

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 273 OF 2017

(CORAM: MWARIJA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

**KILOMBERO NORTH SAFARIS LIMITED APPELLANT
VERSUS**

**REGISTERED TRUSTEES OF MBOMIPA
AUTHORITIES ASSOCIATION RESPONDENT**

**[Appeal from the decision of the High Court of Tanzania (Commercial
Division), at Dar es Salaam]**

(Songoro, J.)

dated the 21st day of October, 2016

in

Commercial Case No. 63 of 2013

JUDGMENT OF THE COURT

13th July & 12th August, 2021

MWAMPASHI, J.A:

Kilombero North Safaris Limited, the appellant, sued the Registered Trustees of Mbomipa Authorities Association, the respondent, in the High Court (Commercial Division) vide Commercial Case No. 63 of 2013. The suit was for financial losses and costs allegedly suffered and incurred by the appellant due to the respondent's negligent and/or dishonest misrepresentations inducing the appellant to enter into a contract with the respondent which could however not be enforced hence causing financial losses and costs to the appellant. The reliefs sought by the appellant as against the respondent included, among others, **firstly**, a declaration that

the respondent induced the appellant to complete the agreement by misrepresentation, **secondly**, payment of USD 2,203,139.27 as compensation for the losses and costs suffered and incurred by the appellant and **thirdly**, payment of general damages to be assessed by the Court for loss of reputation in the tourist hunting market, anguish, distress, agony and inconvenience caused.

The genesis of the dispute between the parties is an agreement entered by the parties on 13th day of July, 2012 whereby the respondent allocated to the appellant the whole hunting quota for tourist hunting activities inside the Wildlife Management Area (WMA) known as Lunda Zone 1 and the surrounding villages within Iringa District. It was the appellant's case that when the agreement was being made, the respondent claimed that it had resource user rights over the said zone including rights for tourist hunting activities duly granted to it by the Director of Wildlife, that it had sufficient power, authority and right to negotiate and sign agreements with potential investors and further that it had the blessing of the Director of Wildlife and the District Council and therefore that the tourist hunting licence was grantable for the zone with no conditions attached upon signing the agreement.

Upon entering into the agreement, the appellant allegedly paid USD 83,401.27 to the respondent and Wildlife Department and commenced costly mobilization activities including worldwide advertisements and marketing of the zone/area allocated hence attracting a good number of tourist hunters and that some of them actually arrived in the country for tourist hunting expeditions. Unfortunately, the appellant could not carry on the tourist hunting business as intended because the Director of Wildlife declined to issue the relevant tourist hunting licence. It was at this point that the appellant realized that it had been induced to enter into the agreement by misrepresentation on the part of the respondent and decided to sue the respondent.

In its written statement of defence, the respondent agreed to have entered into the agreement in question with the appellant and that the requisite fee was paid by the appellant as agreed. It was however denied by the respondent that there was any misrepresentation or warranties on its part for purposes of inducing the appellant to enter into the agreement. The respondent maintained that it was neither responsible for the refusal of the licence nor for the losses or costs allegedly suffered and incurred by the appellant.

It is also worth noting at this very stage, mainly because one of the grounds of appeal arises from this, that before the hearing of the suit could be commenced, the appellant made an application in terms of Rule 24(1) and (3)(b) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 (the Commercial Court Rules), for leave to amend its plaint. In that application, the appellant intended and sought to amend paragraph 9 of the plaint so that the claim on financial losses and costs as well as the particulars of said losses and costs pleaded therein, could be amplified and substantiated by annexing and introducing a number of receipts, invoices and other documents relevant to the said claimed losses and costs. The application was, however, on 19th day of February, 2016, refused. The grounds for the refusal included the finding by the trial judge that the amendment sought to be made by introducing a bundle of receipts and invoices issued by retailer and business institutions, could prejudice the respondent who could have no time to check the authenticity of the documents and make a credible and convincing defence.

After the refusal of the appellant's application to amend the plaint, the hearing of the suit proceeded and at the end of the trial the suit was dismissed on 21st day of October, 2016, for the appellant's failure to prove

the claims. It was also ordered that the respondent be paid half of the costs incurred in defending the suit.

Being aggrieved by the dismissal of the suit, the appellant has preferred this appeal raising four grounds of appeal as follows:-

1. The trial Judge erred in law by refusing the Appellant leave to amend its Pleint on ground that the Respondent will have no time to check the authenticity of the documents to be included in the Pleint.
2. The trial Judge erred in law and fact by finding that the Appellant failed to prove misrepresentation.
3. The trial Judge erred in law and fact by confining the issue of misrepresentation to a pre-contractual stage and ignoring the misrepresentation that formed part of the agreement between parties.
4. The trial Judge erred in law and fact by failing to appreciate the evidence on record hence coming to wrong conclusions.

