IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A And MURUKE, J.A.)

CIVIL APPEAL NO. 294 OF 2022

EQUITY BANK TANZANIA LIMITED ..... 1ST APPELLANT
EQUITY BANK KENYA LIMITED ..... 2ND APPELLANT

VERSUS

STATEOIL TANZANIA LIMITED ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania, Commercial Division at Dar es Salaam]

(Magoiga, J.)

dated the 01st day of October, 2021

in

Commercial Case No. 105 of 2020

.....

RULING OF THE COURT

23rd April & 16th May, 2024

MWAMPASHI, J.A.:

At the outset of the commencement of the hearing of the appeal, we wanted to firstly satisfy ourselves on the propriety or otherwise of the proceedings before the High Court and the validity of the resultant judgment. We, in particular invited the counsel for the parties to address us on the following issue, which we thought was pertinent; Whether the omission to order for the amendment of plaint to implead the 2nd appellant, Equity Bank Kenya Limited (EBK) following the order made by the High Court under Order I rule 10 (3) of the Civil Procedure Code [Cap. 33 R.E. 2019] (the CPC) for EBK to be added to the suit as 2nd defendant, was fatal and vitiated the subsequent proceedings and the resultant judgment.

At least for purposes of this ruling, the following background facts from which the above raised issue arises, suffices: The 1st appellant, Equity Bank Tanzania Limited (EBT) had extended several banking facilities to the respondent, State Oil Tanzania Limited (SOT) which were secured by a number of immovable properties, debentures and guarantees in favour of EBT. Sometimes in 2018, in a bid to find means of paying off its indebtedness not only to EBT but also to other banks in Tanzania namely; FNB Bank, TIB Bank and ABC Bank, and also for additional working capital, SOT had to find and obtain a loan from a foreign financing lender. For that purpose, EBK was approached and through it, a financial advisor called Nisk Capital Advisors of Nairobi (NISK) was engaged and with its financial advisory and brokerage services, SOT managed to obtain a foreign loan of USD 18,637,500.00. from Lamar Commodity Trading DMCC of Dubai (LAMAR) payable in 12 months.

According to Clause 4.1 of the Loan Facility Agreement between SOT and LAMAR dated 30.10.2018, it was a condition precedent that before any drawing is made under the Facility, an unconditional and irrevocable Standby Letter of Credit (SBLC) shall have been obtained and issued to LAMAR as beneficiary covering the amount payable to SOT under the Facility. In compliance with the said condition, EBK was allegedly approached and requested by SOT to issue the said SBLC to LAMAR and for that purpose, on 21.11.2018, a Banking Facility was executed by EBK and SOT. The said banking facility was followed by a Tripartite Facility Agreement dated

12.12.2018 between EBK as a lender, SOT as a borrower and EBT acting as a security agent for EBK in Tanzania. Several securities listed in the Tripartite Facility Agreement in favour of EBT as the security agent for EBK were given by SOT.

The loan amount of USD 18,640.000.00 was disbursed by LAMAR to SOT through an escrow account opened by EBK in its name. Thereafter, EBK paid off all the indebtedness of SOT to EBT and to other banks. EBK also paid a commission of USD 372,800.00 to itself, USD 750,000.00 to NISK for advisory and brokerage services and USD 74,560.00 to the government of Kenya as excise duty. The balance left for SOT was USD 736,899.74.

SOT having defaulted to honour its obligation to liquidate the loan it had obtained from LAMAR, the SBLC issued by EBK was allegedly re-called by LAMAR and the amount due to it under the Loan Facility Agreement which it had availed to SOT was allegedly collected from EBK. Based on the alleged payment of SOT's loan to LAMAR by EBK, on 17.10.2020, EBT as security agents of EBK, served on SOT a letter by which, among other things, it demanded payment of USD 19,625,316.00 being the outstanding loan balance. It was also intimated by EBT in the said demand letter that, failure to pay the outstanding balance will trigger the enforcement of its rights under both the Loan Agreement and Security Documents. The said demand by EBT is what prompted SOT to institute Commercial Case No. 105 of 2020 in the High Court against EBT.

