IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO.42 OF 2011

1. DODSAL HYDROCARBONS
& POWER (TANZANIA) LIMITED.....1ST PLAINTIFF/APPLICANT

2. DODSAL RESOURCES & MINING
ITILIMA BUSILI (TANZANIA) PVT.....2ND PLAINTIFF/APPLICANT

3. DODSAL RESOURCES & MINING
ITINGI (TANZANIA) PVT LIMITED.....3RD PLAINTIFF/APPLICANT

VERSUS

HASMUKH BHAGWANJI MASRANI.....DEFENDANT/RESPONDENT

Date of last order: 09/11/2011
Date of oral hearing: 09th of November, 2011
Date of ruling: 23/12/2011

RULING

MAKARAMBA, J.:

This is a ruling on application lodged in this Court by the Applicants by way of Chamber Summons on the 10th day of October 2011 for leave to amend the Plaint. On the 06th day of October 2011, this Court invited learned Counsel for the parties to address it orally on the application, which they did on the 09th day of October 2011.

Messrs CUTHBERT TENGA and KIBUTA ONG'WAMUHANA, learned Counsel argued for the Applicants/Plaintiffs and Mr. DILIP KESARIA, learned Counsel represented the Respondent.

The nature of the application is such that a brief background is apposite. On the 20th May 2011, the Applicants/Plaintiffs instituted a suit in this Court against the Respondent/Defendant for permanent prohibition orders to restrain the Respondent from acting as Directors of the Applicant companies and for further orders as to costs and to reliefs as the Court may deem fit to grant. Following preliminary objection raised by the Counsel for the Respondent/Defendant, that, there was lack of verification clauses in the Plaint and Reply to Written Statement of Defence; that the pleadings contained scanned signatures as well as scanned signatures in the Affidavit of RAJEN KILACHAND in support of the application for temporary injunction; and the inclusion of Witness Statement and Affidavit in support of a suit, this Court, on the 29th day of August 2011 (per Hon. Makaramba, J.) upheld some of the points of preliminary objection and accordingly expunged from the court record the Affidavits and witness statements which were referred by the Applicants/Plaintiffs in their pleadings, and held that amendment of the pleadings in so far as the defective Plaint and the reply to the written statement of defence was possible subject to leave of the Court. Following that ruling, on the 12th September 2011, the Applicants/Plaintiffs lodged in this Court an application for amendment of the Plaint to which the Defendant's/Respondent's Counsel also raised an objection, which this Court, after brief oral submissions from Counsel, upheld on the 06th October 2011, and struck out the Applicant's application for amendment of the Plaint due to patent defects as well as the counter affidavit. On the 10th day of October, 2011, the Applicants/Plaintiffs re-lodged the application by

way of Chamber Summons under Order 43 Rule2, Order 6, Rule 17, section 68(e) of the Civil Procedure Code Cap.33 R.E. 2002 and any other enabling provisions of the law for the following orders:

> *"1. That this Honourable Court may be pleased to grant leave to the Applicants to amend the Plaint on such terms and conditions as herein sought and as the Court shall deem fit to grant.*
>
> *2. Costs of this Application to be costs in the cause*
>
> *3. Any other or further orders as may be necessary and just to grant."*

The Applicants' Chamber application is supported by the affidavit of KIBUTA ONG'WAMUHANA, which was sworn at Dar es Salaam on the 25th day of October 2011. Paragraphs 10, 11 and 12 of that affidavit are being contested by DILIP KESARIA, learned Counsel for the Respondent in his counter affidavit. For convenience sake I shall reproduce the contents of the said paragraphs 10, 11 and 13 of the affidavit of KIBUTA ONG'WAMUHANA hereunder as follows:

> *"10. That on the 20th day of May 2011, the Applicants jointly instituted a suit in this Court against the Respondent for permanent prohibition orders to restrain the Respondent from acting as a Director of the Applicant companies and for further orders as to costs and to reliefs as the Court may deem fit to grant.*
>
> *11. That the said suit was instituted by way of a Plaint. After receiving a written statement of defence (WSD) and Counterclaim from the Respondent, the Applicants then responded with a Reply to*

WSD and Reply to Counterclaim as part of their Pleadings in support of the Plaint for the decree sought in this suit.

