IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 19 OF 2019

KAHAMA OIL MILLS LIMITED.....APPLICANT

VERSUS

WIMBE CONSULT. LTD.....RESPONDENT

(Original Civil Case No. 4 of 2019 – High Court of Tanzania at Sumbawanga)

R U L I N G

20th January – 24th February, 2020:

MRANGO, J.

This is a ruling in respect of the application made under **O. VIII r. 23 and O.VI r. 17 of the Civil Procedure Code as amended by GN. No. 381 of 2019**, by the applicant KAHAMA OIL MILLS LIMITED.

The application is supported by the affidavit sworn by the George Bahati Ndege, an officer for the applicant.

The applicant prays for this court to amend the scheduling order made in Civil Case No. 4 of 2019 in order to reopen pleadings in the suit, also for the court to grant leave to amend written statement of defence filed on 10th day of April 2019 in order that the applicant raises proper

defence and to raise a counterclaim against the plaintiff in the terms set out in the affidavit annexed here to.

In opposition to the application, the respondent WIMBE CONSULT LIMITED, filed counter affidavit sworn by the principal officer, Marwa Magige Waitara.

Before this court the applicant had a legal services of Mr. Romani Selesini Lamwai – Learned Advocate while Josephat Ndelembi – Learned Advocate appeared for the respondent.

Before the matter was called for hearing on 15th November 2019, this court ordered the parties to argue by way of written submission whereas the parties complied with and they filed their respective submission as scheduled by the court.

In support of the application learned advocate for the applicant prayed for the affidavit of Mr. George Bahati Ndege be adopted and form part of his submission.

As regard this application the learned advocate for the applicant submitted that it is on record as stated in para. 3 of the Affidavit that M/S Kailu Law Chambers of Mwanza were initially instructed to represent the applicant in the suit. As Mr. Julius Mushobozi, an advocate for the M/S Kailu Law Chambers was the one seized with the brief, while his legal

officer, who had been detailed to make a close follow up of the applicant's many cases and who at one point of time masqueraded as an advocate was the one who was entering appearance. He stressed that paragraph 3 of the affidavit emphatically states that Mr. Masero signed and filed the written statement of defence without showing it to any officer in senior management of the applicant. He further argued that according to Mr. Ndege, he discovered serious flaws in the written statement of defence when the accompanied Mr. Masero to Sumbawanga and upon expressing his disquiet to Mr. Masero, the latter contacted his principal in Mwanza and had a soft copy of a purportedly corrected written statement of defence which Mr. Masero printed in Sumbawanga and filed it in court against without showing it to the deponent.

He went further arguing that in Para. 5 of the affidavit, Mr. Ndege depones that after Mr. Masero had filed the written statement of defence, he read it and discovered that did not raise any objections while the Applicant was convinced that the suit was filed in the wrong registry, that there was no Board resolution allowing the plaintiff to file the suit, and that the plaintiff was estopped from instituting the suit. He also noticed that Mr. Masero had annexed the original sale contract and he had signed the written statement of defence as a Principal Officer of the Applicant which

he was not and also had forged the signature of the Applicant counsel. He said neither was there a counterclaim which the Applicant had instructed to he raised in the written statement of defence. He said these issues were raised by Mr. Ndege but Mr. Masero ignored them and in consequence, the Applicant engaged M/S M.R.M. Lamwai & Co. Advocates to work with M/S Kailu Law Chambers Advocates, but the latter refused to work with the former and no reasons were given.

The learned advocate submitted that on the basis of the forged written statement of defence, the court proceeded with the first pretrial and scheduling conference and it was only when Mr. Roman Selasini Lamwai appeared before the court to make an application for the amendment of the written statement of defence that he discovered that the matter had while being conducted by an unauthorized person, been fixed for mediation.

The learned advocate submitted that the application is opposed by a counter – affidavit filed by the one Marwa Magige Waitara, the Managing Director of the respondent company. They submitted that the counter affidavit does not raise anything of substance to oppose the application.