According to the plaint appearing at page 1 of the record of appeal which was filed on 22.10.2020, the case by SOT was against EBT and among other reliefs, SOT prayed for the following declarations: that it had fully paid and satisfied the banking facilities dated 22.03.2017, 30.06.2017 and 16.10.2017; that all collaterals registered in favour of EBT to secure the Banking Facility dated 21.11.2018 are illegal and that EBT is not entitled to recover any part or the whole of USD 18,640,000.00 or interest or any penalty from SOT. SOT also prayed for an order for EBT to discharge all mortgages, debentures, personal guarantees and indemnity and title deeds illegally held by it following the satisfaction of banking facilities dated 22.03.2017, 30.06.2017 and 16.10.2017.

In its written statement of defence filed on 25.11.2020, EBT refuted all claims levelled against it. Alongside the written statement of defence, EBT raised a counter-claim against SOT for payment of USD. 330,335.00 with interest at the rate of 8% per annum based on an Invoice Discounting Facility which EBT allegedly availed to SOT on 01.11.2019.

The pleadings in regard to the suit between SOT and EBT having been completed, the case was called on for necessary orders on 10.12.2020 when Mr. Frank Mwalongo, learned counsel for SOT, intimated that after passing through the written statement of defence filed by EBT, he intended to apply for a judgment in admission against EBT. The said intimation by Mr. Mwalongo made Mr. Dillip Kesaria, learned counsel, who, by then, was representing EBT,

to rise up and make an application for EBK to be added to the suit under Order I rule 10 (2) of the CPC on account that EBK was a necessary party whose involvement in the suit was indispensable for effective and complete settlement of all issues involved in the suit. Mr. Kesaria did also intimate that he already had instructions to defend EBK. Mr. Mwalongo had no objection to the application made by Mr. Kesaria. The High Court granted the application made by Mr. Kesaria by making the following order:

> *"This court under the provisions of Order I Rule (10) (2) as prayed by the learned counsel for the defendant and not objected by the learned counsel [for the] plaintiff hereby order and direct that Equity Bank Kenya Limited be joined on this suit as 2nd Defendant to enable this court give effective orders and determine the real controversy between parties. Consequently, Mr. Kesaria is given 21 days from today to file written statement of defence. Upon filing the same to serve the plaintiff, who if wishes to file a reply within 14 days from the date of service. It is so ordered and directed".*

Although the plaint was not amended so as to add EBK as a party and 2nd defendant to the suit as per trial court's order in terms of Order I rule 10(4) of the CPC, EBK filed its written statement of defence in which it impleaded itself as a 2nd defendant. Apart from refuting all claims and reliefs sought by SOT, which in fact, were not against it but EBT, EBK raised a

counter-claim against SOT praying for payment of USD 19,689,985.00 with interest at court rate.

After SOT had filed its reply to EBK's written statement of defence and also the written statement of defence to the counter-claim raised by EBK, the pleadings were marked complete. Following the failure of mediation, full hearing of the suit ensued to its finality. In its judgment dated 01.10.2021, the High Court, among other things, found that the SBLC EBK had promised to issue under the Banking Facility dated 21.11.2018, was never issued by EBK to LAMAR in the substance and form agreed. Subsequently, while the counter-claims by EBT and EBK against SOT were dismissed in their entirety with costs, the suit by SOT was allowed and all the reliefs it had sought in the plaint against EBT were granted hence, the instant appeal by EBT jointly with EBK. It is noteworthy that, as we have alluded to above, no relief was granted against EBK, definitely so, because in the plaint, SOT never had a case or claim against EBK and had sought no relief against it.

Back to the issue raised by the Court on the propriety of the proceedings that ensued without the plaint being amended for EBK to be impleaded in the suit as such and also on the validity of the resultant judgment, the counsel for both parties were of the unanimous view that the omission not to amend the plaint was not fatal and did not vitiate the proceedings and the resultant judgment mainly because none of the parties was prejudiced by the omission.