12. That by reason of urgency in the matter, and by reason of varying opinion on procedural matters regarding the forms of the pleadings in Tanzania vis-à-vis those of other Commonwealth Countries and jurisdictions. And by reason of the fact that the Directors of the Applicant companies reside outside Tanzania and all initial pleadings were prepared by Counsel outside Tanzania and duje to technological advancement in electronic transfer of documents from one point to the other, the following defects unfortunately manifested in the Pleadings which were:

(i) lack of verification clauses in the Plaint and Reply to Written Statement of Defence;
(ii) scanned signatures in the pleadings;
(iii) scanned Signatures which appeared in the Affidavit of RAJEN A. KILACHAND in support of an Application for temporary orders;
(iv) the inclusion of Witness Statement and Affidavit in support of a suit."

In paragraph 3 of the Counter-affidavit of DILIP KESARIA, lodged in this Court on the 24th day of October 2011, contesting the contents of paragraph 10, 11 and 12 of the Affidavit of KIBUTA ONG'WAMUHANA it is stated as follows:

"3. Paragraphs 10, 11, and 12 of the Affidavit do not disclose any, let alone sufficient reason to explain the defects in the pleadings filed by the Plaintiffs/Applicants. To the contrary they demonstrate that the Plaint filed by the Plaintiffs/Applicants contains deliberately false statements."

In the affidavit sworn by KIBUTA ONG'WAMUHANA lodged in this Court on the 25th day of October 2011 in reply to the Respondent's Counter affidavit, it is stated as follows:

> *"3. That I have also noted the contents of paragraph 3 of Dilip Kesaria's counter-affidavit and that the paragraph is more argumentative in nature than it is of factual but nevertheless I say that what I stated in paragraphs 10 and 11 of my Affidavit of 10th October 2011 were matters of fact, while in paragraph 12, I pointed out by highlighting the defects in the pleadings and in my paragraph 13, I revisited the Ruling of this Court dated 29th August 2011 on the preliminary objection of the Defendant, allowing the Applicants/Plaintiffs to seek leave of the court, if they so wish, for amendments of their pleadings. I further say that in my paragraph 14, I stated that the pleadings will be amended only to the extent of making good the defects as per Affidavit and court's ruling which did not by itself declare the contents in the Plaint as deliberate false."*

The learned Counsel for the parties with great zeal and enthusiasm made very powerful oral submissions in support and rival, which are canvassed in this ruling. Mr. Mr. Cuthbert Tenga, learned Counsel for the Applicants flagged off his submissions in support of the Application by touching on a number of general principles relating to the amendment of pleadings and also cited to this Court a number case authorities where those principles have been applied. Mr. Tenga also referred this Court to Order VI Rule 17 of the Civil Procedure Code on amendment of pleadings which states as follows:

> *"17. 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****." (the emphasis is of this Court.)*

Mr. Tenga also referred this Court to Order 1 Rule 10 of the Civil Procedure Code, which in his view reiterates free amendment of pleadings at any time even when the judge is writing his judgment. However, in my view the provisions of Order 1 Rule 10 of the Civil Procedure Code are not directly relevant to the matter in issue presently since that provision concerns amendment in relation to parties in a suit. Mr. Tenga submitted further that the gist of Order VI Rule 17 of the Civil Procedure Code is free or liberal amendment of the pleadings at any stage of the proceedings for the purpose of determining the real questions in controversy between the parties. Mr. Tenga referred this Court to the authoritative author of ***Mulla Code of Civil Procedure*** 16th Edn. at p.1823, wherein nine grounds to be considered by Courts when dealing with amendment of pleadings are set out, namely, necessity to determine the real controversy; non alteration/substitution of the original cause or character of the pleadings; to remove inconsistency; non-prejudicial; the claim not time barred; does not defeat a legal right; minimization of litigation; not to delay compensation by costs; and non fraudulent error. Mr. Tenga submitted further that some of these principles have been adopted by courts in East Africa. Mr. Tenga referred this Court to some of these cases including that of **INDIAN GENERAL INSURANCE VS PALMER [1966] E.A 172** applying some of the conditions stated in Mulla to amendment of defence; **ZAN MAHMOUD A. MUHIDIN VS PEOPLES BANK [1994] TLR 204**

where one more requirement was added; **EASTERN BAKERY'S CASE [1958] EA 461** where it was stated that the principles applicable to amendment of a plaint also apply to amendment of defence; and **KIMANI EA vs. AG [1969] EA 29** at p.34, where amendment was allowed at the appeal level. Mr. Tenga prayed that this Court be pleased to exercise its discretion under Order VI Rule 17 of the Civil Procedure Code and grant leave to the Applicants to amend the plaint and the reply to the written statement of defence.

In reply, Mr. Kesaria conceded that it is the discretion of the Court to order amendment of the pleadings but submitted that the Chamber Summons does not tell what is it that the Applicants want this Court to grant leave to amend and referred particularly to paragraph 15 of the Affidavit, which does not state what is it in the Plaint that the Applicants seek to amend. Paragraph 15 of the Chamber Summons states as follows:

> *"15. That I make this Affidavit in support of prayers sought in the Chamber Summons."*

Mr. Kesaria referring to the counter affidavit submitted further that no sufficient reasons are disclosed for the exercise by this Court of its discretion to grant leave to amend. Mr. Kesaria submitted further that the affidavit of Kibuta highlights false statement, referring to paragraph 12 of the said affidavit where it is stated that the pleadings were prepared by Counsel outside Tanzania. Mr. Kesaria submitted further that the Ruling of this Court dated 29/08/2011 per Makaramba, J. granted leave to amend the Plaint but not to insert the original affidavit. Mr. Kesaria submitted

further that the application should therefore be confined to amendment of the Plaint by having the verification clause and the original signatures but not to allow the other documents namely, the affidavits and witness statements, which were ordered by this Court to be expunged from the court record.

Mr. Kesaria reiterated the arguments he had earlier put forward when addressing this Court on the points of preliminary objection which lead to the ruling of this Court dated 29/08/2011 that amendment should be made prior to objection raised because it is trite law now that once a preliminary objection has been taken no application for leave is permitted as it amounts to pre-emption or circumvention of the objection raised. In buttressing this point, Mr. Kesaria referred this Court to a number of decisions of the Court of Appeal including that of **JALUMA GENERAL SUPPLIES LTD VS STANBIC BANK (T) LTD Civil Appeal No.34/2010**; **SHABIR EBRAHIM AND 2 OTHERS vs. SELEMANI RAJABU MIZINO Civil Application No.137/2007** at p.5&6; and **FRANK KIBANGA vs. ACU LIMITED Civil Appeal No.24/2003.** Mr. Kesaria also referred this Court to the decision of Massati, J. (as he then was) in **ANSELIMO MINJA vs SUPA FOOD CORPORATION LIMITED Commercial Case No.5/2005** (unreported) at page 4 reiterating the principles where the Court declined application to amend the plaint after objection had been taken. Mr. Kesaria insisted that the Applicants' Counsel are well aware of the legal principle governing amendments after an objection has been taken and should therefore confine their application to the amendment of the Plaint since the previous defects in the affidavits,

the witness statements and the reply to the written statement of defence did not touch upon the Plaint. Mr. Kesaria reiterated further that the issue of verification or scanned signatures to the Plaint was not taken by him, which is why the application has to be confined to amendment of the Plaint, which in any case the Applicants have not explained what is it they want to amend in the Plaint. Mr. Kesaria submitted further that even if this Court was to forgive the Applicants, the amendment should be confined only to the two matters namely, the scanned signatures and the verification clause in the Plaint and therefore they should be allowed to re-file a Plaint containing a proper verification clause and original signatures, but no more. Mr. Kesaria referred to the ruling of this Court dated 29th August 2011 and submitted that this Court determined that subsequent pleading, namely, the reply to the written statement of defence had a defective verification clause and lacked original signatures, which are curable by amendment but there is no application to this effect in the current chamber summons. Mr. Kesaria submitted further if that is the case then the Defendants will have nothing to amend in their written statement of defence and hence they do not intend to file an amended defence and the pleadings should be considered closed for the next stage in the suit to proceed.

In rejoinder, Dr. Tenga referring to paragraphs 12, 13 and 14 of the affidavit of KIBUTA submitted that in terms of Order VI Rule 1 of the Civil Procedure Code "*pleadings*" are defined to mean "*the plaint, written statement of defence and subsequent pleadings*" such as those mentioned under Rule 13 of Order VI of the Civil Procedure Code, which include

counter claim and set off. Dr. Tenga also made reference to paragraph 12 of the affidavit of KIBUTA setting out the defects outlined in the pleadings. In a purely logical fashion though, Dr. Tenga argued deductively that if the Plaint is wanting, then all subsequent pleadings including the written statement of defence cannot stand, a position which also Mr. Kibuta seems to share, that amendment of the Plaint will definitely trigger consequential amendments in all subsequent pleadings.

I have carefully followed the submissions by Counsel for the parties. The main controversy surrounds the reach and import of the application the Applicants lodged in this Court on the 10th day of October, 2011, by way of Chamber Summons which is for among other orders, for an order that this Honourable Court be pleased "*to grant leave to the Applicants **to amend the Plaint** on such terms and conditions as herein sought and as the Court shall deem fit to grant.*" The application for leave to amend was triggered by the ruling of this Court of 29th August 2011 (per Makaramba, J.) wherein it is stated at pages 28-29 of the typed ruling as follows:

> *"The **defects** in the Plaintiff's **reply to the written statement of defence**, to wit, lack of **verification clause** and for bearing **scanned signatures** and not original signatures, which defects also appear **in the Plaint** which does not also have a **verification clause** and bears **scanned signatures** on behalf of the 1st, 2nd and 3rd Plaintiffs and not original signatures **are curable by way of amendment with leave of this Court.**"* (the emphasis is of this Court).

No one can convincingly argue that the above cited part of the ruling of this Court on the kind of the curable defects in the Plaint and the reply

to the written statement of defence is ambiguous. The ruling of this Court dated 29/08/2011 part of which has been reproduced above in my view, is fairly straight forward, It is unambiguous and does not therefore call for any interpretation or construction. In its ruling of 29/08/2011, this Court having deliberated on the preliminary objections raised by the Defendant/Respondent, determined that the defects in the reply to the written statement of defence which were also contained in the Plaint, namely, lack of verification clause and lack of original signatures, were both curable by way of amendment, but with the leave of this Court. The Applicants however do not state in their Chamber Summons that they are seeking leave to amend the reply to the written statement of defence as well, which in its ruling this Court found it also to be containing the same defects as the Plaint. Mr. Cuthbert Tenga, Mr. Kibuta and Dr. Tenga have strenuously tried to convince this Court on the breadth and length of the of Order VI Rule 17 of the Civil Procedure Code, which no one dispute that it is fairly liberal on the discretionary powers of this Court to order for amendment, which could be made even at the appellate stage. The learned Counsel for the Applicants have also cited to this Court a number case authorities both from within and without interpreting the provision of Order VI Rule 17 of the Civil Procedure Code; and have outlined a number of grounds for consideration by courts in exercising its discretionary powers on amendment of pleadings. The efforts of learned Counsel for the Applicants are wholeheartedly commended by this Court. The statement of principles and the case authorities they have cited in this Court in support of their submissions on Order VI Rule 17 of the Civil Procedure Code are

relevant to the particular circumstances covered under that Order. In my view however, and with due respect to the learned Counsel for the Applicants, their submissions on Order VI Rule 17 of the Civil Procedure Code in so far as the exercise by this Court of its discretionary powers to order for amendment of pleadings do not help to explain why the Applicants did not expressly state in their Application that they were also seeking for leave to amend the reply to the written statement of defence so as to cure the defects this Court pointed out in its ruling dated 29/08/2011, which defects are also found in the Plaint the Applicants are now asking this Court for leave to amend. The prayers in the Chamber Summons go as follows:

> *"1. That this Honourable Court may be pleased to grant leave to the Applicants to amend the Plaint on such terms and conditions as herein sought and as the Court shall deem fit to grant.*

Emanating from the above prayer, no one can blame Mr. Kesaria for his submission that the Chamber Summons does not tell what is it that the Applicants want this Court to grant leave to amend. Paragraph 15 of the Affidavit, which Mr. Kesaria also referred to in his submissions add to the gap by stating as follows:

> *"15. That I make this Affidavit in support of* ***prayers sought in the Chamber Summons****."*

The "***prayers sought in the Chamber Summons***" mentioned in paragraph 15 of the Chamber Summons refers to "*leave to the Applicants*

to amend the Plaint." Mr. Kesaria righty argued that since the Applicants' Chamber Summons is confined only to the amendment of the defects in the Plaint namely, lack of verification clause and lack of original signatures. The issue is whether the exercise by this Court of its discretion under the law should be confined only to the two defects in the Plaint and not more. The controversy is whether this Court should only grant the prayer for amendment of the Plaint or should stretch such powers to include amendment of the reply to the written statement of defence. In my considered view, this Court has inherent powers under section 95 of the Civil Procedure Code to make any orders as "*may be necessary for the ends of justice or to prevent abuse of the process of the court.*" Such discretion however, has to be exercised judiciously, that is, by being satisfied by sufficient reasons. Mr. Kesaria argues that even for the limited prayer to amend the Plaint, the Applicants have not explained the reasons for the defects they now seek to cure. Mr. Kesaria has taken issue with what apparently to him looks like "*false information*" conveyed by Mr. Kibuta in paragraph 12 of his affidavit that "***all pleadings were prepared by Counsel outside Tanzania.***" I do not have sufficient evidence before me to be able to determine whether or not Mr. Kibuta has made a false statement under oath. What is clear to me however, as per paragraph 12 of the Affidavit of Mr. Kibuta, "***the Directors of the Applicant companies reside outside Tanzania.***" This reason, in my view may go to explain some of the defects in the pleadings. The nature of the matter before this Court is such that the intended amendments to the plaint and the reply to the written statement of defence will go a way to make this

Court be able to determine the real matters in controversy. The Counsel for the Applicant as is for the Counsel for the Respondent all are in concert that there exist real issues in the suit which need to be determined by this Court. In my view, an order for amendment of the reply to the written statement although not specifically constituting a prayer in the Chamber Summons will not occasion any injustice on the part of the respondents neither will it change the substance of the matters in controversy since it only seeks to cure the defective verification clause and lack of original signatures in the reply to the written statement of defence as is the case for the amendment of the plaint to cure similar defects, to which Mr. Kesaria does not object. It is for these reasons that this Court finds it just that amendments should be both for the Plaint and to the reply to the written statement of defence. I am fortified further in this view by the ruling of this Court dated 29/08/2011 which allowed amendments not only to the plaint but also to the reply to the written statement of defence to cure the defects in the verification clause and lack of original signatures. It is my humble and considered opinion that the omission or failure by the Applicants to include a specific prayer for the amendment of the reply to the written statement of defence is not that fatal to this suit as it does alter the nature of the matters in controversy since it is a matter of procedure. It is a matter of form and procedure which should not prejudice the plaintiff in pursuing its case. As it was succinctly put by Hon. Lugakingira J.A (as he then was) in **D.T. DOBIE (TANZANIA) LIMITED vs PHANTOM MODERN TRANSPORT (1985) LTD Civil Application No.141 of 2004** cited to this Court by the Applicants' Counsel, rules of

procedure are handmaids of justice which means that they should facilitate rather than impede decisions on substantive issues. The said amendments to the plaint and to the reply to the written statement of defence are "*necessary for the ends of justice.*"

Let me now turn to consider albeit very briefly the reply submission by Mr. Kesaria on a point which seems to me to be a point of preliminary objection, that once a preliminary objection has been taken no amendment can be allowed, which position Mr. Kesaria buttressed by taking this Court on a tour of a number of decisions of the Court of Appeal, ***Frank Kibanga's case (supra)***, ***Shabir Ebrahim's case*** (supra) and ***Jaluma's case (supra)***, and of this Court, ***Anselim Minja's case***. The principle alluded to in the case authorities Mr. Kesaria cited in his reply submissions is that once a preliminary objection has been taken no amendment can be allowed as this amounts to circumvention.

In ***Frank Kibanga's case (supra)***, the respondent raised two points of objection, that the appeal was incompetent for two reasons first, for lack of an abstracted copy of the decree appealed from, and secondly, that the record of appeal did not contain certain exhibits produced at the trial. The Appellant prayed for leave to file a supplementary record so as to bring a copy of the decree into the record of appeal. The Respondent objected to the appellant being given leave to file a supplementary record by arguing that such application should have been made before the Notice of Preliminary Objection was filed and that there should be good reasons for the omission. The Court of Appeal (per Mrosso JA) upholding the first point of objection that the appeal was incompetent because of lack of an

abstracted copy of the decree appealed from, stated as follows at page 8 of the typed ruling:

> *"There is no gainsaying, therefore, that the absence of a copy of the extracted decree from the record of appeal renders the appeal incompetent. We cannot, after the objection was raised, allow the appellant in the present proceedings to remedy the defect. To do so at this stage would be tantamount to pre-empting the preliminary objection. We uphold the first ground of objection and we hereby strike out with costs this appeal for being incompetent."*

In ***Shabir Ebrahim's case*** (supra) Mbarouk, J.A. rejecting application to withdraw application abhorred the practice of pre-empting a preliminary objection already before the Court when dealing with a prayer and cited a decision of the Court of Appeal in **THE MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND SHIRIKA LA USAFIRI DAR ES SALAAM vs GASPAR SWAI AND 67 OTHERS Civil Appeal No.101 of 1998 (unreported)** where it was held that it was improper for the appellant to seek to defeat a preliminary objection to an appeal "***by acts designed to remove its basis***." In ***Shabir Ebrahim's case*** Mbarouk, J.A. rejected prayer by Mr. Kesaria, learned Counsel to withdraw an application for extension of time for leave to appeal having conceded to a preliminary objection raised by Mr. Rwechungura, learned Counsel that the application was wrongly filed in the Court of Appeal for the law required it to have been made to the High Court in the first instance.

