

TANZANIA / JUDGMENT

leo developers ltd vs bhladwa another 2022 tzhc 12864 9 august 2022

COURT
TZHCDECIDED
9 August 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF DAR
ES SALAAM AT DAR ES SALAAM CIVIL CASE NO. 102 OF 2019 LEO DEVELOPERS
LTD..... PLAINTIFF VERSUS B.H. LADWA
LIMITED..... 1st DEFENDANT AZANIA BANK
LIMITED..... 2nd DEFENDANT

RULING

26th July & 9th August, 2022 KISANYA, J.: On 4th September, 2019, the plaintiff, Leo Developers Ltd filed a suit praying for judgment and decree against the defendants, B.H. Ladwa Limited and Azania Bank Limited, as follows: -

- (a) Specific performance by the defendants.
- (b) The defendants to pay off al interest from the date of breach to the date of payment.
- (c) For the Defendants to pay specific damages at the tune of United State Dollars One Hundred and Fifty Six Thousand (USD 156,000,000)
- (d) General Damages amounting to United States Dollars Hundred and Eighty Eight Thousand.
- (e) Costs of the suit be provided for by the Defendants.
- (f) Any other relief(s) that this Honourable Court may deem just to grant and equitable to grant.
1 In terms of clause 15 of the plaint, the 1st and 2nd defendants were alleged to have breached the contract they entered with the plaintiff by delaying to accomplish their respective obligation in time and execution thereof. Upon being served, the 2nd defendant filed a written statement of defence in which she raised a counter claim against the plaintiffs, Kevan Dinesh Bhikha and Jayat Dhanji Bhika. Her claim against the defendants in the counter claim was for payment of USD 925,862.88 being an amount due and owing to the plaintiff from the said Kevan Dinesh Bhikha and Jayat Dhanji Bhika on account of the term loan facility of USD 750,000 extended to the plaintiffs together with interest and other charges thereon. It turned out that the defendants in the counter claim did not file their respective written statement of defence on the counterclaim. However, the record shows

that the first pre-trial settlement and scheduling conference was conducted on 11th May, 2021 and that parties proceeded to mediation which was marked to have failed on 28th June, 2021. When the matter was placed before me for final pre-trial settlement and scheduling conference (FPTC) and hearing on 26th July, 2022, the plaintiff was represented by Mr. Barnaba Luguwa, learned advocate. On the other hand, Mr. Nehemia Nkoko, learned advocate appeared for the 1st defendant while the 2nd defendant enjoyed the legal services of Mr. Mbagati Nyarigo, also learned advocate. The 2nd and 3rd defendants did not appear. At the outset, Mr. Luguwa addressed the Court on two issues pertaining to the development which took place after institution of this matter. The first issue is related to the building subject to this suit. Referring the court to the list of additional documents filed by the 2nd defendant, the learned counsel contended that the building was sold by Mark Auction and Court Brokers on 23/03/2021. He went on to state that the buyer is the late Ismail Hamis Kalolo whose estate is being administered by Mustafa Jumbe. Another issue raised by Mr. Luguwa is in respect of the amendment of the Government Proceedings Acts via the Written Laws (Miscellaneous Amendments) Act, 2019 which require the Attorney General to be impleaded in all cases against the Government, public corporation and institutions. He was of the firm view that the amendment affects this case because the 2nd defendant is owned by the Government institutions. From the foregoing, Mr. Luguwa prayed to amend the plaint for the following purposes: One, to implead the name of the buyer of the suit premises; two, to implead the Attorney General; and three, to make the reliefs for specific performance as an alternative of a new relief namely, declaration that the house was sold illegally. 3

Responding, Mr. Nkoko contended that the amendment will not serve the purpose and that the plaintiff was indenting to bring a cause of action which is not related to the case at hand. The learned counsel was of the view that the proper recourse is for the plaintiff to file a fresh suit. Mr. Nyarigo was in agreement with Mr. Nkoko. He went on submitting that this case is based on breach of contract and not issues related to illegal selling of mortgaged property. The learned counsel submitted further that this Court is enjoined to consider whether the amendment is necessary. He contended that the plaintiff was made aware that the house was sold when the 2nd defendant filed the counter affidavit in Misc. Civil Application No. 158 of 2021 in which the plaintiff application for temporary injunction was rejected for being overtaken by event. Further to the above, Mr. Nyarigo prayed to proceed ex-parte against the plaintiff on the contention that she filed no written statement of defence to counterclaim. As to other defendants in the counterclaim, the learned counsel for the 2nd defendant conceded that the record is silent on whether they were served. He also prayed to amend the counter claim in order to indicate the outstanding amount after disposal of the suit premises by the plaintiff in the counter claim. Rejoining, Mr. Luguwa submitted that the plaintiff believed that the house was not sold. His submission was based on the reason that the list of 4 documents filed on 18/05/2022 do not show whether the purchase price was paid. Therefore, he reiterated his prayer that the plaintiff be granted leave to amend the counter claim. Having examined the record and considered the submissions made by the learned counsel, I will proceed to determine whether the prayer for leave to amend the pleadings is meritorious. In terms of Order VI, Rule 13 of the CPC, pleadings can be amended at any

stage of the proceedings. However, the law is certain that the amendment of pleadings is aimed at determining the real issues in controversy between the parties and without causing injustice to the other side. It is settled law that pleading cannot be amended to introduce new issue or fresh matter of facts of the case or if such amendment creates inconsistencies in the pleadings. This stance was taken in the case of Dr Fortunatus Lwanyantika Marsha versus Dr William Shija and AG, Misc. Civil Cause No 15 of 1995, HCT at Mwanza (Unreported) which was cited by this Court (Mwenegoha, J) in the case of Rasia Harubu Salim (Administratrix of the Estate Of Harubu Salum Msamala vs Halima Mshindo and Others, Land Case No. 131 of 2018 (unreported). In our case, the first reason for amendment is to enable the plaintiff to implead the Attorney General. It is not disputed that the 2nd defendant is owned by the Government institutions. That fact was not contested by Mr. 5 Nyarigo. As rightly argued by Mr. Luguwa, this case was filed when the requirement to implead the Attorney General before suing the 2nd defendant was not in force. That requirement was included in the Government Proceedings Act vide the Written Laws (Miscellaneous Amendment) (No. 4) Act, 2019 which came into force on 20th September, 2019. It is trite law that legislation operates retrospectively if its effect is on the procedure. See for instance the case Benbros Motors Tanganyika Ltd. vs Ramanlal Haribhai Patel [1967] HCD 435; Director of public prosecutions vs Jackson Sifael Mtares & Three Others, Criminal Application No. 2 of 2018; and Joseph Khenani v. Nkasi District Council, Civil Appeal No. 126 of 2019). In that regard, I am satisfied that there is a need to allow the plaintiff to amend the plaint in order to implead the Attorney General. As regards the prayers to amend the plaint to allow the plaintiff to implead a person to whom the house was sold and to include the prayer for an alternative relief to wit, a declaration that the building was sold illegally, I agree with the counsel for the 1st and 2nd defendants that the intended amendment is not related to the cause of action in the case at hand. As indicated earlier, the present suit is founded on breach of contract for construction of 10 storeys building and bank facilities agreement between her and the 1st and 2nd defendants respectively. Nothing was deposed about the sale of mortgaged building. On that account, I am at one with the learned 6 counsel for the defendants that amendment of the plaint for purposes of impleading the buyer of the building and adding another relief cannot be granted. It is a distinct cause of action. For instance, it has nothing to do with the 1st defendant. As regards the prayer to amend the counter claim, I am convinced that the amendment is aimed at resolving the real controversy between the parties by indicating the outstanding amount of the loan facilities advanced to the plaintiff. In relation to the prayer by the plaintiff in the counterclaim to proceed ex-parte against the plaintiff in the main case, I have noticed that it was not proved that all the defendants in the counterclaim were duly served with counter claim. Although, it was recorded during the 1st PTCT that the pleadings are complete, the counsel who appeared for the plaintiff indicated that he had no case file with him. For the foresaid reasons, I am of the considered view that the counter claim cannot proceed ex-parte against the plaintiff in the main case and other defendants named therein. In the light of the foregoing, I hereby order as follows:

1. The plaint and subsequent pleadings be amended to implead the Attorney General.
 2. The counter claim be amended to reflect the outstanding sum. 7
 3. The amended counter claim be served to all defendants in accordance with the law.
 4. Other prayers are not granted. In consequence and to the extent stated herein, the scheduling order made during the first PTC is hereby amended or departed under Order VIII, Rule, 23 of the CPC. It is so ordered. DATED at DAR ES SALAAM this 9th day of August, 2022. S.E. Kisanya JUDGE 8
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