As regard the **departure from scheduling Order**, learned advocate submitted that the provision of the Civil Procedure Code relied

upon provides thus, **Order VIII r. 23 as amended by the Civil Procedure Code (Amendment of the First Schedule) Rules GN. No. 381 of 2019**:

> **Prohibition of further amendment to an order; Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise.**

The learned advocate went further arguing that in the current application, it has been stated very clearly that the written statement of defence was drafted, signed and filed by a person who was not authorized to do so. Mr. Masero was neither advocate nor a principal officer of the Applicant. Otherwise, one cannot explain why, Mr. George Bahati Ndege who is a Principal Officer of the Applicant would have accompanied Mr. Masero to Sumbawanga from Kahama for the case and why he should have protested

to him regarding the written statement of defence as deponed to in par. 4 of his affidavit.

To buttress his position he said the definition of "officer" in relation to a body corporate includes a director, manager or secretary. There is no officer of the company known as principal officer. The concede that **O. XXVIII** provides that any pleading may be signed and verified on behalf of the corporation by the secretary or other principal officer of the corporation. On the same token they submit that this "principal officer" must be within the meaning ascribed to it by **section 2 of the Companies Act, Cap. 212**.

He added that in the written statement of defence, Mr. Maswi Masero called himself "Principal Officer of the defendant". He does not state what position he holds in the company. He is definitely neither of the three mentioned in the definition under the Companies Act. He said a manager of the company has sworn that in fact Maswi Masero is not an officer of the company. The fact that he was introducing himself as principal officer of the company as stated in para. 6 of the counter affidavit does not make him one. He added para. 6 of the counter affidavit **"it is also stated that it is the state of mind and best of the applicant that Mr. Masero was acting under the full instructions of the applicant..."** This

statement is incomprehensible. Moreover, one wonders where is the evidence that he was acting under the instructions of the applicant. Mr. Ndege in his affidavit para. 3 stated that the Applicant had instructed M/S Kailu Law Chambers and that Mr. Maswi Masero had been introduced to the Applicant by one Julius Mushobozi Advocate of Kailu Law Chambers. They invited for the court to hold that indeed Mr. Maswi Masero was not qualified to file the written statement of defence and had forged his principal's signature to show that it was drawn and filed by his principal. He is of the view that, that is serious fraud which has to be redressed and qualifies the situation for the court indulgence under O. VIII r. 23 of the Civil Procedure Code. What is at stake is hundreds of millions of shillings which the court indulgence is not exercised in favour of making a total departure from the scheduling order made as a result of the misconduct of Mr. Maswi Masero and his principal, M/S Kailu Law Chambers Advocates, the interests of justice will not be met.

As regard the application for amendment, the learned advocate submitted that the law on amendments to pleadings is very clear. **Order. VI r. 17 of the Civil Procedure Code** provides that;

"Amendment of pleading

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" [underlining supplied].

He further said according to this rule, amendments to pleadings are not handicapped by the scheduling orders made in a suit. If the intention of the legislature was such that amendments should not be allowed after the first pretrial conference, then the above quoted rule would have been amended to provide so. He thus put it clearly that the principles as developed judiciary are still relevant. To buttress his point he cited to this court the case of **AGROVETY AND CONSTRUCTION CO. LTD v. SALUM SAID KLEB [1995] TLR 168 (HC)** as one among myriad of cases which interpreted the above quoted provision. The High Court in that case made the following holding;

"The import of the provision under Rule 17 of Order VI of the Civil Procedure Code is that though a court has been vested with a discretion to grant an

amendment as applied for by either party, such discretion may only be exercised where the amendment appears to the court to be necessary for the purpose of determining the real questions in controversy between the parties."

He said the court in this case reiterated the fact that the granting of amendments to pleads is a matter of the discretion of the court. However, he said the court must be satisfied that such amendments are necessary for determination of the real question in controversy between the parties. The Court of Appeal in the case of **GEORGE M. SHAMBWE v. ATTORNEY GENERAL, AND ANOTHER [1996] TLR 334 (CA)** cemented this position by observing that:

"The principles upon which amendments to pleadings should be made needed to be reaffirmed: Amendments sought before the hearing should be freely allowed if they could be made without injustice to the other side and there was no injustice if the other side could be compensated by costs."

The learned advocate submitted that the suit arises out of the credit sale of pipes which did not go through. The plaintiff claims that the pipes belong to it even when it did not pay the purchase price and after returning them to the defendant, the current applicant. The proposed amendments as annexed to the chamber summons shows that the real question in controversy in the suit is whether the Credit sale had the effect of transferring title to the respondent, and if yes, what are the rights of the applicant in case the pipes are held to belong to the respondent. This is a reason why there cannot be an effectual determination of the real question in controversy between the parties if the applicant is not allowed to raise a counterclaim by way of amendment.

He added that the proposed amended written statement of defence has raised four points of preliminary objection. All of them as substantive points which go to the jurisdiction of the court. They cannot be raised otherwise than by way of amendment.

Lastly he said the suit is at a very early stage. The respondent will have an automatic right of filing a written statement to the counterclaim. In the premises, no injustice will be occasioned to him if the amendment is allowed.

In response, Mr. Josephat Ndelembi prayed for the court to adopt counter affidavit sworn by Marwa Magige Waitara, Director for the respondent to be part of submission.

Mr. Ndelembi submitted that Mr. Masero being counsel for the applicant and defendant in the suit was acting under full instruction of the applicant and he introduced himself as the counsel for the applicant that he is from M/S Kailu Law Chambers who was the law firm previously represented the applicant. He submitted that, in that regard pleading drafted by defendant was properly drafted, signed, filed and the scheduling order complied with legal requirements of the law.

Mr. Ndelembi further argued that Mr. Maswi Masero being counsel for applicant was a qualified person to draft and file pleadings as he accompanied the applicant before this honorable court and he was addressing the court on all the progress and actions taken by applicant on the matter and what are the prayers and opinions of the applicant. He said it is not true that Mr. Maswi Masero forged a signature of the principal as if that is so then the applicant should address the court on criminal proceedings and or actions taken against Mr. Maswi Masero. He reiterated that all the narrations by applicant are afterthought since he see the impossibility to succeed in his defence in main suit.

Mr. Ndelembi further argued that it is the respondent contentions that it is the negligence of the applicant to instruct a person they call as unqualified as he was representing the applicant as he was receiving all information from applicant before taking any action and he was from the law firm registered under Brela and Advocates Act. He however said the plaint was filed in the proper registry of the High Court and the preliminary objections sought to be raised are baseless and unfounded with intention to abuse the court process.

Mr. Ndelembi was of the view that the affidavit sworn by Mr. George Bahati Ndege in supporting of the application does not disclose sufficient grounds to move the court granting prayers for amendment of written statement of defence since applicant has not attached any proof disqualify Mr. Masero Maswi as a principal officer but only mere words.

As regard the departure to the scheduling order, Mr. Ndelembi submitted that it is true that under **Order VIII r. 23 as amended by GN. No. 381 of the Civil Procedure Code, Cap. 33**, the law prohibit further amendment of the scheduling order unless there is satisfied that there is necessary on that departure to the interest t of justice BUT to the case at hand there is no questions controversy between parties which have to be determined by this Honorable Court.

He however said the case cited by applicant of **GEORGE M. SHAMBWE vs. ATTORNEY GENERAL AND ANOTHER [1996]** is totally distinguishable in the matter at hand as the case of AGROVERTY AND CONSTRUCTION CO. LTD VS. SALUM SAID KLEB [1995] as well as case decided on the favor of the respondent and the court was provided against the party seeking amendment. He said in the case of AGROVERTY AND CONSTRUCTION CO. LTD vs. SALUM SAIID KLEB, the court held that the intended amendment in this case is unnecessary for the purpose of determining the real question between the parties. The Court proceeded to dismiss the application for amendment.

Lastly, Mr. Ndelembi submitted that it their submission and observation on the face of law that all the four points of preliminary objections are not substantial, are baseless, unfounded, frivolous which abuse the court process and are made not to dispense the justice in the main suit. In that regard he said they pray that this application be dismissed in its entirety with costs.

In this brief rejoinder, Mr. Lamwai submitted that Learned Counsel does not dispute the fact that the applicant instructed Kailu Law Chambers. He said the issue is whether the person who acted was qualified to do so. According to the applicant, Advocate Julius Mushobozi was the one who

was the one seized with the brief. There is no one on the Roll of advocates by the name of Maswi Masero. He illegally acted as an advocate and thus all that he did was a nullity. Mr. Lamwai further argued that Learned Counsel for the respondent at page one of his submissions states that Mr. Masero was acting under the full instructions of the applicant and had introduced himself to the court as an advocate from Kailu Law Chambers appearing for the applicant. They submit that the fact remains that Maswi Masero has never an advocate although he masqueraded as an advocate, and the applicant cannot be punished for the illegality caused by him and Kailu Law Chambers. He said any documents drafted by him as an advocate are therefore inadmissible.

Mr. Lamwai argued further that respondent has not come up with any evidence showing that Mr. Maswi Masero is an advocate enrolled under the Advocates Act. Thus it is wrong for Learned Counsel for the respondent to call him counsel for the defendant. He was not qualified to act for the Defendant/Applicant in terms of the Advocates Act. Also, the denial by Learned Counsel of Mr. Maswi forgery of his principal signature cannot stand in the absence of Advocate Julius Mushobozi's affidavit to contradict the statement on oath given on behalf of the Applicant.

Mr. Lamwai submitted further that Learned Counsel for the respondent insinuates negligence in the applicant's instructions given to M/S Kailu Law Chambers. It is true that there is a firm of Advocates known as Kailu Law Chambers and the resumption is that it is made up of duly registered advocates. The applicant has very clearly pointed out that the advocate who was dealing with the matter was Mr. Julius Mushobozi. One therefore wonders what the Counsel for the respondent is driving at by imputing negligence on the part of the applicant. The rest of the submissions by the Learned Counsel are irrelevant to the current application and they should wait for the appropriate moment when the issue of jurisdiction is argued.

A regard the **departure from the Scheduling Order**, Mr. Lamwai argued that the Learned Counsel for the respondent has not respondent at all to the submissions we made on matter. He has not addressed the court on our submissions that the impostor, Maswi Masero, was not an Authorized Officer of the company within the meaning of the Companies Act. They invite for the court to agree with them and hold that all that was done by him was a nullity and in fact they are not even at the stage of the first pre-trial conference.

As regard the **application for amendment**, Mr. Lamwai submitted that amendments to pleadings are not handicapped by the scheduling orders made in a suit. This has not been answered by Learned Counsel for the respondent. They invited for the court to agree with them on this formulation of the law., He said the Learned Counsel for the respondent has submitted that case of AGROVERTY AND CONSTRUCTION CO. LTD vs. SALUM SAID KLEB [1995] (HC) is distinguishable from the current case. He does not show how distinguishable it is and does not address the principle stated in the decision as quoted in their submissions. He has done the same as regards the case of GEORGE M. SHAMBWE vs. ATTORNEY GENERAL AND ANOTHER [1996] TLR 334 (CA). They accordingly humbly pray for the court to disregard all the respondent's submissions and grant the application with costs accordingly. They did not have to waste the time of the court and everybody's time and costs to mount such an innocuous resistance ad they should pay for it in any event and before they proceed with the main suit.

Having carefully perused the records of this application and the respective submissions of parties, the main issues to be determined by this courts are, one whether departure of this court from the scheduling order is necessary for the interests of justice; two, whether the amendments of

pleadings is necessary for the purpose of determining the real questions in controversy between the parties.

As regard to the first issue whether departure of the court from the scheduling order is necessary for the interests of justice; it was on record and as well argued by Mr. Lamwai that Mr. Maswi Masero was not dully authorized by senior management of the applicant to draft, sign and file the written statement of defence as it was done, as he was neither an advocate nor a principal officer of the applicant. Through the affidavit sworn by Mr. George Bahati Ndege stated that he discovered serious flaws in the written statement of defence. Mr. Ndege submitted that the applicant earlier instructed M/S Kailu Law Chambers to defend the matter, but the written statement of defence was signed by one Maswi Masero. Mr. Maswi Masero was once introduced to the applicant by their then advocate, Mr. Julius Mushobozi. Mr. Maswi Masero signed the said written statement of defence as a principal officer of the applicant which he was not, and he forged signature of the counsel for the applicant in the said written statement of defence. Neither was there a counterclaim as instructed and raised by the applicant, and again it had no objections raised by the applicant. As a result the court proceeded with the first pretrial and scheduling conference ordered based on unqualified and defective written

statement of defence. From the record, Mr. Julius Mushobozi, an advocate from M/S Kailu Law Chambers was the one instructed to represent the applicant, but his legal officer masqueraded as an advocate who was entering appearance. With that argument the applicant sought the assistance of this court so as it can make a departure from the scheduling order. The argument was vigorously opposed by the Plaintiff now the respondent.

However, the law of Civil Procedure Code is very clear with regard to departure from the scheduling Order. **Under Order VIII r. 23** as **amended by the Civil Procedure Code (Amendment of the First Schedule) Rules GN. No. 381 of 2019** provided that;

> Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise.

There law as it is, prohibits amendment of an order made, unless the court is satisfied such amendment is necessary in the interests of justice.

As argued by the learned counsel for the applicant, from the records it apoears to this court that the written statement of defence was drafted, signed and filed by Mr. Maswi Masero who was not dully authorized by the applicant. The fact that he was not dully authorized and he signed the written statement of defence as an officer of the applicant while not renders that document nullity and as if there is no filed written statement of defence before this court.

With in mind on what was raised by the applicant, this court see to it that the applicant had advanced genuine complaints necessary for the court to intervene for the purpose of determining the real issues in controversy between the parties, which is necessary in the interests of justice, thus I see no reason whatsoever to refuse amending the scheduling conference order made by this court in the Civil Case No. 4 of 2019.

With regard the second issue as to whether the amendments of pleadings is necessary for the purpose of determining the real questions in controversy between the parties, the applicant informed this court that the suit arises out of sale on credit of pipes which actually did not go through.

On the same point he said the plaintiff claims to have ownership of the popes without the purchase price being paid by him and even after returning them to the defendant, current the applicant.

The applicant pointed out that the real questions in controversy in the suit as contained in the proposed amendments annexed to the chamber summons are; whether the credit sale had the effect of transferring title to the respondent, and if answer is in affirmative, what are the rights of the applicant in case the pipes are held to belong to the respondent.

The Learned Advocate for the applicant cited to this court the provision of the law that provides for amendments to pleadings, which is **Order VI r. 17 of the Civil Procedure Code** and I quote as follows;

> "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." [Underlining supplied]

With the above cited provision of law in mind, I concur with the argument advanced by the learned counsel for the applicant that amendments to pleadings are not handicapped by the scheduling orders made in a suit. What is important for the court to consider is amendment which appears materials or necessary for the purpose of determining the real questions in controversy between the parties.

The above principle of the law was considered in the case of this court, **AGROVERTY AND CONBSTRUCTION CO. LTD. vs. SALUM SAID KLEB [1995] TLR 168 (HC)** cited to me by the learned counsel for the applicant. In this case the High Court held that;

> "The import of the provision under Rule 17 of Order VI of the Civil Procedure Code is that though a court has been vested with a discretion to grant an amendment as applied for either party, such discretion may only be exercised where the amendment appears to the court to be necessary for the purpose of determining the real questions in controversy between the parties."

With the above considerations, this court see no injustice can be occasioned to the respondent if the leave to amend pleading is granted by

this court to the application as long as the amendments sought appear before this court necessary to determine the real issue in controversy between the parties to the dispute as elaborated above. See case of CAT of **GEORGE M. SHAMBWE vs. ATTORNEY GENERAL AND ANOTHER** cited to me by the learned counsel for the applicant.

Accordingly, the application to amend the scheduling order in Civil Case No. 4 of 2019 and the leave to amend if not to file afresh a written statement of defence is hereby granted by this court with no order as to costs.

It is so ordered.

D.E. MRANGO

JUDGE

24.02.2020

Date - 24.02.2020

Coram - Hon. D.E. Mrango – J.

Applicant - Ms. Anna Assey – Adv.

Respondent - Ms. Neema Charles – Adv.

B/C - Mr. A.K. Sichilima – SRMA

COURT: Ruling delivered today the 24th day of February, 2020 in presence Ms. Anna Assey – Advocate for the Applicant and Ms. Neema Charles – Advocate for the Respondent.

Right of appeal explained.

D.E. MRANGO

JUDGE

24.02.2020