In ***Jaluma's case (supra)***, Mr. Kesaria, learned Counsel raised a preliminary objection that the appeal was incompetent because the record of appeal did not include exhibit D3 and prayed to be struck out to which

Mr. Mwandambo, learned Counsel readily conceded but implored the Court that the respondent be allowed to amend the notice of appeal. Nsekela, J.A. making reference to **THE MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND SHIRIKA LA USAFIRI DAR ES SALAAM vs GASPAR SWAI AND 67 OTHERS (supra)** refused to allow the course of action proposed by Mr. Mwandambo for the simple reason that the prayer for amendment of the notice of appeal after a preliminary objection has been raised was aimed at pre-empting the preliminary objection, and proceeded to strike out the notice of appeal with costs.

In ***Anselim Minja's case***, the Defendant raised two points of preliminary objection to the suit and the Plaintiff also raised preliminary objections against the Defendant's counter affidavit but his Lordship Massati confined himself to the Defendant's objections to the suit. Arguing on the alternative prayer by the Plaintiff's Counsel that the plaint could be amended, the learned Counsel argued that in law, no amendment could be allowed to defeat a preliminary objection and cited **FRANK KIBANGA vs. ACU LIMITED** (supra) and another decision of the Court of Appeal of Tanzania in the case of **HARISH AMBARAM JINA by His Attorney AJAR PATEL vs. ABDULRAZAK JUSSA SULEMAN Civil Appeal No.2 of 2003** (unreported) to support his contention. Hon. Massati, upheld the preliminary objection that the Court had no jurisdiction since the matter before it was a land dispute and proceeded to strike out the suit and also rejected the prayer by the Plaintiff's Counsel for amendment of the plaint. Mr. Kesaria implored upon this Court in the present application to toe the same line as in ***Anselim Minja's case*** (supra) not to allow leave for

amendment after preliminary objection has been taken. I should emphasize here that in ***Anselim Minja's case*** (supra), Hon. Massati refused to grant leave to amend because having determined that the court had no jurisdiction to entertain the suit it had divested itself of authority to make any other order, which is different from the present application since this Court still has jurisdiction over the suit. Furthermore, in that case even if Hon. Massati had authority to grant leave to the Plaintiff to amend the plaint, such amendment would not have saved the suit. The amendment which was sought in that case were substantive and prejudicial to the other party different from the present application where the proposed amendment to the Plaint and the reply to the written statement of defence only go to the form and not the substance of the suit and hence not prejudicial to the Respondents.

The case authorities discussed above brings out three conditions in order for the doctrine of pre-emption to become operational. First, there has to be a matter (application/appeal) lodged in court. Secondly, there has to be an objection raised against such matter. Thirdly, there has to be prayer or application to amend after objection has been raised against the matter and before such objection has been determined. In the present matter, there is a pending application for amendment of the Plaint pursuant to a ruling of this Court. However, there is no preliminary objection raised and further there is no prayer to amend. As I intimated to earlier, the application for leave to amend came as a result of the ruling of this Court on the preliminary points of objection taken by the Defendants and this Court determined that the defects pointed out in the plaint and the

reply to the written statement of defence to wit, lack of verification clause and original signatures were curable by amendment upon leave of this Court sought. In my view, much as there is a pending application for leave to amend, there is no objection raised and the prayer for amendment which is contained in the Chamber Summons was a result of ruling on this Court and therefore it does not fall within the rubric of "*acts designed to remove the basis of such objection*" which would have triggered the doctrine of pre-emption of preliminary objection as determined in the various case authorities cited by Mr. Kesaria in his reply submissions discussed above.

It is for the foregoing reasons that this Court hereby grants leave to the Applicants to amend the Plaint and the written statement of defence to the extent of curing the defects in the verification clause and the scanned signatures so as to have original signatures. The costs of this application shall be costs in the cause. Order accordingly.

.....

R.V. MAKARAMBA
JUDGE
23/12/2011

Ruling delivered this 22nd day of December 2011 in the presence of Mr. C. Tenga, Advocate for the Applicants/Plaintiffs and Mr. Rwehumbiza, Advocate for the Respondents/Defendant.

.....

R. V. MAKARAMBA
JUDGE
23/12/2011.

Words count: 5,240