

**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. 25 OF 2022**

TAMBULI GROUP OF COMPANIES LIMITED PLAINTIFF

VERSUS

NMB BANK PLC DEFENDANT

RULING

14th July and 18th August, 2022

KISANYA, J.:

The plaintiff herein sued the defendant for professional negligence when dealing with the overdraft facilities advanced to her by the latter. The claims against the defendant include, a declaration that the defendant acted professionally negligent; a declaratory order that the interest charged in the loan agreement be halted from the day the plaintiff filed a report of loss of its cargo to the defendant; and payment of Tshs. 400,000,000 being specific damages and Tshs. 4,500,000,000 as general damages.

On the other side, apart from refuting the plaintiff's claims, the defendant raised a counter claim against the plaintiff in the main case (1st defendant in the counterclaim), Japhet Alfayo Bwire (2nd defendant), Caritas Christian Kabyemela (3rd defendant), Nathaniel Bubhuli Masinde (4th defendant) and Amulike Christian Mwakyembe (5th defendant). She prayed for several reliefs including, declaration that the 1st defendant is in breach of the

facility letters; declaration that the 2nd and 3rd defendants are liable to the plaintiff in terms of the Personal Guarantee and Indemnity as well as Directors' Personal Guarantee and Indemnity; declaration that the 2nd, 4th and 5th defendants are liable to the Plaintiff in terms of the Mortgage Deeds in default of their obligations; an order for payment to the defendants, jointly and severally of Tshs. 3,055,999.51 being outstanding loan amount; an order for vacant possession and sale of mortgaged properties; and an order for sale of all of the 1st defendant's fixed and floating assets to recover the loan.

Against the counter claim, the defendants' counsel filed a notice of preliminary objection on the point of law to the effect that the counter claim is in contravention of the requirement of Order VII Rule 1(c) of the CPC by failing to describe the names, description and place of residence and address of the 2nd, 3rd, 4th and 5th Defendants.

When the matter came up for hearing of the preliminary objection, the plaintiff was represented by Mr. Benson Kuboja, learned advocate, while Mr. Godwin Nyaisa, learned advocate represented the defendant who is the plaintiff in the counter claim. Both counsel made their respective submissions for and against the preliminary objection.

In his submission in chief, Mr. Kuboja argued that the counter claim is in contravention of Order VII Rule 1(c) of the CPC. His arguments were premised on the ground that the counter claim does not describe the names,

description and place of residence and address of the 2nd, 3rd, 4th and 5th Defendants. It was his further argument that Order VII, rule 1(c) of the CPC is coached in mandatory terms. To bolster his argument, the learned counsel cited section 52 of the ILA and the case of **Martha Masanja (Administrator of Estate of Masanja Milanga) vs Beni Marechela and 6 Others**, Land Case No. 147 of 2019. Referring further to the case of **Mariam Samburo (Legal Personal Representative of the Late Ramadhan Abas**, Civil Appeal No. 109 of 2016, CAT (unreported), Mr. Kuboja argued that non-compliance to the mandatory requirement cannot be cured by overriding objective. He, therefore, urged this Court to strike out the counter claim on the ground that it was bad in law for failure to comply with the law.

Responding, Mr. Nyaisa submitted that the provisions of Order VII, Rule 1(c) of the CPC has been complied with. He contended that the names of the 2nd to 5th defendants are stated at page 5 of the written statement of defence and that their descriptions are stated in paragraph 23 and 38 of the Written Statement of Defence (WSD). Making reference to paragraph 53 of the joint WSD to the counter claim, Mr. Nyaisa argued that the descriptions averred in the counter claim were not disputed.

In his further submission, the learned counsel contended that the defendants in the counter claim were not prejudice on the ground that they

were duly served basing on the descriptions provided for in the counter claim. He was of the view that the question whether the address is correct cannot be determined at this stage because it is based on the issue of fact. The learned counsel relied on the cases of **Als Noremco Construction (Noremco) vs DAWASA**, Commercial Case No. 47 of 2009 (unreported), **Ngerengere Company Limited vs Edna William Sita**, Civil Appeal No. 209 of 2016 (unreported).

Mr. Nyaisa went on submitting that the cases referred to by the counsel for the plaintiff in the main case are distinguishable from the circumstances of this case. His submission was based on the contention, in the case of **Martha Masanja** (supra), the names of the defendants were not properly stated, while the case of **Mariam Samburo** (supra) was related to the authenticity of the proceedings. In conclusion, the learned counsel argued that the counter claim was in compliance with the law. In alternative, he submitted that the irregularity if any did not prejudice the defendants.

Rejoining, Mr. Kuboja submitted that the address of the 2nd to 5th defendants was known to the plaintiff and the counter claim does not state the address of the 1st to 5th defendants in singularity as required for under Order VII, Rule 1(c) of the CPC. He submitted further that the said defect cannot be cured by the fact that the defendants filed a counter claim. It was his submission that paragraph 38 of the joint WSD display that the defendants

disputed some of the facts averred in the counter-claim and that the cases cited by Mr. Nyaisa are not relevant to the case at hand. The learned counsel reiterated that the law was not complied with.

After careful consideration of the submissions of the learned counsel, the point for determination is whether the counter claim contravenes Order VII, Rule 1(c) of the CPC. While the learned counsel for the defendants in the counter claim argues that the law was not complied, the counsel for the plaintiff contends that the provision of Order VII, Rule 1(c) of the CPC was complied with.

At the outset, I find it appropriate to preface my determination by quoting the provision of Order VII, Rule 1(c) of the CPC which is the epicentre of the issue under consideration. It stipulates: -

"The plaint shall contain the following particulars-

(a) N/A

(b)N/A

(c) the name, description and place of residence of the defendant including email address, fax number, telephone number and post code if available, so far as they can be ascertained."

Reading from the above provision, I agree with Mr. Kuboja that it is coached in mandatory terms. The plaintiff, is therefore, duty bound to ensure that the plaint contains the particulars set out under Order VII,

Rule 1. As far as the particulars of the defendant are concerned, Order VII, Rule 1(c) of the CPC requires the plaintiff to indicate his (defendant) name, description and place of residence. The law is also certain that descriptions as to email address, fax number, telephone number and post code are included if they are available.

I was then inclined to examine the counter claim in order to satisfy myself whether the above requirement was complied with. As rightly observed by Mr. Nyaisa, the name of each defendant was duly stated at page 7 immediately after the name of the plaintiff.

The description and address of the defendants are provided for under paragraph 23 of the written statement of defence as follows:

"The 1st Defendant, corporate body is a customer and borrower of the Plaintiff/Defendant. The 2nd Defendant is a natural person, a director of the 1st Defendant, mortgagor and guarantor of the 1st Defendants' loan. The 3rd Defendant is also a natural person and a director of the 1st Defendant and guarantor of the 1st Defendant's loan while the 4th and 5th Defendant are equally a natural person and mortgagor of the 1st Defendant's loan. Their address for service for purposes of this suit is in care of:

*Bwire Benson Kuboja,
Kuboja advocates LL.P.
House No. 11, Bwehoja Street,
Pinda Road, Hananisifu,*

*P.O. Box 72872,
Dar es Salaam,
Mobile: 0716 924949
Email: bwirekuboja@gmail.com*

It is my considered views that the above particulars are sufficient to describe the particulars of the defendants including the 1st, 2nd, 3rd, 4th and 5th defendants. As rightly observed by Mr. Nyaisa, the above particulars were not disputed by the defendants. This is reflected in paragraphs 38 of the written statement of defence to counter claim in which the defendants averred as follows:

*That the contents of paragraphs 22 and 23 being merely formal and **descriptive of the parties herein, are not disputed** save for the averments in the Plaintiff/Defendant in the original suit's Written Statement of Defence.*

The bolded excerpt shows that the defendants in the counter claim had no issues with their respective description in the counter claim.

As regards the residence of the defendants, I agree with Mr. Nyaisa that such fact was averred in paragraph 38 of the counter claim. The relevant part reads:

"The Plaintiff and 1st Defendant have places of business in Dar es Salaam, the 1st, 2nd, 4th and 5th Defendants reside in Dar es Salaam."

Responding to the above facts, the defendants had this to say in paragraph 53 of the written statement to the counter claim;

"That, the Defendants note the contents in paragraph 38 whereas they reside in the areas mentioned,...."

On the foregoing, it is clear that the particulars related to the name, description, place of residence and address of the defendant were provided for in the counter claim. As that was not enough, the defendants in the counter claim did not dispute the particulars averred for by the plaintiff. Even if the said facts were disputed, that issue calls for evidence. It cannot be determined at the stage of preliminary objection.

In view of thereof, I am satisfied that the provision of Order VII, Rule 1(c) of the CPC was complied with. Consequently, the preliminary objection is hereby overruled and dismissed for want of merit. Costs shall follow the event.

DATED at DAR ES SALAAM this 18th day of August, 2022.



S.E. Kisanya
JUDGE
18/08/2022