IN THE EAST AFRICAN COURT OF JUSTICE

(APPELLATE DIVISION)

AT ARUSHA

Coram: (*Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, VP.; and Aaron Ringera, JA.*)

APPEAL NO. 02 OF 2018

BETWEEN

THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA ..... APPELLANT

AND

UNION TRADE CENTRE LIMITED (UTC)..... RESPONDENT

AND

1. SUCCESSION MAKUZA DESIRE
2. SUCCESSION NKURUNZIZA GERARD } INTERVENERS
3. NGOFERO THARCISSE

[Appeal from the Judgment of the First Instance Division (Monica K. Mugenyi, PJ.; Isaac Lenaola, DPJ.; Fakihi Jundu, Audace Ngiye and Charles Nyawello, JJ.) dated 29th March 2018 in Application No. 1 of 2018 arising from Reference No. 10 of 2013]

JUDGMENT

A. INTRODUCTION

1. This is an Appeal against the Judgment of this Court's First Instance Division ("the Trial Court") dated 29th March 2018 in Application No. 1 of 2018 arising from Reference No. 10 of 2013 whereby the Trial Court declined to strike out the Second Amended Reference and ordered each party to bear its own costs.

2. The Appellant (who was the Applicant in the Application in the Trial Court) is the Attorney-General of the Republic of Rwanda. He was represented in the Appeal by Mr. Nicholas Ntarugera and Miss Specioza Kabibi, both of whom are Senior State Attorneys.

3. The Respondent is a duly incorporated Limited Liability Company in the Republic of Rwanda. It was represented in the Appeal by Mr. Isaac Bakayana, Advocate, duly instructed by the firm of M/s Acadia Advocates of Kampala, Uganda.

4. The Interveners are natural persons who are Residents in the Republic of Rwanda. They did not appear at the hearing of the Appeal, but did in a letter dated 7th August 2018 addressed to the Registrar of the Court express disinterest in the Appeal and stated that they stood to be guided by the decision of the Court in relation to the Parties to the Appeal.

B. BACKGROUND

5. On 15th November, 2015 in **Union Trade Centre Limited (UTC) V The Attorney General of Rwanda** [EACJ Appeal No. 1 of 2015], we remitted Reference No.10 of 2013 back to the Trial Court for hearing *de novo.* When the said Reference came up for hearing on the 6th September, 2016 before the Trial Court, the Respondent (who was the Claimant in the Reference) sought leave and was allowed to amend its Reference. And on 4th November 2016, an Amended Reference ("the first Amended Reference") was filed in Court.

6. On 15th November, 2017 when the first Amended Reference came up for scheduling, it transpired that the Union Trade Centre Mall (the subject matter of the Reference) had been auctioned off by the Rwanda Revenue Authority on account of its alleged failure to pay taxes due to the Government of Rwanda. Counsel for the Respondent, in the circumstances, sought leave of the Court to amend the first Amended Reference to introduce the fact of auction of the mall. Counsel for the Appellant on his part stated that it was the Respondent's right to amend Pleadings and that he could neither object to nor support the application since it was the Respondent's right and within the powers of the Court to decide the matter. In the event, the Trial Court granted the Respondent leave to amend the first Amended Reference. Consequently, the second Amended Reference was filed in Court on 13th December, 2017.

7. On the 8th January 2018, the Appellant filed Application No. 1 of 2018 seeking to strike out or expunge the second Amended Reference on the grounds that the same was an abuse of the process of the Court in that (i) it had introduced a new cause of

action contrary to the principles governing amendments of pleading, (ii) it prejudiced the Appellant as there was a matter pending for determination in the original Reference both a Preliminary Objection to the effect that the same was time barred and the issue of the *locus standi* of the Respondent which had been raised by the Interveners; and (iii) The amendments contravened this Court's Order of 15th November 2015 to the effect that the Reference be tried *de novo*.

8. After considering the submissions of the learned Counsels for the Parties, the Trial Court in an elaborate judgment delivered on 28th March, 2018 found that the Appellate Court's Order for a *de novo* hearing did not preclude amendments to the pleadings on record, that the Appellant's Preliminary Objection and issue of *locus standi* of the Respondent were not prejudiced by the amendment, and that the second Amended Reference did not raise a new cause of action, nor would such a cause of action(had it been found that the amendments created one) have been prejudicial to the Appellant. The Trial Court concluded that the second Amended Reference did not fall within the ambit of Rule 47 (1) of the East African Court of Justice Rules of Procedure,2013("the Rules") and that, to the contrary, the said pleading would neither prejudice nor delay the fair trial of Reference No. 10 of 2013, but rather it clarified the real issues in controversy between the Parties. In the result, the Trial Court disallowed the Application to strike out the second Amended Reference with no Order as to Costs.

C. APPEAL TO THE APPELLATE DIVISION

9. Dissatisfied with the above Judgment, the Appellant appealed to this Division. It proffered the following grounds of appeal, namely:

    1) That the Trial Court erred in law by disallowing the application to strikeout the second Amended Reference No. 10 of 2013;

    2) That the Trial Court erred in law by not considering the Appellant's case, thus delivering a judgment in contravention of rule 47 (1) (a) (b) (c) of the East African Court of Justice Rules of Procedure;

    3) That the Trial Court confirmed a procedural irregularity whereby the Respondent UTC amended the pleadings and introduced a new cause of action after a period of 4 years and 4 months and without considering the general principles of amending a Reference; and

    4) The Trial Court erred in law by delivering a Judgment which was against the Appellate Division's Decision on Appeal No. 1 of 2015 dated 15th November, 2017.

10. The Appellant asked the Court for an Order to reverse the whole decision appealed against and for the decision of the Trial Court to be dismissed.

11. At the Scheduling Conference of the Appeal, the above grounds of Appeal were consolidated into two issues, namely:-

1) Whether Trial Court erred in law by disallowing the Application to strike out the second Amended Reference; and

2) What reliefs are the parties entitled to.

12. After the scheduling conference, the Parties in compliance with the Court's Directions filed their written submissions, and on 7th February, 2019 Counsel for the Parties appeared before the Court and highlighted those written submissions at length.

The Appellant's Case

13. The substance of the Appellant's case before us was that the Trial Court exercised its discretion to grant leave to amend pleadings unjudicially in that it departed from well-established principles which govern amendments to pleadings. According to the Appellant, those principles are well elucidated in both the Decisions of the former Court of Appeal for East Africa in **Eastern Bakery V. Castelino** [1958] E.A. 461 and **Habib Jaffer Vs Vir Singh** [1962] E.A. 557 and **Hagod Jack Simonia V. Johar** [1962] E.A. 336 and in the Decisions of the Superior Courts of Kenya in **Nasser Ahmed t/a Airtime Business Solutions Vs Celtel Kenya Limited** [HCCC No. 661 of 2007] **Martha W. Karua V. African Broadcasting Corporation t.a Kiss Fm Station, Caroline Mutoko and Walter Mong'are Nyambane** [HCCC No. 288 of 2004] **Khan Vs. Roshan** [1965] E.A. 289 and **Kyalo V Bayusuf** [1983] KLR 229. Counsel contended that the pertinent principles to be distilled from those cases were that (i) amendments sought before the hearing should be freely allowed if they can be made

without injustice to the other side; (ii) there is no injustice caused to the other side if it can be compensated with costs; (iii) the delay in filing amendments should be properly compensated by costs; (iv) there is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject of the suit, (v) leave to amend will be refused where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, for example, by depriving him of a defence of limitation, (vi) all amendments should be allowed which are necessary for the determination of the real controversy in the suit, and (vii) amendments which create inconsistency in the pleadings should be refused.

14. It was the Appellant's case that the amendments allowed by the Trial Court violated some of the above Principles in that (i) the amendments introduced a new cause of action after a period of over four years which cause of action was totally different from the one pending in Court since 2013, for whereas the pending cause of action was the taking over of the UTC Mall by the Kigali City Commission of abandoned property which arose on 29th July 2013, the amendment introduced the action of auctioning the UTC mall by Rwanda Revenue Authority which arose on 27th September 2017, an action which was totally different and the two could not be handled under the same Reference which has been pending since 2013, for the actions arose in different periods and were by different legal personalities governed by different laws; (ii) The amendments prejudiced the Appellant for the reasons that there was a pending Preliminary Objection claiming that Reference No.

10 of 2013 was filed out of time and the issue of *locus standi* of the Respondent which was raised by the Interveners was also still pending for decision, and thus the Appellant would be deprived of a fair trial, and (iv) the amendments created an inconsistency in the pleadings in that the Appellate Division had remitted the case as it stood in 2013 to be tried *de novo* and thus the amendments changed the character of the case.

The Respondent's Case.

15. The Respondent submitted before us that the Trial Court could not be faulted for disallowing the Appellant's application to strike out the second Amended Reference for three reasons.

16. The first reason given by the Respondent was that the Appellant had impliedly consented to the amendment. That contention was based on the fact that Counsel for the Appellant had in the Trial Court during the Scheduling Conference accepted as a fact that the UTC Mall had been auctioned by the Rwanda Revenue Authority and that when he was prompted by that Court to indicate his position regarding the Respondent's intention to amend the Reference to reflect that fact, he had answered thus:

> *"It is the Applicant's right to amend the pleadings or leave them as they stand today. Neither can I object or support since it is his right and it is within the powers of this honourable Court to decide on this."*

In those circumstances, Counsel for the Respondent submitted, the amendments must be treated as having been made with the consent of all parties within the contemplation of Rule 48(b).

Counsel relied on Black's Law Dictionary, 2009 where implied consent is defined as "consent inferred from one's conduct rather than from one's direct expression." Counsel for the Appellant submitted that the Appellant having not objected to the amendment even when the facts had been placed before the Court, the Appeal was an utter abuse of court process, frivolous and a waste of the court's time.

17. The second reason proffered by counsel for the Respondent was that the Trial Court properly exercised its power to allow the amendment. In support of that contention, Counsel advanced two contentions. First, he submitted that the Trial Court was clothed with the power to grant leave to amend at any stage of the proceedings in order to facilitate the determination of the real question in controversy between the parties. Reliance was placed on Rules 48 (c) and 50 (1). Secondly, he further contended, the amendments did not introduce a new cause of action for unlike a cause of action as understood at common law, that is to say, a violation of a Plaintiff's legal right by the defendant for which the defendant is liable (see **Auto Garage V Motoko** [1971] E.A. 514, a cause of action under the Treaty is shown once it is alleged that the law, action, or decision complained of was illegal or an infringement of the Treaty (see **Peter Anyang' Nyon'go & Others V The Attorney-General of Kenya & Others** [Reference No. 1 of 2006] and **British American Tobacco (Uganda) Ltd V Attorney-General of Uganda** [Application No. 13 of 2017]). Counsel for the Respondent submitted that as is evident from the pleadings in the first Amended Reference and the second Amended Reference the cause of action canvassed was the same, namely, the alleged violation by the Republic of Rwanda of Articles 5 (3) (g), 6 (d), 7 (1)

(a) and 2, and 8 (1) (a) (b) and (c) of the Treaty. He further contended that the addition of facts relating to the Rwanda Revenue Authority or a prayer to demand for an account of the money obtained from the Mall did not substitute one cause of action for another.

18. The third reason proffered by the Respondent was that the amendments allowed by the Trial Court could not be said to be prejudicial to the Appellant for the Appellant had been given an opportunity to plead in response thereto and its right to canvass any preliminary objection to the Reference or the right of the Interveners to question the *locus standi* of the Respondent to maintain the Reference still subsist and can be raised at the Trial.

THE COURT'S DETERMINATION

19. The Court recalls that the sole issue in this Appeal is whether the Trial Court erred in law in declining to strike out the 2nd Amended Reference.

20. It hardly need be stated that this Court can only find an error of law on the part of the Trial Court if it is persuaded that the latter either ignored or misapprehended or misapplied a pertinent law or principle of law.

21. The governing procedural law with respect to striking out pleading is encapsulated in Rule 47 (1) which provides as follows:

> *"47(1) The Court may, on application of any party, strike out or expunge all or part of a pleading or other*

document, with or without leave to amend, on the ground that the pleading or other document –

(a) May prejudice or delay the fair trial of the case; or

(b) Is scandalous, frivolous or vexatious; or

(c) *Is an abuse of the process of the Court.*"

22. The gravamen of the Appellant's case in the Trial Court was that the Amendments introduced in the second Amendment Reference were not only scandalous, frivolous and an abuse of the Court process in that they introduced a new cause of action and contravened this Court's Order of 15th November 2015 that the Reference before the Trial Court should be tried *denovo*, but they were also prejudicial to a fair trial in that they compromised the Appellant's and Interveners' legal objections to the Reference on account of time bar and *locus standi*. On the other hand, it was the Respondent's Case that the amendments were properly made and they neither introduced a new cause of action nor prejudiced the fair Trial of the Reference.

23. Having examined the entire Record of Proceedings including the Judgment appealed from and having considered the rival submissions, we are far from persuaded that the Trial Court erred in law. On the contrary, the Judgment appealed from is solid in reasoning and entirely unimpeachable. We say so for the reasons below.

24. First, the Trial Court was quite alive to the provisions of Rule 47 (1) and cannot be accused of ignoring the law. In Paragraph 41 of its Judgment, the Trial Court delved into the meaning of the terms frivolous, scandalous, vexatious and abuse of the court process as follows:

> *"41.The term 'frivolous' is legally defined to include a claim that is '**lacking of legal basis or legal merit; not serious; not reasonably purposeful**.' See **Black's Law Dictionary, 8th Edition, 2004, p.692**. The same dictionary defines a scandalous matter as '**matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense;** while a vexatious suit is defined as one '**instituted maliciously and without good cause**'. On the other hand, the **Oxford Dictionary of Law, 7th Edition, Oxford university Press, 2009, P.5** attributes the following meaning to the term 'abuse of process':*
>
> > ***A tort where damage is caused by using a legal process for an ulterior collateral purpose. Actions that are obviously frivolous, vexatious, or in bad faith can be stayed or dismissed by the curt as an abuse of process."***

And in Paragraph 42 of the said Judgment, the Trial Court concluded as follows:

> *"42. Similarly, pleadings that are obviously frivolous, vexatious, or in bad faith or scandalous can be struck out in entirety or in part. We take the view that that is the import of Rule 41(1) (b) and (c) of the Court's rules. With regard to the matter before us, having held as we have that the Amended Reference Neither Raises a new cause of action nor would such a cause of action (had we found otherwise) been prejudicial to the Applicant, with respect, we do not find the Amended Reference to fall within the ambit of Rule 47 (1) of the Court's Rules. On the contrary, we are satisfied that the said pleading will nether prejudice nor delay the fair trial of **Reference No. 10 of 2013**, but rather, clarifies the real issues in controversy between the parties."*

The upshot of the Trial Court's consideration of the Appellant's Application to strike out the 2nd Amended Reference was that the same had not been shown to fall within the ambit of Rule 47 (1).

25. This Court is in agreement with the Trial Court's exposition and application of the ambit of Rule 47(1). Indeed, in **Mpaka Road Development Co. Ltd. V Abdul Gafur Kana t/a April Kapuri Pan Coffee House** *[2001]* eKLR, Ringera J. (as he then was) did an exposition of the words "scandalous, frivolous, or vexatious" in the context of Rule 13 (1) (b) of the Kenyan Civil Procedure Rules (which provision is in *pari materia* with Rule 47 (1) of our Court) and concluded as follows:

> *"I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made on the character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacked seriousness. If it is not serious then it would be unsustainable in Court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious."*

It is patently clear to us that against the backdrop of a proper appreciation of the import of the terms "scandalous, frivolous, or vexatious" in procedural law, the Appellant had used those terms rather loosely and without a comprehension thereof in its Application, and his complaint that the introduction of new cause of action *ipso facto* rendered the pleading scandalous, frivolous or vexatious was misconceived in law.

26. Our further appraisal of the impugned Judgment of the Trial Court also reveals that the said Court was also alive to the principles that

govern not only the making of amendments but the scope thereof as manifested by its extensive consideration of Rules 48 and 50.

27. Secondly, the Trial Court did not misapprehend or misapply the law either. In our opinion, it correctly concluded that the 2nd Amended Reference did not introduce a new cause of action as it was evident that in both the original Reference and the second Amended Reference the expressed cause of action is the violation by the Republic of Rwanda of the same specified provisions of the Treaty, that is to say, Articles 5 (3) (g), 6(d), 7(1) (a) and (2), and 8(1) (a) (b) and (c). The Trial Court was clear that the new facts introduced by the amendments amounted to no more than an introduction of a further incidence of breach. That conclusion must flow from the appreciation that a cause of action, in the jurisprudence of this Court, exists where there is a contention that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. See (**Prof. Peter Anyang' Nyong'o V Attorney General of Kenya case** (Supra), **Sitenda Sebalu V The Secretary General of the East African Community & Others** [EACJ Ref No. I of 2010] and **British American Tobacco (BAT) V The Attorney-General of Uganda** [EACJ Application No. 13 of 2017]) and is thus different from a cause of action at common law whereby the person seeking relief would have to demonstrate a right or interest that has been violated and the liability of the Defendant therefor. (see **Auto Garage V Motoko** [1971] E.A. 514.

28. The Trial Court furthermore also held that even if it had found that the Respondent had introduced a new cause of action by the amendment, such action would have been quite legitimate and

proper by dint of Rule 50 (2) (c) which provides that the Court may grant leave to amend notwithstanding that any relevant period of limitation has expired, if it thinks it is just to do so **"where the amendment adds or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the party seeking leave in the same case."** Thus with respect to the Appellant's main grievance that the 2nd amendment violated the principles or rules of pleading, the same is devoid of merit. Before departing from this complaint, we are impelled by the Appellant's Counsel's vehemence in pressing his submission to underscore that general principles derived from decisions of Municipal Courts are unhelpful to this Court unless it is shown that those principles result from a consideration of procedural rules in *pari materia* with our own rules (which was not done in this case) and that obviously where such distilled principles are at variance with the express provisions of our Rules, our Rules shall prevail.

29. Third, the Trial Court also fairly considered the apprehended procedural prejudice that may arise from the amendments. It found no merit in the contention for the reasons that it had not been shown that the Appellant would be prejudiced in the gathering and presentation of evidence at the trial; the Preliminary Objections on time bar and the *locus standi* of the Respondent to maintain the Reference continued to subsist and were still available for ventilation at the Trial; and the Appellate Court's Order for trial *de novo* was not inconsistent with the application for and the grant of leave to amend. We find no error or misapprehension or misapplication of the law in all that. Indeed,

we wholly agree with the findings and conclusions of the Trial Court in that respect. We need only add that the word *de novo* means "**a-new**" or **"a-fresh"** and, accordingly, when a *de novo* trial is ordered, such trial must be subject to all the vicissitudes of a trial including, but not limited to, applications for amendment. In the latter regard, the law is clear that the Court may **at any stage** of the proceedings allow any party to amend its pleadings in such manner and on such terms as it may direct. (See Rule 50 (1)).

30. Fourth, we have also come to the conclusion that in no wise could it be said that the second Amended Reference was an abuse of the process of the Court. **Black's Law Dictionary**, 9th Edition, defines abuse of process as " **the improper and tortious use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process scope."** In the matter at hand, it would have been an abuse of process to introduce amendments that went beyond the scope of the leave granted, that is to say, amendments other than those permitted by the Court, or which were for a collateral purpose, that is to say, a purpose other than to enable the determination of the real question in controversy between the parties, or of correcting any defect or error in pleadings. The amendments made by the Respondent here did not exceed the scope of the leave granted and they were not made for a collateral purpose. Accordingly, no abuse of process was shown.

31. Before concluding our consideration of this Appeal, we need to say a word or two about the nature of the amendments that were made on 15th November 2015. In the Trial Court, the Respondent persisted that they had been made by consent. The Trial Court held that they were not consent amendments as Counsel for the Respondent had neither objected to them nor did he consent to the application for them. In this Court, Counsel changed tack and pressed us to find that there was implied consent to them. He invoked in aid ***Black's Law Dictionary***, where the term "implied Consent" is defined as **"consent inferred from one's conduct rather than one's direct expression."** Counsel contended that from what transpired on the 15th of November 2015, the Appellant did not object to the amendments sought, even when the facts had been placed before the Court, and on that ground alone the Appeal ought to be dismissed as an utter abuse of the Court process, a frivolity and a waste of the Court's time.

32. Well, we think that whether the amendments were by consent was an issue of fact within the province of the Trial court and, accordingly, even though we ourselves might have reached a different conclusion, we should decline the invitation to depart from the factual finding of the Trial Court in the circumstances of this case since the theory of implied consent was not canvassed before that Court.

33. From all the foregoing, it is crystal clear that the Appellant has failed to establish any error of law or procedure on the part of the Trial Court and consequently this Appeal is destined to be dismissed.

34. As regards who should bear the costs of the Appeal, we see no good reason to depart from the usual rule, namely, that costs follow the event. The Respondent having successfully resisted the Appeal, it is entitled to its costs.

35. The upshot of our consideration of this matter is that we order that the Appeal be, and is hereby dismissed with costs to the Respondent. And to avoid any further back and forth of this matter at the interlocutory stage, we order that those costs shall be taxed after the determination of the substantive Reference in the Trial Court.

IT IS SO ORDERED.

DATED, SIGNED and **DELIVERED** at Arusha this 29th day May 2019.

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Emmanuel Ugirashebuja.
PRESIDENT

.....

Liboire Nkurunziza.
VICE PRESIDENT

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Aaron Ringera.
JUSTICE OF APPEAL