The first to take the floor were the learned counsel for the appellants Messrs Mpaya Kamara and Timon Vitalis. It was argued by Mr. Kamara that it was proper for the hearing and determination of the suit to proceed to its finality without amending the plaint because, firstly, under Order I rule 10 (4) of the CPC, the court may, instead of ordering amendment of a plaint, direct otherwise. In the instant case, it was directed by the High Court that EBK should proceed to file its written statement of defence without the plaint being amended, Mr. Kamara contended. Secondly, the pleadings before the High Court included pleadings in respect of the counter- claims raised by the appellants against the respondent which legally, by themselves, were separate suits. That being the case, Mr. Kamara insisted that, the omission to amend the plaint which was by itself a separate suit, had no effect to the counter-claims. Thirdly, the omission to amend the plaint is an irregularity that can be taken care by the overriding objective principle which calls for substantive justice.

In addition to what was submitted by Mr. Kamara, it was argued by Mr. Vitalis that, sub- rules (2) and (4) of rule 10 of Order I of the CPC, need to be read together. He contended that, since in the instant case the application for EBK to be added to the suit as 2nd defendant was not made by SOT as plaintiff but by EBT as 1st defendant, then it was not necessary for the plaint to be amended. He argued that ordering SOT to amend the plaint while the application to add EBK as 2nd defendant was not made by it, would have

amounted to forcing it to do so. Mr Vitalis insisted that, it is upon a plaintiff to choose who to sue.

As alluded to earlier, Mr. Frank Mwalongo, learned counsel, who led the team of the counsel for the respondent including Ms. Mariam Masandika and Mr. Mohamed Muya, joined hands with the learned counsel for the appellants. He reiterated that, in the instant case, it was not necessary for the plaint to be amended after the court had ordered EBK to be added to the suit as 2nd defendant because Order I rule 10 (4) of the CPC allows the court to direct otherwise instead of ordering for the plaint to be amended. In the instant case, he argued, the court directed EBK to file its written statement of defence and thereafter SOT to file its reply if it so wished.

It was further contended by Mr. Mwalongo that according to the overriding objective principle which is enshrined under sections 3A and 3B of the CPC, the court should focus on substantive justice. He pointed out that, in the case at hand, none of the parties was prejudiced by the omission to amend the plaint and further that, ordering amendment would have delayed the dispensation of justice.

To begin with, and for ease of reference, let the provisions under Order I rule 10 (2) and (4) of the CPC which are relevant to the matter at hand, be reproduced as hereunder:

> *"(2) The Court may, at any stage of the proceedings, either upon or without the application of either party*

and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added

(3) N/A

(4) ***Where a defendant is added, the plaint shall, unless the court otherwise directs, be amended in such a manner as may be necessary;*** *and amended copies of the summonses and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant".*

[Emphasis added]

Based on what was pleaded by SOT in its plaint and also the written statement of defence by EBT, it is common ground that EBT was a necessary party whose presence and involvement in the suit, for effective and complete decision on the issues involved in the suit, was indispensable. It is also no gainsaying that from the pleadings, interests of EBK were also at stake. Further, it is apparent that in the plaint as well as in the written statement of defence by EBT, EBK is abundantly referred to. It was thus right and proper for the High Court to order, in terms of Order I rule 10 (2) of the CPC, that

EBK be added to the suit as 2nd defendant. The addition of EBK to the suit was also proper and necessary for avoidance of multiplicity of suits and it was in line with Order I rule 3 of the CPC under which it is provided that:

> *"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against each such persons any common question of law or fact would arise".*

However, as we have already pointed out earlier, the only issue that arises here and which is the gravamen of this ruling is whether the omission to order amendment of the plaint was, under the circumstances of the instant case, fatal to the extent of vitiating the proceedings and the resultant judgment. Admittedly, amendment of a plaint after an order is made under Order I rule 10 (2) of the CPC for an addition of a defendant to a suit, is a mandatory requirement under Order I rule 10 (4) of the CPC.

Having carefully examined what was pleaded in the unamended plaint filed by SOT as well as the nature and the manner the reliefs were sought by SOT, we are unable to agree with the learned counsel for the parties, that the omission to order amendment of the plaint was not fatal and that the omission did not vitiate the subsequent proceedings and the resultant judgment.

It is our considered judgment that taking into consideration the nature of the dispute between the parties, the plaint ought to have been amended in compliance with the mandatory provisions of sub-rule (4) of rule 10 of Order I of the CPC. This was necessary not only for the addition of the EBK to the suit to be reflected in the plaint but also to let SOT plead other facts relevant and related to EBK which it did not plead but which were relevant to the issues the High Court was to adjudicate. By amending the plaint, SOT would have made specific claims and would have sought reliefs against EBK severally or jointly with EBT. To the effect that the plaint was not amended, SOT had no case or claim against EBK. Moreover, apart from raising the counter-claim in its written statement of defence, EBK ended up merely defending the case levelled against EBT.

It should also be emphasized that apart from the fact that the necessity for adding and joining EBK to the suit as 2nd defendant came from the fact that EBK was a necessary party whose presence in the suit was indispensable. In that regard, for the purposes of enabling the effective determination of the real controversy between the parties as required under Order I rule 10 (2) of the CPC, the plaint had to be amended to implead EBK as defendant and reliefs sought against it. In the instant case, as the plaint was not amended there was thus, no relief sought against EBK in respect of the matter involved in the suit.

There was an argument from the counsel for the parties that by not ordering the amendment of the plaint but by ordering EBK to file its written statement of defence within 21 days, the High Court "otherwise directed" within the ambit of Order I rule 10 (4) of the CPC. Two crucial questions arise from the above argument; **One**, does the said order for EBK to file its written statement of defence, without an order for the amendment of the plaint being made first, amount to the direction envisaged by the law under sub-rule (4) of rule 10? **Two**, if the answer to the above first question is in the negative, did the nature of the relevant dispute and the circumstances of the case, call for the new added defendant (EBK) to file its written statement of defence without the plaint being amended first as it is mandatorily required by Order I rule 10 (4) of the CPC?

To our considered view, in response to the first question posed above, the mere order by the High Court for EBK to file its written statement of defence without first ordering amendment of the plaint so as to implead EBK in the plaint as the 2nd defendant, did not amount to other direction envisaged under Order I rule 10 (4) of the CPC. A close look at the relevant order made by the High Court and reading between the lines, it cannot be said that after ordering the addition of EBK to be joined in the suit as a 2nd defendant under Order I rule 10 (2) of the CPC, the learned trial High Court Judge had in his mind the mandatory provisions under Order I rule 10 (4) of the CPC which as rightly argued by the counsel for the parties need to be read together with

Order I rule 10 (2) of the CPC. It looks that the learned trial High Court Judge missed the application of Order I rule 10 (4) of the CPC by an oversight.

To our understanding, where there is an addition of a defendant to a suit under Order I rule 10 (2) of the CPC and if the court finds that there is no need of ordering amendment of the plaint to implead the new added defendant as it is mandatorily required by Order I rule 10 (4) of the CPC, the court is enjoined to expressly state as such and should assign reasons why the application of the mandatory provisions under Order I rule 10 (4) of the CPC, is to be dispensed with or ignored by not ordering the amendment of the plaint.

It is for the above reasons that, we respectfully disagree with the learned counsel for the parties that by ordering that EBK should file its written statement of defence without the plaint having been amended first, the High Court otherwise directed within the meaning of Order I rule 10 (4) of the CPC.

Regarding the second follow-up question posed above as to whether, under the circumstances of the case and the nature of the relevant dispute, amendment of the plaint could have been skipped, our answer is in the negative and we shall explain. We are of a very settled mind that under the circumstances of the instant case given the nature of the dispute, it was pertinent to amend the plaint to implead EBK, as required by Order I rule 10 (4) of the CPC. Without the amendment of the plaint to implead EBK there was no basis upon which claims against EBK could be founded. According to

section 22 of the CPC, suits are instituted by the plaint. Further, pleadings are always the basis upon which claims are based. In the case of **James Funke Ngwagilo v. Attorney General** [2004] T.L.R 161, the Court observed that:

> *"The function of pleading is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matter on which the parties differ and the points on which they agree, thereby identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matter in dispute".*

It was also an argument by the learned counsel for the parties that since the application for the addition of EBK to the suit as 2nd defendant was not made by SOT, then ordering amendment of its plaint would have amounted to compelling SOT to sue EBK against its will. On this, we are very mindful of the general rule that the plaintiff is entitled to choose a person whom he wishes to sue. Generally, the plaintiff cannot be compelled to sue a person whom he has no desire to sue. See- **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others,** Civil Application for Revision No. 68 of 2011 (unreported). However, it is our considered view that, in the instant case, ordering SOT to amend the plaint so as to implead and claim against EBK would not have amounted to forcing SOT but would have been in

compliance with the law given the circumstances surrounding the nature of the dispute and its effective determination between the parties.