At the hearing of the appeal Ms. Samah Salah, learned counsel, appeared and represented the appellant. Despite being duly served with the notice of hearing through its advocates (Law Domain), the respondent neither appeared nor filed written submissions to oppose the appeal. For the reason of the respondent's absence and its failure to file written

submissions, it was prayed by Ms. Salah, that the hearing should proceed in the absence of the respondent in terms of Rule 112(2) of the Tanzania Court of Appeal Rules, 2009 as amended. The prayer by Ms. Salah was granted by the Court and the hearing of the appeal proceeded in the absence of the respondent.

In her submissions in support of the appeal, Ms. Salah, addressed the Court on all the four grounds. However, since we find that the appeal can be disposed of only on the 1st ground of appeal, we shall not reproduce her submissions in respect of other grounds. Thus, in determining the appeal our focus and concentration will be on what was submitted on the 1st ground of appeal.

Probably because the appeal had not been resisted, Ms. Salah had not much to submit for the appeal. She, at the outset, prayed for the written submissions and the list of authorities, she had earlier filed, to be adopted as part of her oral submission in support of the appeal. She also prayed for the appeal to be allowed on the basis of the said adopted written submissions and list of authorities.

From the written submissions, it was submitted by Ms. Salah, in respect of the 1st ground of appeal, that the trial judge erred in refusing to allow the appellant to amend the plaint on the ground that the

amendment would prejudice the respondent because it will have no time to check the authenticity of the documents that were to be included in the amendment. She argued that Rule 24(1) and (3)(b) of the Commercial Court Rules, allows a party to a case to amend its pleadings at any stage of the proceedings for the purpose of determining the real question in controversy or to achieve justice between the parties. To cement her argument, she referred the Court to the cases of **Central Kenya Ltd v. Trust Bank Ltd** [2000] 2 EA 365 and that of **Mbayo and Another v. Sinani** [2007] 2 EA 306. Ms. Salah also relied on **Mulla, the Code of Civil Procedure**, 16 Ed, Vol. II, at page 1821.

It was also argued by Ms. Salah in the written submissions, that amendment of pleadings before hearing can be allowed if the same cannot cause injustice to the other party. On this she cited the cases of **Wamuiga v. Central Bank of Kenya** [2002] 1 EA 314 and that of **Kenyata National Hospital v. KCB LTD & Another** [2003] 2 EA 528. She also referred the Court to **Mulla** (supra) at pages 1823 and 1824. She insisted that from those authorities, it is established that the only injustice which may result from the denial of amendment is that which cannot be compensated by damages which was not the case for the application before the trial judge.

Ms. Salah concluded by submitting that it was very wrong for the trial judge not to allow the appellant to amend her plaint on the ground that the respondent will not have time to authenticate the documents sought to be added by the amendment. She argued that the amendment was aimed at enabling the court to justly determine the question of losses and damages the appellant had suffered after being induced to enter into the agreement in question. It was further submitted by Ms. Salah that the refusal to amend the plaint was based on a wrong apprehension of the law because the alleged delay to do so was not a sufficient reason to refuse amendment as compensation by costs was possible. She lastly argued that amendment ought not to have been refused on technical grounds.

We have dispassionately considered the record of appeal and the submissions made in support of the appeal, particularly in respect of the 1st ground of appeal. The issue for determination by this Court is whether the trial judge was right in refusing leave to amend the plaint on the ground that the amendment sought by the appellant would prejudice the respondent who would have no time to cross check the authenticity of the documents intended to be introduced by the amendment and also that it would have no time to make a credible defence.

Amendments of pleadings in the High Court (Commercial Division) is governed by rule 24(1) and (3)(b) of the High Court (Commercial Division) Procedure Rules, 2012 (the Commercial Court Rules) under which it is provided as follows:-

24 (1) *The Court may, at any stage of the proceedings, allow the plaintiff or any party to the proceedings to amend the plaint or pleadings, on such terms as to costs or otherwise as may be just and in such manner as it may direct.*

(2) ...

(3) *The Court's order of amendment under this rule shall be for the purpose of:-*

(a) *Correcting any defect or error in any proceedings, or*

(b) *Determining the real question in controversy or to achieve justice between the parties.*

The power given by rule 24(1) of the Commercial Court Rules, is wide as pleadings can be amended at any time of the proceedings. It should however be emphasised that the power given by the said rule 24(1), is discretionary and has to be exercised judiciously within the principles governing amendments of pleadings. Further, according to rule 24(3)(b) of the Commercial Court Rules, there are two conditions that need to be satisfied for amendments of pleadings to be allowed. **Firstly,**

amendments can be allowed when such amendments are necessary for the purpose of determining the real question in controversy between the parties and **secondly**, is when the amendments are aimed at achieving justice between the parties. The test applicable on both two conditions is the consideration whether or not the proposed amendment is likely to occasion any injustice to the other side.

The position of the law on amendment of pleadings is settled. Besides the cases from the neighbouring jurisdiction cited by Ms. Salah, it has been repeatedly reiterated by courts in our jurisdiction that amendments of pleadings can be made at any stage of proceedings provided such amendments are necessary and important for the determination of the real question in controversy between the parties and also provided they can be made without injustice to the other side. In **Salum Abdalla Chacha t/a Rahma Tailors v. The Loans and Advances Realization Trust and 2 Others**, Civil Appeal No. 49 of 1997 (unreported) this Court insisted, among other things, that:-

“The amendment must aim at and be limited to what will be necessary for determining the real questions in dispute between the parties.... Any amendment must not result in a substitution of an entirely new case”.

