# IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

## FIRST INSTANCE DIVISION

*(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo J & Audace Ngiye, J)*

**APPLICATION NO.13 OF 2016**

***(Arising from Reference No.2 of 2016)***

**PAUL JOHN MHOZYA ............................................... APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF**
**THE UNITED REPUBLIC OF TANZANIA.............. 5TH RESPONDENT**

**7TH JULY, 2017**

## RULING

## Introduction

1. Reference No.2 of 2016 was filed on 3rd June, 2016 and is said to have been founded on Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter **"the Treaty")** as well as Rule 24 of this Court's Rules of Procedure (hereinafter, "the Rules").

2. The Applicant, acting in person, is a citizen of the United Republic of Tanzania and resident in Kongowe Mzinga (B), Temeke Municipality, Dar-es-Salaam.

3. The Respondent is the Attorney General of the United Republic of Tanzania sued in that capacity and his address has been given as Attorney General's Chambers, Magogoni Road, Kivukoki Front, P.O. Box 9050, Dar-es-Salaam.

4. The Reference is said to have been filed by the Applicant upon unresolved allegations of *"widespread office hooliganism comprising high level conspiracy that [was] transmitted by persons within the Office of the President of the United Republic of Tanzania, various Ministries and Municipal Authorities"* which have led *inter alia* to alleged complete isolation of the Applicant. Details of these matters will form the basis of the Petitioner's case as shall be addressed at the determination of the Reference.

## The Application

5. The Application before us was filed on 28th November, 2016 and arises from the proceedings of this Court on 21st November, 2016 when the Reference aforesaid was listed for a Scheduling Conference under

Rule 53 of the Rules. On that day, the record would show that the Applicant was absent, having notified the Court of his difficulty in attending Court but Mr. Richard John Kilanga, Senior State Attorney, representing the Respondent, was present.

6. Mr. Kilanga on that day made an oral application under Rule 21(2) and (3) read together with Rule 48 (c) of the Rules seeking leave to amend the Respondent's response to the Reference. This Court granted him the leave sought and directed him to file the Amended Response within fourteen (14) days and serve the same on the Applicant who was granted twenty-one (21) days from the date of the service to file his Reply to the Amended Response should he have deemed it necessary to do so.

7. The Applicant, dissatisfied with that order filed the present Application premised on Rules 21(1) and (2) as well as Rules 72(2) of the Rules seeking orders of review of the orders of 21st November, 2016 on the following summarized grounds:

    i. ***That when the Applicant and Mr. Kilanga signed the draft scheduling conference notes, there was no indication that Mr. Kilanga intended to make any application before this Court including on an amendment of the Response to the Reference;***

    ii. ***In the oral application for leave to amend the Response to the Reference, Mr. Kilanga relied on Rule 21(2) of the Rules which was not relevant to such an application;***

    iii. ***As a result of the grant of leave to amend the said Response to the Reference, the Applicant has been occasioned irreparable injustice.***

8. In a supporting Affidavit sworn on 28th November, 2016, the Applicant has repeated his allegations above but has also added that he believes that Mr. Kilanga and his colleague, Mr. Alesia Mbuya, were out to sabotage his case and should not be allowed to handle the case on behalf of the Respondent again. *(sic)*

## Applicant's Submissions

9. The Applicant filed written Submissions on 10th February, 2017 and of relevance to the Application before us, he submitted firstly, that the oral application for amendment was made out of malice and with a clear intention to sabotage the Scheduling Conference for the Reference.

10. Secondly, that the application was made *ex-parte* and the resultant *ex-parte* order also contravened Rules 21(2) and (3) of the Rules. Thirdly, that the issues sought to be introduced by the intended amendment would have the effect of introducing matters that would either be outside this Court's jurisdiction or are time-barred. The matters referred to are said to include his suspension from work as a teacher (he claims that this issue is under the jurisdiction of local legal and administrative institutions), and the non-survey of his plot of land, one of the subjects of the present dispute.

11. For the above reasons, the Applicant prays for review of the orders aforesaid.

## Respondent's Reply

### *Preliminary Objection and Submissions*

12. In a replying Affidavit sworn on 15th December, 2016, Mr. Kilanga, on behalf of the Respondents, deponed that he did not fraudulently and by false pretense solicit and obtain the orders in contention. And that

the said orders were in any event properly granted under the relevant Rules.

13. Further, it is Mr. Kilanga's deposition that there was no agreement between the Applicant and himself that he would not pray for any orders in this Court on 21st November, 2016 and that no document concerning the Applicant and his case was ever forged by either Mr. Kilanga or his colleague, Mr. Mbuya.

14. Further to the above, the Respondent filed a Notice of Preliminary Objection raising the issue that the Application is incompetent for being supported by an affidavit which contains lies. The lies are said to be the allegation that Mr. Kilanga had fraudulently and by false pretenses solicited and obtained the order to amend the Response to Reference; and that by so doing Mr. Kilanga is intent on sabotaging the Applicant's case. Relying on the decision of the Court of Appeal of Tanzania in **Ignazio Messina vs. Willow Investments SPRL, Civil Application No.21 of 2001**, it is therefore the Respondent's prayer that the said Affidavit be expunged from the record.

15. By way of Submissions, the Respondent has urged the point that no sufficient reason has been disclosed to warrant grant of the orders sought and in any event, no prejudice has been caused to the Applicant who was granted an opportunity to file any rejoinder to the amended Response if he thought it fit to do so.

16. It is the Respondent's further submission that if new issues are raised in the Amended Response, then they should be addressed at the Scheduling Conference and incorporated as new issues or facts to be addressed by the Court in its determination of the Reference.

17. As regards the procedure for effecting amendments to pleadings before this Court, the Respondent submits that Rules 21(2) and 3 as read with Rule 48(c) of the Rules were properly invoked and the amendments were sought only for purposes of enabling the Court to determine the real issues in controversy. In addition, that the application to amend was properly made, orally, and there was no need for a formal application to be made in that regard.

18. Invoking Rule 1(2) of the Rules, the Respondent further submits that this Court has inherent power to make such orders as would meet the ends of Justice and it was therefore properly within its mandate to grant the orders of amendment.

19. Regarding the Applicant's contention that some of the issues to be raised by the Respondent in the Amended Response are time-barred or are outside this Court's jurisdiction, the Respondent's answer is that those issues would be addressed at the Scheduling Conference and hearing of the Reference and not at this interlocutory stage of the proceedings. The same submission has been made with regard to all other issues of fact that are in contest between the parties including the issue *inter alia* of the dispute relating to the Applicant's plot of land and alleged death threats directed at him.

20. For the above reasons, the Respondent prays that the Application before us be dismissed with costs.

**<u>Applicant's Rejoinder to the Respondent's Submissions</u>**

21. In rejoinder Submissions filed on 10th April, 2017 and of relevance to the matter at hand, the Applicant has argued that since no proper notice of the Preliminary objection raised was given to him, the same should not be entertained at all.

22. Further, that prior to the proceedings of 21st November, 2016, Mr. