

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 29 OF 2021

(Arising from Commercial Case No. 103 of 2019)

CRDB BANK PLCAPPLICANT

VERSUS

SIKEM REAL ESTATE DEVELOPERS LIMITEDRESPONDENT

RULING

Mruma, J:

This is an application for leave to amend the Defendant's written statement of defence . The application is brought under Rule 24 (1) and (3) (a) of the High Court (Commercial Division) Procedure Rules and Section 95 and Order XLIII Rule 2 of the Civil Procedure Code (Cap 33 RE 2019). On top of amendment of the said written statement of defence the Applicant is also requesting this Court to strike out the witness statement of the defendant filed pursuant to this Court's order made on February, 25th 2021.

Arguing in support of the Application Ms. Njombe, Advocate for the Applicant (ie Defendant) submitted that the applicant seeks to amend her written statement of defence because the written statement of defence which was filed by Ms. Norbet Chaula (Advocates) has some errors that could not

simply be corrected by way of hand but they require amendment of the entire pleading and annexures. Some of the error mentioned by the Applicant's counsel includes improper pleadings at paragraph 3 of the written statement of defence where the defendant did not plead in response to all allegations raised under paragraph 3 of the plaint, paragraph 4 of the defence which did not indicate the dates of disbursement and the outstanding amounts from the loan disbursed and paragraph 5 which did not clearly elucidate on the nature of notice given to Respondent.

Further to that it is the Applicant's contention that in paragraph 6 the Defendant did not plead as to the matters of the meeting referred to under paragraph 7 of the plaint and that there are general omissions throughout the written statement of defence which could better and the Court in adjudication of this matter.

The second ground advanced by the learned counsel is that the Applicant wishes to make a Counter – claim because she has a claim against the Respondent.

I have carefully considered the argument of the learned counsel regarding this application. Filing of written statement of defence and counter claim are governed by Order VIII Rules 1(1) and (2) and 9 (1) and (2) of the CPC. Under Rule 17 of Order VI the Court may at any stage of the proceedings allow either party to alter or amend his pleadings, although, however, under Rule 23 the same Order, where a scheduling conference order is made no departure from or amendment of such order is be allowed unless the Court is satisfied that such departure or amendment is necessary

in the interest of justice. There is a corresponding provisions under Rule 24 of the Rules.

In the case at hand an amendment of written statement of defence which will certainly amount to a departure from a scheduling conference order is being sought after witness statements of both sides have been filed. In my view this request for turn of events at this stage quite disturbing. First, this is an old matter but for one reason or another it is never ending. The plaint in the matter was presented for filing way back in September, 2019 this means that it will have its 2nd anniversary in the shelves of this Court coming September, 2021. Rule 32 (2) of High Court (Commercial Division) Procedures Rules sets life span of all Commercial cases and the maximum time prescribed by the law is 12 months. However, under Rule 24 (1) of the Rules, this Court has discretionary powers to allow a party to amend its pleadings but under subrule (3) of the same Rule the court's order of amendment must be for 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. (emphasize mine)

The term defect or error in the proceedings is not defined in the Rules (ie High Court Commercial Division) Procedure Rules 2012, but generally the term defect or error in proceedings may entail failure to comply with the rules of procedure and practice direction. The question that would follow is whether for instance failure by the defendant to indicate dates of disbursements or the nature of notice given to a party would be regarded as defects or errors in the proceedings. In my view those defects or errors are not defects and errors in

the proceedings envisaged by the Rules. Therefore they do not fall within the ambit of Rule 24 (3) quoted above. It will be unsafe in my opinion to assume that inadequate or improper pleading is the same thing as defective or erroneous proceedings. Whereas improper or inadequate pleadings may refer to sloppy or careless pleadings, defect or error in proceedings entails a breach of a rule or practice direction. Careless pleadings do not fall within the ambit of error or defect in proceedings. Moreover Rule 24 (3) (a) clearly refers to defect or error to be those in the proceedings and not defect or errors in the pleadings. Pleadings are defined under Order VI Rule 1 of the CPC as a plaint, written statement of defence and such other subsequent pleadings as may be presented in accordance with Rule 13 of Order VIII. This is different from proceedings which although not defined under the Rules or the Code but according to Black's Law Dictionary 9th Edition by Bryan A. Garner page 1324; is a word much used to express the business done in court or an act done by the court expressly or impliedly.

Thus, it is my finding that the error and defect envisaged in Rule 24 (3) (a) of the Rules is an error and defect in the proceedings and not in the pleadings. It is my further finding that the request to amend written statement of defence at this stage is therefore a complete negation of the overriding objective of the law of attaining an expeditious, affordable proportionate and just disposal of disputes. I should accordingly deny the Defendant an opportunity to amend her written statement of defence at this stage.

Regarding filing of a counter claim, a counter claim being a suit can be filed and determined separately from the present suit. That said, the application is dismissed. Costs will be in the cause.




A.R. Mruma

Judge

25/5/2021