In emphasizing that under Order I rule 10 (2) of the CPC, the court has jurisdiction to order an addition of a defendant to a suit even where it is against the will of the plaintiff, the Court, in **Tang Gas Distributors Limited** (supra) stated that:

> *"It should also be emphasized here that from the tenor of rule 10(2), it is just and proper to add such a defendant, even where the plaintiff does not think he has any cause of action against him: see,* ***AMON v. RAPHAEL TUCK & SONS, LTD*** *[1956]1 All E.R. 273 at p.277 and* ***BENTLEY MOTORS (1931) LTD v. LAGONDA LTD*** *[1945] All E.R. 211".*

In the instant case, ordering the amendment of the plaint, following the order by the High Court for the addition of EBK to the suit under Order I rule 10 (2) of the CPC, would not have amounted to compelling SOT or going against its will because, as we have alluded to earlier, SOT had no objection to the addition of EBK to the suit as a 2nd defendant.

As regards the argument by the learned counsel for the parties that this is a fit case for the application of the overriding objective principle because non of the parties was prejudiced by the omission to amend the plaint, with respect, we are again, not in agreement with the learned counsel. The overriding objective principle has no intention of undermining mandatory

procedural laws. At this point, we wish to reiterate what we observed in the case of **Njake Enterprises Limited v. Blue Rock Limited & Another**, (Civil Appeal No. 69 of 2017) [2017] TZCA 304 (3 December 2018, TANZLII) thus:

> *"... the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;*
>
> > *The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms".*

We also wish to insist that taking into consideration the nature of the dispute between the parties and the amount of money involved being colossal, the need for a fair trial which is in accordance with the mandatory procedural laws, is something that could not be undermined. In the instant case, it is not only the issue of the parties not being prejudiced but it is also for the interests of justice that mandatory procedural laws are adhered to. In our recent decision in the case of **Evarist Arobogast v. Republic** (Criminal Appeal No. 60 of 2021) [2024] TZCA 348 (10 May 2024, TANZLII), we reiterated that it is always our duty to ensure that proceedings are conducted in accordance with the law and established principles. In the above cited case, we also reproduced a paragraph from our earlier decision in **Adelina Koku Anita &**

Another v. Byarugaba Alex, Civil Appeal No. 46 of 2019 [2019] TZCA 416 (4 December 2019, TANZLII) which is to the effect that:

> *"It is certain that where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring irregularity because it has a duty to ensure proper application of the law by the subordinate courts and/ or tribunals".*

The counsel for the parties did also argue that the omission to order the amendment of the plaint is not a fatal irregularity because of the presence of the counter-claims raised by the appellants. With respect, based on what we have discussed and observed above, we find that the argument should not detain us. Besides, the presence of the counter-claims did not have the effect whatsoever of impleading EBK as a party to the suit. The argument is not that much tenable.

In the event, we find that, under the circumstances of this case, the omission to order the amendment of the plaint after EBK had been added to the suit as 2nd defendant, was a serious and fatal procedural irregularity which was in contravention of mandatory provisions of Order I rule 10 (4) of the CPC. We also find that the omission vitiated the proceedings subsequent to the High Court order for addition of EBK to the suit as 2nd defendant as well as the resultant judgment.

Consequently, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [Cap 141, R.E. 2019], quash that part of the High Court order dated 10.12.2020 directing EBK to file its written statement of defence and nullify all the proceedings subsequent to that order. We also quash the resultant judgment and remit the record of Commercial Case No. 105 of 2020 to the High Court (Commercial Division) for retrial of the case after the mandatory provisions of Order I rule 10 (4) of the CPC have been complied with. We make no order as to costs.

DATED at **DAR ES SALAAM** this 16th day of May, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered on this 16th day of May, 2024 in the presence of Mr. Gilbert Masaga, learned counsel holding brief for Mr. Mpaya Kamala, counsel for the appellants and Ms. Mariam Masandika, counsel for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL