IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES ALAAM.

CIVIL CASE No. 220 OF 2012

BETAM COMMUNICATIONS TANZANIA LTD..... PLAINTIFF

Versus;

1. CHINA INTERNATIONAL TELECOMMUNICATIONS CONSTRUCTION CORPORATION.RESPONDENT.....1ST DEFENDANT
2. CITCC TANZANIA LIMITED.....2ND DEFENDANT

RULING

16/09/2014 & .12/12/2014.

This is a ruling on what I may conveniently call cross-preliminary objections (POs). The first PO was lodged by both the first and second defendants, CHINA INTERNATIONAL TELECOMMUNICATIONS CONSTRUCTION CORPORATION and CITCC TANZANIA LIMITED. It is based on a single point of law that the amended plaint in this case contravenes Order VII rule 1 (f) and (i) of the Civil Procedure Code, Cap. 33 R. E. 2002. The PO was raised though their respective amended written statements of defences (WSDs). The plaint in question was amended following the court order dated 5th December, 2013. The second PO was raised by the plaintiff, BETAM COMMUNICATIONS TANZANIA LTD through a formal notice of PO. It is based on the following points of law'

1. That the respective WSDs were filed without leave of the court in contravention of Order VIII rule 13 and Order VI rule 17 of Cap. 33, hence liable to be struck out and dismissed.

2. That the two defendants, having dispensed to apply for leave to present their respective amended WSDs, forfeited their entitlement to apply for the same at any subsequent occasion.
3. Alternatively, the respective amended WSDs which purport to challenge the lawfulness of the plaint (through the first PO) are tantamount to an appeal against the ruling dated 5th December, 2013 to this same court, hence deserve to be struck out and dismissed.

The cross POs were argued verbally. The two defendants were represented by Mr. Francis learned counsel while the plaintiff was advocated for by Mr. Mpesha learned counsel.

Mr. Mpesha argued his points related to the first PO cumulatively to the following effect; that upon the plaintiff filing the plaint, the defendants filed their WSDs. The court then ordered the plaintiff to amend the plaint so as to plead (in it) the fact that there existed the company's board resolution (if any) authorising the institution of the suit and to attach the resolution accordingly. The plaintiff complied with the order. However, the defendants filed their respective amended WSDs without first making a formal application for leave of the court and obtain the same. That omission contravened Order VIII rule 13 and Order 6 rule 17 of Cap. 33 as the amended WSDs changed the substance of the previous WSDs. The amended WSDs were not justified because the amended plaint had changed nothing apart from attaching the board resolution. The learned counsel for the plaintiff further submitted that even if the amended plaint changed the nature of the plaint, the defendants could not be entitled to file amended WSDs without leave of the court. He thus urged this court to strike out the amended WSDs and order the case to proceed for mediation.

In his replying submissions to the first PO, Mr. Francis learned counsel for the defendants submitted that, in law whenever there is an amended plaint, the defendant has the right to file an amended WSD. He also argued that Order VIII rule 13 of Cap. 33 is irrelevant as it carters for pleadings filed subsequent to the filing of a WSD which is not the case here.

On the alternative point of the first PO the learned counsel for the defendants contended that, the PO raised in the respective WSDs touches the jurisdiction of

this court. He added that an issue of jurisdiction can be raised at any time, citing the decision of this court in A. **S. Norempo Construction v. Dar es salaam Watter and Sewerage Authority (DAWASA) Commercial Case No. 47 of 2009, at Dar es salaam** (Makaramba, J) to support the contention. The defendant had thus the right to bring the attention of the court to the irregularity in the pleadings by raising the PO in the WSDs. He added that the defendants could even rise the PO through a notice of PO. He thus urged this court to overrule the first PO raised by the plaintiff.

In his rejoinder to the replying submissions, the learned counsel for the plaintiff argued that, the thought the defendants were present when the court made its order permitting the plaintiff to amend the plaint, they did not pray for the leave to amend their WSDs, hence barred as argued before. He also argued that while the amended plaint did not make any changes apart from attaching the board resolution, the amended WSDs unnecessarily made substantial changes from the original ones, hence unjustified. He added that in law courts do not permit amendments of pleadings unless it is necessary to do so, which was not the case in the matter under discussion.

Regarding the second PO, the learned counsel for the defendants submitted that, Order VII rule 1 (f) of Cap. 33 mandatorily, by use of the word "shall" directs that a plaint must contain the fact that the court has jurisdiction. Without that fact the court lacks jurisdiction to entertain the suit. Paragraph 12 of the amended plaint purports to indicate that this court has jurisdiction to try the matter but it does not suffice for want of details disclosing a specific sum claimed by the plaintiff. He further submitted that in law a jurisdiction clause of a plaint must disclose details of the sum claimed as per the decision of this court (Mushi J, as he then was) in **Joshua International Ltd v. Mpalc Kaba Mpoki, Civil Appeal No. 467 of 2002, at Dar es salaam.** He also charged that failure to comply with Order VII rule 1 (f) of Cap. 33 was held fatal to the plaint and renders it defective and liable to be struck out, he cited **Arusha Art Ltd v. Alliance Insurance Corporation Ltd, Hith Court Commercial Case No. 12 of 2011, at Arusha** (Mruma, J.). Ato fortify the contention.

The learned counsel for the defendants also argued that Order VII rule 1 (i) of Cap. 33 also requires the suit to state the sum claimed for purposes of court fees.

The fact that paragraph 10 states that the amount claimed is Nine Millions United States Dollars (USD) does not suffice since the exchange rate fluctuates, hence the difficult to assess the court's jurisdiction (pecuniary). He was specific that the sum must be in the Tanzanian legal tender. He thus prayed for this court to strike out the plaint.

In his replying submissions to the arguments related to the second PO, Mr. Mpesha for the plaintiff argued that the PO is aimed at delaying the hearing of the case because paragraph 10 of the plaint which shows that the amount claimed is Nine Million USD suffices since one can go to the central bank and see the exchange rate and he shall know that the amount is within the jurisdiction of this court. He also submitted that paragraph 12 of the plaint also specifically states the geographical jurisdiction of this court and states that the amount claimed is with th pecuniary jurisdiction of this court and the defendants' counsel did not tell the court as to which court has jurisdiction to entertain the matter if not this court. He added that the ruling dated 5/12/2013 had the effect of declaring the plaint proper save for the ordered amendments; hence this court is *functus officio* to hold otherwise, he cited the case of **Scholastica Benedict v. Martin Benedict [1993] TLR 1** and that of Zee Hotel Management and others v. Minister for Finance and others [1997] TLR 265 to cement his stance. He also submitted that the defendants could have risen this PO together with the previous PO (overruled in the ruling dated 5/12/2013), but they did not do so hence precluded from doing so at this stage. He submitted that. in law all the points of PO must be raised and argued simultaneously and not in piece meal. He referred this court to the decision of the East African Court of Justice in the case of **African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, Reference No. 9 of 2010** to support his fight.

In the rejoinder submissions regarding he second PO, the learned counsel for the defendants only reiterated his submissions in chief, hence this ruling.

I will first determine the first PO and then the second PO. The main issue related to the first PO is therefore, whether or not the defendants properly filed their respective amended WSDs. The provisions of Order VI rule 17 of Cap. 33 on which the first PO was mainly pegged reads thus, and I quote for a readymade reference;

> "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." (bold emphasis is mine).

According to Order VI rule 1 of Cap. 33, the term "pleading" means a plaint or a written statement of defence or such other subsequent pleadings. It is therefore my settled view that, from the wording of the quoted provisions above, no any plaint, WSD, reply to WSD or reply to counter claim can be amended without leave of the court. The court thus, has discretional powers to grant leave for amending pleadings. Again, I am settled in mind that, according to the same provisions of law, such discretional mandate of the courts cannot be used arbitrarily. Only amendments that the court considers as necessary for determining the real issues between the parties can be permitted by the court. My views are supported in the case of **Agrovety and Construction Co Ltd v. Salum Said Kleb [1995] TLR 168** (Mwaikasu, J. as he then was). This principle thus covers all pleadings including the amended WSDs filed subsequent to an amended plaint in the case at hand. And it is more so considering the fact that the amended plaint did not change the substance its previous substance, but the amended WSDs changed their respective previous gist.

The rationale for the above principles on amendment of pleadings is this; in law pleadings carry the essential information for framing issues that lead to the fair and just decision of the case. It follows thus that; a party to court proceedings is not at liberty to amend pleadings the way he or she likes for fear that he/she may introduce new and irrelevant information that may embarrass or take the adverse party by surprise. This style of ambushing justice is inconsistent with the legislative purpose of procedural rules which are basically intended to be the maid, and not the ravisher of justice. The argument by the learned counsel for the defendants that the defendants had an automatic right to file their respective amended WSDs following the amended plaint is not thus tenable and not backed by any law, the counsel himself actually cited none. I thus agree with the argument by the learned counsel for the plaintiff that the defendants could not amend their respective WSDs without leave of the court.

I have also considered the provisions of Order VIII rule 13 of Cap. 33 cited by the learned counsel for the plaintiff as the second support for the first PO. A closure scrutiny of these provisions supports the finding that they are not totally irrelevant in the matter under discussion as the learned counsel for the defendant believed. In my view, the provisions supports the spirit embodied under Order VI rule 13 of Cap.33 in the sense that they prohibit presentation of any pleading after the presentation of the WSD except by leave of the court. The exception in this general rule is that, only the following pleadings can be filed without leave of the court after the presentation of the WSD; a defence to a set-off or counterclaim and a reply to a WSD where the summons served to the defendant was a summons to file the defence (as opposed to a summons to appear). The exceptions to this rule do not apply to the case under discussion. It follows thus that, upon filing their original WSDs, the defendants in the suit at issue, were barred by these provisions, from presenting any other pleading (including the so called amended WSDs) without leave of court. For these reasons, I hold the issue related to the first PO negatively to the effect that the amended WSDs were improperly filed in court. I consequently uphold the first PO and find the two amended WSDs liable to be struck out.

Regarding the second PO, the issue is whether or not the amended plaint offends Order VII rule 1 (f) and (i) of Cap. 33. These provisions of law are conspicuous, they require a plaint to include particulars showing that the court has jurisdiction and a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees. I have also read paragraph 9, 10 and 12 of the plaint. Their totality is to the effect that the plaintiff claims against the defendants jointly and severally for the sum of USD 9, 541, 926. 97 being a total amount of commission, interests, general and specific damages. The plaint further states that the allegedly breached agreement (subject matter of this suit) was executed in Tanzania and the sum claimed fall under the pecuniary jurisdiction of this Honourable Court. In my view, these averments adequately meet the requirements of Order VII rule 1 (f) and (i) of Cap. 33. I cannot imagine any better words that the plaintiff could use in disclosing the particulars required under such provisions.

Again, even for purposes of assessing the pecuniary jurisdiction of this court, the amount claimed is well with that jurisdiction. Paragraph 9 (b) of the

plaint shows that general damages claimed by the plaintiff amount to only USD 1, 050, 000. 00. The law is to the effect that general damages are not considered in assessing the pecuniary jurisdiction of the court; see the Court of Appeal of Tanzania decisions in **M/S Tanzania – China Friendship Textile CO. LTD v. Our Lady Of the Usambara Sisters, TCA Civil Appeal No.84 of 2002, at Dar es salaam** (unreported). It follows thus that, even if one deducts this amount from the total amount claimed, the total claim that will remain for assessing the pecuniary jurisdiction will be USD **8, 491, 926.97**. If this amount is converted into Tanzanian Shillings (Tshs), it will, by far fetch more than Tshs. 150, 000, 000/= which is within the pecuniary jurisdiction of this court in matters arising from contracts like the one under consideration. This view is based on s. 40 (2) (a) and (b) of Magistrates' Court Act, Cap. 11 R. E. 2002 as amended by Act No. 25 of 2002 read together with s. 2 (1) – (3) of the Judicature and Application of Laws Act, Cap. 358, R. E. 2002 and article 108 (2) of Cap. 2 which in their generality confer the pecuniary jurisdiction of this court.

It must also be noted that the exchange rate currently is revolving around Tshs. 1700.00 per a single USD. This court is entitled to presume this rate under s. 122 of the Evidence Act, Cap. 6 R. E. 2002, regard being had to the common course of natural events, and the public and private business currently prevailing in our country. The complaint by the learned counsel for the defendant to the effect that the claim in foreign currency is improper unless it is converted in local currency does not also move me an inch from this stance for, that is an obsolete law following the decision in **Continental Agencies vs. A. C. Berrillo Co. Ltd (1971) EA 205.** The contemporary law is to the effect that following the enactment of the Foreign Exchange Act, No. 1 of 1991 which came into force on 16/3/1992 vide Government Notice No. 37 of 1992, courts of this land can entertain and grant claims in foreign exchange, see the Court of Appeal of Tanzania decision in the case of **Attorney General v. Sisi Enterprises Ltd, Civil Appeal No. 30 of 2004, at Dar es salaam** following its previous decision in **Transport Equipment Ltd vs. D.P. Valambhia [1993] TLR 91.**

For the aforesaid reasons, I determine the issue related to the second PO negatively to the effect that the plaint did not offend Order VII rule 1 (f) and (i) of Cap. 33. 1 consequently overrule the second PO.

Before I wind up, I must make some remarks and findings on som arguments advanced by the parties. In fact, the order dated 5th December, 2013 wa a result of a PO raised by the same defendants. Following that ruling the plaintif filed the amended plaint, but the defendants have raised the second PO thought th amended plaint essentially contains similar facts to the original plaint. Th defendants did not raise the second PO together with the previous PO so that the could be determined cumulatively. Though I agree with the learned counsel for th defendant that an issue of jurisdiction can be raised at any stage of proceedings parties must do so with a genuine intention. Raising PO in piece meal have th effect of delaying cases unnecessarily, especially where both sides of the case ar ably represented as in the case at hand. I would thus tend to agree with th plaintiff's counsel lamentation that the defendants have a hidden agenda fo delaying the hearing of the case under consideration through raising ungrounde POs by instalments. Delay of cases through that style is not only inconsistent witl the interests of justice especially right to fair trial, but it also amounts to abuse o court process. The right to fair trial is a fundamental right of every person, i includes the right to speedy trial. This right is enshrined by article 13 (6) (a) th Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2. Articl 107A (2) (b) of the same Constitution also prohibits courts of this land fron delaying cases unnecessarily. This court will not thus condone any step that has colour of violating these constitutional requirements.

Having observed as above, I hereby strike out the amended WSDs filed by the two defendants and for the sake of justice; I order that the original WSDs wil continue to be considered in these proceedings. I also approve the envisaging mad by the learned counsel for the plaintiff and I order that the suit shall proceed to th next stage that would follow as soon as the plaintiff filed the amended plaint an before the defendants filed their purported amended WSDs. It is so ordered.

JHK. UTAMWA

JUDGE

12/12/2014