

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM
MISCELLANEOUS COMMERCIAL CAUSE NO. 159 OF 2023
(Arising from Commercial Case No. 7 of 2023)

MOHAMMADI WOODWORKS LIMITED.....APPLICANT
VERSUS
HONEST LOGISTICS LIMITED..... RESPONDENT

RULING

March 5th & 22nd, 2024

Morris, J

Pleadings are legal mouthpieces of litigants in civil suits. They speak to the Court about parties' disputes. Evidences prove assertions in such pleadings. Unless pleadings are in their proper squares, evidences stand to do less in aligning the litigants' claims to the desired just-end. In this application, leave of the Court is pursued for the applicant to file a counter-claim subsequent to his filing a written statement of defence. Supporting it, is the affidavit affirmed by Mustafa Aunali Zavery. However, the application is contested. Shamsudin Panjwani has a counter affidavit lodged on behalf of the opposing respondent above.



The background of this matter involves Commercial Case No.7 of 2023. The case was filed by the respondent against the applicant and two other individuals. The defendants filed a joint written statement of defence (WSD) which contained the applicant's counter claim (C-C) against the respondent-plaintiff. However, the C-C was on October 6th, 2023 struck out for want of competence. The resolute applicant wants his C-C relodged. However, he considers that such step cannot sail to fruition without leave of the Court. Hence, this application.

During hearing of this matter, both parties were represented. Advocate Yohana Julius Ayall represented the applicant. The respondent had services of Ms. Lilian Kihyo and Mr. Gilbert Mushi, learned Advocates. Both parties prayed to adopt respective affidavits as part of their submissions. In addition, the applicant's counsel prayed to include in his submissions the skeleton arguments filed earlier in this court.

To kick-start, the applicant submitted that the present application was filed in order to promote prudence, logic and avoid his C-C being *res-subjudice* or *res-judicata*. To him, the envisaged C-C will assist the parties opposite rights to be heard and determined simultaneously. Citing Order



VIII Rule 13 of ***the Civil Procedure Code***, Cap.33 R.E.2019 (***the CPC***); the applicant's counsel argued that the C-C sought to be filed can only be filed if leave is granted by the Court. To him, pleadings subsequent to the filing of WSD should be filed after obtaining the court's leave.

Ms. Kihyo and Mr. Mushi did not support the application. To them, both ***the CPC*** and ***the High Court (Commercial Division) Procedure Rules***, 2012 (elsewhere, "***the Rules***") do not legislate for any application of this nature. That is, insomuch as, it is not statutorily predicated; the now-being-pursued leave is unjustifiable in law. They also submitted that the provisions relied on by the applicant (Order VIII Rules 9 and 13 of ***the CPC***); provide that, a C-C should be included in the WSD; and that no leave is required howsoever.

Further, according to both advocates, the right remedies for the applicant are to pray for amendment of the WSD to include the C-C therein; or file a fresh suit and seek for consolidation of the two suits at a later stage, where necessary. Finally, the respondents prayed for dismissal of the application with costs.



In rejoinder, Mr. Ayall reiterated that the present matter is the most appropriate one. He maintained that it is not compulsory for the defendant to include the C-C in his WSD. However, to him, if it has to be filed separately especially after the filing of WSD, the C-C must be subject to court's leave. For further persuasion, reference was made to the case of ***Shri Ambaram Shri Laxman Ji and Another v Shri Jadulal Shri Ratanlal Ji Choudhary and 6 Others***, Civil Rev. No. 98 of 2021 (High Court of Madhya Pradesh at Indore), para 10 (unreported).

Moreover, to him, since the C-C in the WSD was struck out for being incompetent; the applicant cannot apply for amendment per Order VII of ***the CPC***. He also was not in favour of the completely new suit as proposed by the opponents because such case would face the doctrine of *res-subjudice* or *res-judicata* to Commercial case No. 7 of 2023 already pending in this court. He resonated the prayers in the application.

Before I embark on determining this application, to which I set the Court to answer the issue whether the prayers in the application in tenable; I will analyze a couple of aspects regarding the C-C. **Firstly**, in civil proceedings, the C-C is one the defendant's rights. He earns it by virtue of



being sued by a person against whom he also alleges to have a claim and/or a cause of action. According to Order VIII Rule 9 (1) of **the CPC**, such cause of action must be due to the defendant prior to the filing of his defence against the suit for which he is sued.

Secondly, when it is raised by the defendant, the C-C technically turns to be a cross suit. That is, the parties now swap positions in that respect. The plaintiff in the main suit assumes the position of the defendant in so far as the C-C (cross suit) is concerned in line with Order VIII Rule 9 (1) of **the CPC**. Correspondingly, the effect of each party's pleadings in the C-C become inverse. Hereof, I place reliance on the cases of **John Lessa v Zamcargo Limited and Another**, Civil Appeal No. 61 of 1996; **Airtel Tanzania Limited v Ose Power Solutions Limited**, Civil Appeal No. 206 of 2017 (both unreported); and **Joe RM Rugarabamu v Tanzania Tea Blenders Limited** (1990) T.L.R. 24.

Thirdly, despite its automatic cross-suit-status, the court has the discretion to dictate the mode of its determination. There are two major modes in this regard. **One**, the court may proceed with determination of both primary and cross suits conjunctively [**Runway (T) Limited v WIA**



Company Limited and Cascade Company Limited, Civil Appeal No 59 of 2015; and ***Director Moshi Municipal Council v John Ambrose Mwase***, Civ. Appeal No. 245 of 2017 (both unreported)]. **Two**, if in its assessment, the court finds it expedient for the cross suit (C-C) to be disposed of separately; the order to such or other effect will be entered. This approach may involve striking out the C-C, as the case may be (Order VIII Rule 12 of ***the CPC***).

With the foregoing types of approach at the background, therefore, it is apparent that the C-C cannot be simply or outrightly ignored by the court. Doing so would amount to playing double standard; or to treat parties unequally before the law, contrary to ***the Constitution of the United Republic of Tanzania***, Cap. 2 R.E. 2019; and/or denying one party the right of being heard at the expense of favoring the opposite party. Either way, it is unlawful. In ***Runway (T) Limited v WIA Company Limited (supra)*** it was laid a firm legal principle that;

"We are, however, of the considered view that even if the respondents might have failed to adduce evidence to prove the counter claim, that did not relieve the trial court from the duty of making a decision thereon."



Fourthly, working from the basis that the C-C is the defendant's automatic right, another equally important aspect is the time or stage of the civil litigation at which it can be raised. This enquiry invites the reading and evaluation of Order VIII Rule 13 of **the CPC**. Below, I quote the whole rule in the interest of ease of comprehension. It provides, thus;

*"No pleading **subsequent to the written statement of a defendant** other than by way of defence to a set-off or counterclaim shall be presented **except by the leave of the court** and upon such **terms** as the court thinks fit, but the court may at a pre-trial conference require a written statement or additional written statement from any of the parties and fix a time for presenting the same:*

*Provided that, where a defendant has presented a written statement of defence in accordance with a summons to file a defence the plaintiff may, without obtaining leave of the court, present **a reply to the written statement of defence** within seven days after the written statement of defence or, where there are two or more defendants, the last of the written statements of defence, shall have been served upon him in accordance with the provisions of rule 2 of Order VI (bolding rendered for emphasis). "*



From the foregoing excerpt of the Code, the general rule is that filing of pleadings after the defendant has presented his WSD is; either, as of (automatic) right or subject to the leave of the court. Explicating this rule further, pleadings that can be lodged to the court post-defendant's WSD are in four categories. **One**, the plaintiff may file his WSD to the C-C or set off. This step is automatic. **Two**, further to the stated WSD, the plaintiff may; as of right, file a reply to the defendant's WSD. **Three**, other pleadings may be filed by any party after he obtains "the leave of the court and upon such terms as the court thinks fit". **Four**, the court (at pre-trial) may order a written statement or additional written statement to be filed.

Admittedly, the proceedings at hand, therefore, have been initiated in line with the third category above. Without overstating the background, after the applicant's (defendant's) C-C was struck out by this court on October 6th, 2023; the subject party's pleadings which were spared are his WSD. The controversy between the parties herein hinges on such issue as to whether the applicant herein can file the C-C at this stage. Whereas the applicant argues that he can rightly do so, the respondent holds a totally different view.



In my considered opinion, in line with the categorization of pleadings which can be filed after the defendant has filed his WSD; the rivalry submissions of parties herein should be evaluated and considered on the basis of whether the applicant exhibits adequate grounds to move court to grant the sought leave. I have the reasons for holding such view. I will state them here. **First**, inarguably the pending Commercial Case No.7 of 2023 has it a record that the only existing pleadings of the defendant is the WSD. Hence, he can precisely be considered as having no right to file any other pleadings without court's leave.

Second, and as correctly argued by Mr. Ayall, it is not mandatory that the C-C must be filed within the WSD lest, the visage of Order VIII Rule 13 of *the CPC* would be shrunk. **Third**, as alluded to earlier in this ruling, in a case where the C-C is filed, the court is guided by expedience in deciding whether such C-C should be disposed of simultaneously with the plaintiff's suit or separately. **Fourth**, the respondent contended that the applicant has at his disposal two options: to pursue amendment of the WSD to include the C-C therein; and to file a fresh suit and pray to consolidate two cases later.



I will generally reach an agreement with the respondent's counsel regarding the subject twin alternatives. Nevertheless, I am inclined to hold a different conclusion to the respondent's deduction hereof. The availability of the stated options to the applicant does not, in my considered judgement, oust his right to file the envisaged C-C if he meets the legal threshold of being granted leave to do so. In addition, after ordering the C-C to be struck out of the defendant/applicant's WSD; it would be asymmetrical to circumvent the said order by seeking to reintroduce it by way of amendment. Technically reasoned, unless the said order is vacated first, the court will still be *functus officio* in such regard.

The above said and done, I will now consider the merit of the application. From the affidavital depositions, the primary reason given by the applicant to support the application is that: the prospective C-C "raises some serious questions that need to be addressed by the court for final and conclusive determination of the controversy between the parties to this Court". During hearing, the applicant's counsel amplified it by arguing that the applicant's claims are intertwined with the contention in the plaintiff's suit such that it would be ideal for the court to decide the parties' dispute



fully; amending the existing pleadings to include the C-C would amount to abuse of court process; and that to file a separate/fresh suit will amount to courting for obvious wrath of *res subjudice* or *res judicata* against that prospective suit. While I subscribe to the applicant's argument regarding abuse of court process, I hold that it is not necessarily the case that whenever the C-C is filed and/or determined separately, the principles of *res subjudice* or *res judicata* undermine it. Such rules, apply on case-to-case basis. That is, they are to be considered on merits of each case.

It is not out of place if I reaffirm the objective of C-C. Among the rationales of a cross-suit are to save time, money and related resources; to have the parties' interfused related disputes resolved conjointly with completeness; the court to arrive at one decision for two suits thereby avoiding the risk of giving two contradictory judgements; and to maintain coherency in court proceedings. These aspects are apparent in the matter at hand. The applicant had his so-called C-C raised right from the outset after being served with the plaint in Commercial Case No.7 of 2023. Hence, the present move is not an afterthought.

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In addition, the striking out of the applicant's purported C-C did not finally determine the parties dispute therein. The applicant retained the right to refile his C-C appropriately in future. Furthermore, the respondent does not mainly object the C-C being introduced by the applicant and/or disposed of by the court; save for the vehicle with which to commute towards such destination. In other words, by concession, the respondent's primary opposition against this application is that the applicant has the suitable options to achieve the same results. This opposition notwithstanding, having reasoned that such options do not bar the applicant from filing the C-C; the respondent's disputation is considered in the disaffirmation.

I am not naïve to the fact that the leave sought herein should be granted sparingly. Indeed, factors to be considered before granting leave, in my view, include: the stage of the proceedings. It would mirror odd, for instance, if filing of the C-C is permitted when hearing of the case has commenced. Likewise, if introducing the C-C would amount to joining other parties whose inclusion in the suit is subject to other condition precedents; such as statutory notices, or seeking extension of time prior to suing them, the court's loathness comes into contemplation against the prayer.

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Moreover, if the applicant failed to comply with the filing order previously given by the court for him to file the C-C; *et cetera et cetera*! In other words, the court is normally guided by expedience in the interest of parties.

Consequently, the Court finds and holds that the applicant herein has demonstrated sufficient justification for his prayer in the application. I will, as I hereby do, merit it. For avoidance of doubt, the applicant is hereby given a fourteen-day leave to file the envisaged additional pleadings in the form of C-C against the respondent (plaintiff in Commercial Case No. 7 of 2023); if he so still desires. I make no order as to costs.



C.K.K. Morris

Judge

March 22nd, 2024

Ruling delivered this 22nd day of March 2024 in the presence of Advocates Nixon Tugara and Yohana Ayall for the applicant; and Franklin Chonjo for the respondent.

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C.K.K. Morris

Judge

March 22nd, 2024

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