** Hon. U. J. Agatho J.

**For Applicants:** Queen Allen (Advocate)

**For Respondent:** Patricia Tarimo (Advocate)

**C/Clerk:** Beatrice

**Court:** Ruling delivered today this 24<sup>th</sup> February 2023 in the presence of Queen Allen, learned counsel for the Applicants, and Patricia Tarimo, the learned counsel for the Respondent.



A handwritten signature in black ink, appearing to read "U. J. Agatho".

**U. J. AGATHO**  
**JUDGE**  
**24/02/2022**