

TANZANIA / JUDGMENT

20171218 TZHC Dar es Salaam 1

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TZHCDECIDED
18 December 2017

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM CIVIL CASE NO. 195 OF 2015 (By Original Suit) , HASS PETROLEUM (T) LTD PLAINTIFF VERSUS NJAKE ENTERPRISES AND PETROLEUM TRANSPORT LTD DEFENDANT - NJAKE ENTERPRISES AND OIL TRANSPORT- LTD PLAINTIFF VERSUS HASS PETROLEUM (T) LTD DEFENDANT

RULING

10 & 18 Dec. 2017 DYANSOBERA, J: This ruling is on a preliminary objection taken to the !\

- .I counter claim on the following grounds:

1. The counter-claim is bad in law for misjoinder of causes of action
11. The counter-claim is bad in law for introducing a new cause of action based on lease and that falls outside the realm of a civil suit. It is common ground that the parties in this suit are / limited liability companies registered under the laws of , 2 Tanzania Mainland; the plaintiff carrying on the business of oil supply and marketing. In the plaint, the plaintiffs claim against the defendant is for payment of Two Billion Three Hundred Fifty Seven Million, Seven Hundred Sixty Seven Thousand, Three Hundred Ninety Three and Cents Twenty Five (2,357,767,393.25) being the outstanding balance arising from fuel and lubricants supplied to the defendant by the plaintiff, interest on the outstanding balance at the commercial rate of 25% and costs . . The defendant, on the other hand, denying-- -- the claims, has, through his counter-claim, claimed a total sum of Tshs. 199,314,732.36 being outstanding sum arising out of supply or purchase or transportation of the bulk petroleum between the plaintiff and the defendant. The hearing of this preliminary objection was done by way of written submissions whereby Mr. Boniface Joseph, learned advocate represented the plaintiff and argued the written submission opposing submission by defendant's counter claim and Mr. Adronicus K. Byamungu, learned counsel stood for the defendant and argued the written submission of the defendant (by counter-claim) on the preliminary points of law. Supporting the first limb of preliminary objection, Mr. Adronicus K. Byamungu contended that the claim of the outstanding sum of Tshs. 199,314,732.36 is seen to be derived from various transactions, namely, supply or -

..... ~ 3 purchase of bulk petroleum, lease of five petrol stations and flight of charges of transportation of fuel by the plaintiff on behalf of the defendant to the Democratic Republic of the Congo, Rwanda and Uganda. That this shows a misjoinder of causes of action. Citing Black's Law Dictionary, 8th Edition at p. 235 on the meaning of a cause of action to be a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy ____ form_anoth~_person, learned counsel was of the opinion that

- -----p~a~-m~d~fc~~~~fun-mey-----
- ----- simply mean that a cause of action which ought not to have been joined. He said that Rule 3 (1) of Order II of the Civil Procedure Code [Cap. 33 R.E.2002] gives power to the plaintiff to unite in the same suit several causes of action against the defendant but that in this case the causes of action are so disconnected and do not arise out of the same transaction and cannot therefore, be joined together in the one suit. He referred this court to Hon. Sir Dinshah Fadunji Mulla on the Code of Civil Procedure, 16 th Edition, Vol.2 at p. 1667 in the explanatory notes and commentaries persuaded the courts of law to dismiss the cases for misjoinder of causes of action where at p. 1667 it is stated "where the causes of action are different, the suit cannot be clubbed together." He also invited this court to find that under rule II rule 7 the law becomes clear where in a suit it is found that there is a misjoinder of causes of action. He maintained that ·4 • this is an incurable defect. On this argument, learned · counsel relied on the decisions in the cases of Yowana Kahere and Others v. Lunyo Estates Ltd (1959)1E.A. 319 where it was held that "where a cause of action set out in the plaint do not arise out of the same act or transaction but out of wholly distinct and independent acts, then there is a misjoinder of cause of action and the suit cannot be maintained" and Barclays Bank DCO v. CB Patel and -----oth-ers--[-19-5_9_]__1_EA 214 where it was held that "distinct

causes-01--action--aGG,-U,ed__on __qiff~r_f!_!~ dates ana-against----- different defendants and the circumstances --i~-z;;hich--Tfie- liability of different guarantors arose were separate and distinct; accordingly the two causes of action could not be disposed of together." On this first_ point of preliminary objection, learned counsel for the defendant plaintiff prayed the counter claim to be dismissed with costs. As to the second limb of preliminary objection, Mr. Andronicus Binamungu submitted that the lease agreement being a new and distinct claim and a land matter, it cannot be entertained in the counter claim. Opposing to the submission by counsel for the plaintiff, Mr. Boniface Joseph, as regards the first limb of preliminary objection, first told this court that the objection is highly misconceived. He reasoned that the defendant's claim arises out of the same transactions which have resulted from the , 5 main suit. According to him, rule 3 (1) and (2) gives mandate to the plaintiff to unite in the same suit several causes of action provided that the right to the relief claimed arises from the same transaction and there is a common question of law or fact. It is his argument that the common question of fact is the supply and transportation of petroleum and its lubricants on credit arrangement. Further, that the counter

claim was brought under rules 1 and 3 of Order VIII of the -----GPG.---H-e-
pointe_g_g_g_t- that there is, therefore, no violation of

- ----- rule 3 (1) of Order II- of the Code. Besides, it is learned counsel's further sublllissio~ that two cited cases of Yowana Kahere and Others v. Lunyo Estates Ltd and Barclays Bank DCO v. CB Patel and Other were quoted out of contexts and are inapplicable to this case. As far as the second limb of preliminary objection is concerned, Mr. Boniface was categorical that the counter claim is not based on a lease agreement between the plaintiff and the defendant; rather, it is based on the supply or purchase or transportation of bulk petroleum from the plaintiff to the defendant as per paragraph 3 of the counter- claim. Learned counsel maintained that this is a normal suit and not a land matter and that there is a common question of law to be decided that is whether it is the defendant who is indebted to the plaintiff due to the alleged supplies of petroleum and lubricants or whether it is the plaintiff who is 6 indebted to the defendant as a result of supplies and transportation of the said petroleum. In the alternative, learned counsel submitted that in case this court finds that there is a misjoinder of causes of action, then the remedy is not to dismiss the suit but should order an amendment. This court was referred to an Indian case of Ramendra Nath Ray v. Brojendra Nath Dass (1918) ILR 45 on the course the court should take when it finds that -----:t-hēi:e- is_a__m_i_§joinder of causes of action.

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In Toke vs Andrew [1882] 2 Q.B.D. 428; Renton Gibbs & Co. Ltd vs Nevile & Co. [1900] 2 Q.B 181, and above all, the Halsbury's Laws of England, that a party's right to counter claim is not a creature of the Civil Procedure Code and is unlimited; that the English position of the law imported into this country vide S. 2 of the Judicature and Application of Laws Ordinance, 1961 (Cap. 453) was never changed by the enactment of The Civil Procedure Code, 1966. I should start by stating that the English legal position. Paragraphs 478 and 487 of the Halsbury's Laws of England Paragraph 478 states, II. . .! 7 "478. Subject matter of counterclaim. A counterclaim can zn general be brought in respect of any claim, or the entitlement to any relief or remedy, against a plaintiff in an existing action in respect of any matter, whenever and · however arising, being a claim or entitlement that could be the subject of a separate action. It is not confined to money claims, or to causes of action of the same nature as the -----ongi-nal-acti_Q'l',__~!}_d, except where a person other than ···· ----- --the plaintiff-is- also- ~~~d;~;~~~~f~~da.nt to-zf,-zr-need--not-----· relate to or be connected with the original subject oJ--tfie·----- - cause or matter. A claim founded on tort may be opposed to one founded on contract and in an action in rem the defendant may set up a counterclaim in personal. The defendant by his counter - claim may ask for any form of relief, for example a declaration, a vesting order against forfeiture, an injunction, the appointment of a recezver, specific performance, the revocation of a

patent, an account, payment of a money claim or damages," (emphasis mine) It is therefore, clear that under English law there is nothing wrong with the counter claim and the manner in which the defendant has raised. The issue is whether our law holds the same position. The provisions of Order VIII of the Civil Procedure Code [Cap.33 R.E.2002], in my view answer this question. ■ -w- 8 Order VIII, Rule 9 (1) and (2) and rule 11 (2) of the Civil Procedure Code provide as hereunder: "9. (1) Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence, the defendant may in his written statement of defence state - particulars of the claim made or relie7-75,----- remedy sought by him.

(2) Where a counterclaim is set-up in ~ written statement of defence, the counterclaim shall be treated as a cross- suit and the written statement shall have the same effect as a plaint in a cross suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint. 11.

(2) The rules relating to a written statement of defence by a defendant shall apply to a reply by the plaintiff or a person joined as a party against whom a counterclaim is made. 9 This is found in O. 8, Rule 12, CPC which gives the court an unlimited discretion in deciding which counter - claim should proceed in the same action. It provides, "12. Where a defendant has set up a counterclaim the court may, if it is of the opinion that the subject matter of the counterclaim ought for any reason to be disposed of by a separate suit, order the counterclaim to be struck out or order it to be tried separately or make such other-order-a-s-may-be----- _ expedient. " The effects of the counter claim according to these provisions under the Civil Procedure Code are the following:

1. Has the effect of a cross-suit and the court can pronounce a final judgment both on original claim and counter claim
2. The counter claim of the defendant will be treated as a plaint.
3. In answer to the counter claim the plaintiff has the right to file a written statement of defence
4. Counter claim need not arise out of the same transaction
5. It enables the defendant to enforce the claim against the plaintiff as an independent action
6. The counter claim will be decided on merits even if plaintiffs suit is stayed, dismissed, discontinued or withdrawn
7. It is an independent claim
8. It is separable from the plaintiffs claim
9. It is enforceable by cross-action in favour of the defendant

10. Should satisfy the rules relating to filing of plaint I am thus of the settled view that the defendant's counter - claim is legally proper. For the reasons stated, e preliminary objections stand overruled with costs. I l Delivered this 18 th day of December, 2017 in the presence of Mr. Stanslaus Michael, lear . d counsel for the plaintiff but in the absence of the defend ,,,-----..._ . \,lRT "" . C, . ' . \~ W.P. D OBERA (g /\~ JUDGE '(. j;b/\ ~. . . . , * ,// .. ,/ / . - . 1! ' ,_;;;;-_,,, ' ~~ /'i

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