

IN THE HIGH COURT OF TANZANIA

COMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 45 OF 2021

MKOMBOZI COMMERCIAL BANK PLC PLAINTIFF

VERSUS

COSMAS AISEN MSIGWA

T/A NYASIGALA TRADING CENTRE DEFENDANT

RULING ON PRELIMINARY OBJECTION

K. T. R. Mteule, J

29/9/2021 & 25/11/2021

This is a ruling on Preliminary objection raised by the Plaintiff against the amended Written statement of Defence which is premised on the following points of law:

1. That, the Amended Written Statement of defence is fatally defective for contravening Rule 19 (1) of the High Court (Commercial Division) Procedure (Amendments) Rules, 2019 (Rules)
2. That, the Amended Written Statement of defence (WSD) is fatally defective for contravening Order VI Rule 14 of the Civil Procedure Code (Cap 33 RE 2019). (CPC)



The Preliminary objection was argued by Written Submissions. Mr. Claudio Msanga Advocate from Mawala Advocates filed submissions for the plaintiff while Mr. Amin Mohamed Mshana Advocate filed submissions for the Defendant.

In support of the preliminary objection, **Mr. Claudio Msanga** argued for the first point of objection and neglected the second one. On the first point, he submitted that under **Rule 19 (1) Rules**, pleadings in Commercial Court should mandatorily not exceed 10 pages but the amended WDS filed by the defendant contains 17 pages. He cited the case of **Ecobank Tanzania Limited versus A. A. Trans limited and Another, Commercial Case No. 96 of 2018**, where the plaint was struck out for exceeding 10 pages.

On the other hand, Mr. Amin Mohamed Mshana started the defendant's submission by attacking the way the Preliminary Objection is raised. Citing the case of **The Government of Libya versus Meis Industries Co. Limited, Civil Case No. 225 of 2012**, he contended that except for the objection of jurisdiction which can be raised at any time during the proceedings, all others must be raised in the Written Statement of Defence. According to Mr. Mshana, an objection which is incapable of bringing the matter into finality is only allowed when raised in the Written Statement of Defence as per Mukisa Biscuits hence equating the



instant preliminary objection as intending to confuse issues and increase costs.

Submitting on contravention of **Rule 19 (1) Rules**, Mr. Mshana Advocate averred that the Defendant's WSD contains 10 pages and the counter claim being a separate suit on its own as per **Order VIII Rule 9 of the CPC**, contains 7 pages. According to him no law is violated by neither the Written Statement of Defence nor the counter claim. Mr. Mshana distinguishes this scenario from the one in the cited case of **Ecobank** cited by Mr. Claudio in that in Ecobank there was a plaint which exceeded 10 pages and not a WSD and a counter claim as in the instant case.

Mr. Mshana added that the authority in **Ecobank** is in conflict with the decision in **I&M Bank Tanzania Limited versus Hi Bros-Canvas and Tents Limited and Another, Commercial Case No. 3 of 2018**, where **Hon. Magoiga J** at page 10 stated that the rejection ought to have been done at the admission stage.

Mr. Mshana called into application the principal of overriding objective shall there be a defect in the pleadings so as to embrace substantive justice.

It is not in dispute that the raised preliminary objection even though allowed does not put into an end the suit as Mr. Claudio prayed for the WSD to be rejected. Rejection of pleadings does not preclude its further filing. Being it a WDS, the plaint will remain, and the defendant will have another chance to refile upon compliance with prerequisite procedure.

We are operating in an error where substantive justice is given a precedence. The recent inclusion of more categorical illustration of the principle of overriding objective in the **Laws of Procedure (Sections 3A and 3B in the Civil Procedure Code and The Appellate Jurisdictions Act)** is a call to relax procedural complications to expedite justice in a more friendly procedure which do not give precedence to procedural complications.

With the above remarks, I will decide this preliminary objection by expounding only one argument evolving around the issue as to whether a counter claim should be treated as a separate suit in accordance with **Order VIII Rule 9 of the CPC**. The interpretation will be given in favour of the principle of overriding objective.

In Rejoinder Mr. Claudio is not in support of this argument on premise that the definition of pleading under **Order VI Rule 1 of the CPC** does not recognise a counter claim as a separate set of pleadings. The rule provided: -

*"1. "Pleading" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other **subsequent pleadings** as may be presented in accordance with rule 13 of Order VIII."*

Subsequent pleadings according to the mentioned **Order VIII rule 13** plainly means counter claims and setoff. It provides:



"13. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counterclaim shall be presented except by the leave of the court and upon such terms as the court thinks fit, but the court may at a pre-trial conference require a written statement or additional written statement from any of the parties and fix a time for presenting the same:"

Rule 13 of Order 11 referred to in the above words bars subsequent pleadings other than set off and counter claim to be filed without the leave of the court. This means counter claim is one of pleadings subsequent to WSD. On this premise, I agree with Mr. Mshana that it is safe to consider Counter claim as a separate pleading. In this respect, having a counter claim containing less than 10 pages and the Written Statement of Defence containing less than 10 pages is not a violation to Rule 19 (1) of the Rules. This alone is sufficient to dispose of the Preliminary objection.

Having found that counter claim can legally be treated as a separate pleading subsequent to WDS, I find the said preliminary objection lacking merit. Consequently, the Preliminary Objection is overruled.

Dated at Dar es Salaam this 25th Day of November 2021



KATARINA. T. REVOCATI MTEULE

JUDGE

25/11/2021