Further, in **Motohov v. Auto Garage Ltd and Another** [1971] H.C.D No. 81, Biron, J (as he then was) had the following correct and strong observations;-

“Amendments shall be made as may be necessary for the purpose of determining the really question in controversy between the parties.... The making of amendment is not really a matter of power of a court but its duty, so that the substantial justice may be done”.

As we have earlier alluded to, the appellant sought to amend her plaint by further amplifying claims in paragraph 9 of the plaint and by introducing some receipts, invoices and documents to substantiate the claim. The application to amend was declined for the reason that if allowed, the respondent would be prejudiced because the respondent being a defendant would have no time to check and consult a hundred of retailer and business institutions who had issued the receipts and invoices sought to be introduced and also that the respondent would not be in position to make a credible and convincing defence. We are of a considered view that in so holding and deciding the trial judge did not properly direct his mind to the circumstances of the matter and to the general principles that govern applications for amendment of pleadings.

We are in agreement with Ms. Salah that, since the appellant's suit was basically on the claim that the appellant had been induced to enter into the agreement by misrepresentation allegedly resulting into the appellant incurring costs and losses some of which specific, then, the amendments sought by the appellant were necessary and important for attainment of justice between the parties. One of the issues that emanated from the pleadings from the very beginning and which the court was duty bound to decide was on whether the appellant had really incurred the claimed losses and costs and if yes, to what extent. In fact, such an issue was framed and recorded by the trial judge at the commencement of the hearing. That being the case, the amendments sought to be made could not be said to have been new but the amendments were aimed at bringing out more clearly the real question in controversy between the parties. The amendments sought were necessary for the determination of the suit.

From the trial court judgment, it is also apparent that the application to amend the plaint was refused because the appellant delayed and did not make such amendment at the earliest stage of the proceedings and also because the receipts, invoices and documents sought to be introduced were bulky. It is still our considered view that, under the

circumstances of the case at hand, this reasoning by the trial court resulted from the failure by the trial court to address its mind to the facts on record and the principles governing applications for amendment of pleadings. As we have observed above, the amendments sought would have resulted in bringing out more clearly the real question in controversy between the parties (see **Wamuiga** (supra)). We are also inspired with the observation in the case of **Central Kenya Ltd** (supra) also cited by Ms. Salah, wherein it was held that;-

“Neither the length of the proposed amendments nor delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs”.

Again in the case of **Eastern Bakery v. Castelino** [1958]EA 461 it was held, among other, by the defunct East African Court of Appeal that;-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs”.

We also find it clear that under the circumstances of the case at hand the amendment sought by the appellant would not have prejudiced or caused any injustice that could not be compensated by costs to the respondent. The amendment sought was not mala fide and was likely to cause no any serious injustice to the respondent. After the amendment the respondent had the right to be given time to prepare its defence including amending its written statement of defence and it was also entitled to be compensated by costs.

Lastly, we wish to insist that when issues in regard to pleadings arise, effort should be to see that real issues in dispute are adjudicated. Refusing leave for a party to amend his pleadings where it is necessary and important to do so for the determination of the real question in controversy between the parties does not only stop the party from setting up his case but it also blocks him from leading relevant evidence to prove his case. The duty of the court when dealing with settlement of disputes is always to determine the rights of the parties. This cannot be achieved if a party is not allowed to amend his pleadings aimed at bringing out more clearly the real question in controversy between the parties.

In the final analysis, for the above reasons, we find the 1st ground of appeal meritorious. The trial judge erred in law when he refused the

appellant leave to amend its plaint. The appeal is therefore allowed on that sole ground. Consequently, the ruling of the trial court dates 19th February, 2016 is hereby reversed to the effect that the appellant is allowed to amend its pleadings in accordance with the law. In the event, the judgment and proceedings after that ruling are quashed and the suit is ordered to be retried as from that stage of the proceedings.

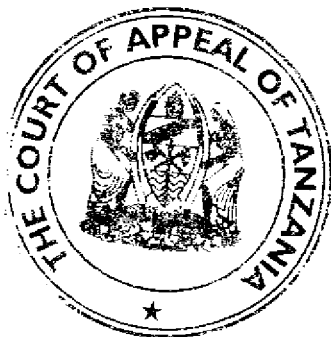
Appeal allowed with costs.

DATED at DAR ES SALAAM this 3rd day of August, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL



The Judgment delivered this 12th day of August, 2021 in the presence of Ms. Grace Kibaki, Counsel for the Appellant and the absence of the respondent duly served through his advocates (Law Domain) is hereby certified as a true copy of the original.

A handwritten signature in black ink, appearing to be "G. H. Herbert", written over a circular stamp or mark.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL