

TANZANIA / JUDGMENT

# athumani said janguo v diamond trust banktanzania limited 4 others

## 2023 tzhclandd 16574 25 may 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 187 OF 2022 ATHUMAN SAID 3AN6UO PLAINTIFF ■■■" VERSUS, DIAMOND TRUST BANK TANZANIA LIMITED 1<sup>®</sup> DEFENDANT WIA GROUP LIMITED 2<sup>^^</sup> DEFENDANT WIA COMPANY LIMITED 3<sup>°</sup> DEFENDANT ABDULRAHMAN KINANA 4<sup>^</sup> DEFENDANT ERICK MWENDA 5<sup>™</sup> DEFENDANT Date of last Order: 18/04/2023 Date of Judgment: 25/05/2023

### RULING

I. ARUFANI<sup>^J</sup> This ruling is for a point of preliminary raised by the counsel for the 3<sup>^^</sup> and 4<sup>\*^.</sup> defendants in the matter at hand that: --

- (1) The plaintiff without leave of this Honourable Court, amended his plaint beyond what the court ordered on 19<sup>^</sup> September, 2022 as well as beyond what he prayed. During hearing of the raised point of preliminary objection the plaintiff was represented by Capt. Ibrahim Mbiu Bendera, learned 1<sup>•</sup> advocate and while the first defendant was represented by Mr. Tazan Mwaiteleke, learned advocate, the third and fourth defendants were represented by Mr. Bakari Juma, learned advocate. The hearing of the preliminary objection proceeded in the absence of the second and fifth defendants as they have not been served. By consent of the counsel for the parties who appeared in the court the preliminary objection was argued by way of written submissions. The counsel for the third and fourth defendants stated, in his submission, that, on 15<sup>^^</sup> September, 2022 when the matter came for necessary orders the counsel for the plaintiff prayed to be allowed to amend the plaint for the purpose of indicating the correct addresses of the second and fifth defendants and the prayer was granted by the court. He argued that, after being granted the stated prayer the counsel for the plaintiff filed in the court an amended plaint dated 17<sup>^^</sup> October, 2022 which its copy was served to the third and fourth defendants: He stated that, after going through the amended plaint they discovered the plaint was amended beyond what was prayed by the counsel for the plaintiff and beyond what was ordered by the court on 15<sup>^^</sup> September, 2022. He stated the changes made by the counsel for the plaintiff includes; (i) adding of a

new party in The suit-narnely Wla Company who was not a party in the original plaintiff, (ii) changing the nature of the claims of the plaintiff by adding new. paragraphs under paragrajDh 7 of the amended plaintiff which were not pleaded,in paragraph 5 of the .original plaintiff, (ii.i) introducing new paragraphs numbered as paragraphs 8 and 14 which were not in the original plaintiff, (iv) changing the wording of paragraphs 12, 13, 14, ,16,: 17- and 18^ vyhich -after amendment they are now reading differently from the paragraphs which were in the original plaintiff. He submitted it is a principle of law that court order has to be respected and adhered. To support his submission, he referred the court to the case of Rusia Harubu Salim V. Halima Mshindo & Twelve Others, Land Case No. 131 of 2018 HC Land Div. at DSN,(unreported) where it was stated court orders are binding and are meant" to be Implemented.,He argued that, amending plaintiff beyond the court order Is something which cannot go unchecked and the court Is required to;make adverse orders against the offending party to the suit. . He submitted further that, if the objection will be .sustained the proper course,for the court to take is to strike out the offending amended plaintiff. He stated after striking out the amended plaintiff there is nothing which will remain In the file of the case which can be.entertained by the court. He stated the end result of the stated order is to cause the whole suit to fall. At the end he prayed the court to strike out the amended plaintiff and the whole suit with costs." ' In his reply the counsel for the plaintiff stated that, the point of preliminary objection raised by the counsel for the third and fourth defendants is, gravely misconceived, wanting. and contain unjustifiable prayers.. He stated on 15^ September,2022 he prayed to amend the plaintiff under Order VI Rule 17 of the Civil Procedure Code, Cap 33 R.E 2019. He stated his prayer was not to alter the plaintiff but to amend,it and the prayer was granted by the court. " He argued that, the submission by the counsel for the third and fourth defendants that the plaintiff was amended beyond what was prayed is a fallacious proposition as the law provides that, it is the content of the order itself which must be abided in accordance with Order VI Rule 17 of the Civil Procedure Code. He challenged, the submission by.the counsel for the third and fourth defendants by stating he assumes as their prayer was for correction of addresses,of the'defendants then the order of the court-is limited to their prayer for the amendment of the plaintiff. He referred the court to the case, of Peter Wegesa. Chacha Timasi &Two others V. North Mara Gold Mine Limited, Land Case . 4 No. 16 of 2016, HC at Mwanza (unreported) which he stated its decision is similar with the decision; made'in the case of Rasia^Harubu Salim (supra) where it was stated jf the prayer of.a parly to amend his pleading is granted, then the amendment ought to be on what was .prayed. He submitted'the position of the law made in the two cases cited hereinabove is not the correct interpretation of Order VI Rule 17^of the Civil Procedure Code. He.referred'the court to the decision made by the Court of Appeal in the case of Peter Wegesa Chacha Timasi & Two others V. North Mara Gold Mine Limited, Civil Appeal No. 49 of 2020, CAT at Mwanza .where it was stated inter alia that, an order of amendment of pleadings should hot be general or open ended.It must specify points that are going to be added or removed from the pleading sought to.be amended. ■ ■ He also, referred the court to the case of Jovent Clavery Rushaka & Another V. Bibiana Chacha, Civil Appeal No. 236 of 2020 referred in the above cited case whereby the Court of Appeal insisted on amending

pleadings to the extent allowed by the court. He based on the above cited cases.to urgeThe court to find the preliminary objection raised by the counsel for the third and fourth defendants is unmaintainable. He prays that, since the preliminary objection is untenable in law> then It should be dismissed with'costs. In his rejoinder the counsel for the third and fourth, defendants stated the prayer to amend the plaint made by the counsel for the plaintiff on 15^^ September, 2022 was not made under Order VI Rule 17 of the Civil Procedure Code. He stated the prayer was made without being supported by any law. He stated the argument that the prayer to amend the plant was made in accordance with Order VI Rule 17 of the Civil Procedure Code is an afterthought He stated the order to, amend the plaint was made by the court in line with the prayer of the counsel for the plaintiff.' While responding to the submission by the counsel for the plaintiff which stated the order of the court to allow-amendment of the pidint did not specify the areas to be amended, the counsel for the third and fourth defendants argued that, the counsel for,the plaintiff has failed to understand the interpretation made in the authority he has cited in his submission. He stated the Court of Appeal in the case of Peter Wegesa Chacha Timasi (supra) condemned the order of the trial court to ailpvy amendment which stated leave to amend the plaint granted without specifying areas of amendrment and stated it is illegal and ineffectual. ■ He submitted the Godrt of Appeal did.not bless what was done by the counsel for the plaintiff to amend the plaint in the absence of the dear order of the court, rather the.Court of Appeal observed that, the trial court was in an error to allow amendment without specifying areas which such amendment would have been done. He stated it appears the counsel for the plaintiff is challenging the order of the court made on 15^^ September, 2022 at this particular stage while, this js not a revlsiohal or appellate stage. He stated the counsel for the plaintiff cannot condemn the court that It did not specify which area in the plaint were subject to amendment. He.stated it is as if the counsel for the plaintiff is subjecting the court.to issue adverse order to its own order which.in fact it is difficult because the court is now functus officio. He went on arguing that, the Court of Appeal did not leave the impugned amended plaint in the case cited hereinabove Intact as the counsel for the plaintiff want,this court to believe. He stated the Court.of Appeal invoked Its revlsiohal powers provided under section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E 2019 and declared the plaint amended beyond the prayer of the counsel for the. plaintiff ineffectual. He submitted that, as the amended plaint is ineffectual and as the amended plaint replaced the original.plaint the amended plaint and the entire suit is required to be struck out. Finally, he reiterated his prayer in-chief that the plaintiff's suit be struck out with costs. After giving due consideration, to the submissions from the counsel for the parties in relation to the preliminary objection raised'in the matter by the counsel for the third and fourth defendants and after going through the original and the amended plaint the" court has found the jssue to determine ih this matter is whether the preliminary objection raised by the counsel for the third and fourth defendants is meritorious and deserve to be upheld or overruled. The court has found it is true as stated by both;sides,that, on 15^^ September, 2022 vyhen the rnatter was coming for necessary orders the counsel for the, plaintiff prayed to amend the plaint for the purpose of giving the correct addresses of the^

defendants'whose ,summons were served to the office of advocate Hakme Pembe who said their office was representing only the third,defendant in the matter. As the stated prayer was not objected, the court granted the same and allowed the counsel for the plaintiff to amend the plaint. As-rightly argued by the counsel for the third and fourth defendants and without being disputed by the counsel for the plaintiff the prayer by the counsel for the plaintiff to the court was very clear-that he sought to amend the plaint for the purpose of giving the correct addresses of the defendants who had not been served. For clarity purpose.his prayer was made in the,following words: - ■ "My lord, maybe we have indicated wrong addresses for the rest of the defendants, hence we pray to amend our piaint.so as to show the correct addresses for the defendants who have not. been served. The court granted the prayer of the counsel for the plaintiff by ordering that, the counsel for the plaintiff is allowed to amend the plaint; To the understanding of this court and as rightly argued by the counsel for the third and fourth defendants, the order given by the court to the counsel.for .the.plaintiff was to amend the plaint for the purpose of showing the correct addresses for the defendants who had not been served so that they can be served and nothing else. The court has found that,;although the counsel for the plaintiff said he made his prayer to amend the plaint under Order VI Rule 17 of the Civil Procedure Code but as rightly stated by the counsel for the third and fourth defendants, the counsel for the plaintiff did not cite any'law.ih support of his prayer to amend the plaint. However, the court has found the power ofthe court to grant permission for amendment of pleading is provided under Order VI Rule 17 of the Civil Procedure Code which states as follows: - ■/ "The court may at ahy 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. The wording of the above quoted provision of the law shovys clearly that the court is given discretionary power to allow either party to alter or amend his pleading in such manner and on,such term as may be just. It is also making It"mandatory that, all such amendments shall be'made as may be necessary for'the purpose of determine the real question in controversy between, the parties. That being what is allowed to be done in relation to alteration or amendment of a pleading, the court has found the question to ask here is whether the amendment done" to the plaint filed in the court by the plaintiff is in accordance with what was prayed and allowed by the court. The court has found that, although the prayer of the counsel for the plaintiff was to amend the plaint to show the correct addresses, of the defendants who had not been served but he went beyond what he prayed and allowed to do in the amended plaint. The court has found as rightly argued by the counsel for the third and fourth defendants, the counsel for the plaintiff added a new party in the suit namely Wia Company Limited who was.not a party In the original plaint. The court has-also found the counsel for the^ plaintiffs did major amendments iri the original plaint by added new facts which were riot in the original plaint. The stated alterations can be seeing in paragraph 7(i) to (vii) of-the amended plaint which altered the claims , of the plaintiff stated at paragraph 5 of the original plaint by adding claims arising frorn allegations of fraud which were not pleaded in the original plaint. He,also made major alterations on what had been pleaded in other

paragraphs of the original plaintiff mentioned in the submission of the counsel for the third and fourth defendants to the extent of making the amended plaintiff to have 25 paragraphs while the original plaintiff had only 21 paragraphs. The court has found the counsel for the plaintiff argued the amendment done to the plaintiff is in line with the order of the court which allowed the plaintiff to be amended without specifying the parameters of the amendment to be done in the original plaintiff. The court has carefully considered the stated argument and after going through the decision of the Court of Appeal made in the case of Peter Wegesa Chacha Timasl (supra), upon which the counsel for the plaintiff hinged his argument it has found that, there is nowhere stated where the order of the court is not specifying the parameters of the amendment to be made in a pleading, the parties are at liberty to amend their pleadings as they may wish. Although the court is in agreement with the position of the law stated in the foregoing cited case that the order of the court allowing amendment of pleading should specify the parameters of the amendment to be made and should not be general but it is the view of this court that, where amendment of a pleading has been allowed by the court; the parties are required to amend their pleadings basing on what he prayed to amend in his pleading and basing on what is stated in the order of the court allowing the pleading to be amended. To go beyond what a party prayed to amend in his plaintiff and what was ordered by the court to the extent of adding a new party in the case and changing the facts and cause of action of the suit as it was done in the instant case on ground that the order allowing amendment of the plaintiff did not specify the parameters of the amendment to be effect is to the view of this court not correct and should not be allowed by the court. The stated view of this court is getting support from the case of Dn Fortunatus Lwanyantika Marsha V. Dr. Wiliam Shija & Another, 12, Misc. Civil Cause No. 15 of 1995, HC at Mwanza (unreported) where it held inter alia that, when an intended amendment seeks to introduce new or fresh matters of facts into pleadings, or which seeks to create an inconsistency in the pleadings, such an intended amendment will not be allowed. Having found the counsel for the plaintiff has amended the plaintiff beyond what he sought and allowed by the court to amend in the original plaintiff the court has come to the settled view that, the counsel for the plaintiff contravened the rules regarding amendment of pleadings. The rule contravened by the counsel for the plaintiff by introducing new facts in the case which go to the extent of changing the cause of action is Order VI Rule 17 of the Civil Procedure Code which requires amendment of pleadings to be for the purpose of determine the real question in controversy between the parties. While being guided by all what I have stated hereinabove the court has found the preliminary objection raised by the counsel for the third and fourth defendants that the plaintiff's plaintiff has been amended beyond what was sought and allowed by the court is meritorious and deserve to be upheld. Having found the amended plaintiff filed in the court by the plaintiff was amended beyond what was sought and allowed by the court, the court has found the appropriate order which can be made by the court in relation to the stated amended plaintiff is as rightly suggested by the counsel for the third and fourth defendants that it should be struck out. As after striking out the amended plaintiff there is nothing left in the case file to hold the case of the plaintiff, then the suit of the plaintiff is marked struck out for being untenable and the

costs to follow the event. It is so ordered. Dated at Dar es Salaam this 25<sup>th</sup> day of May, 2023 I. Arufani JUDGE 25/05/2023 Court: Ruling delivered today 25<sup>th</sup> day of May, 2023 in the presence of Mr. Kasim Matungila, learned advocate holding brief for Capt. Ibrahim Mbiu Bendera, learned advocate for the plaintiff and in the presence Mr. Bakari Juma, learned advocates for the third and fourth defendants and also holding brief for Mr. Tazan Mwaiteleke, learned advocate for the first defendant. The ruling has been delivered in the absence of the second and fifth defendants who have not been served. Right of appeal to the Court of Appeal is fully explained^\_^ I. Arufani JUDGE 25/05/2023 14

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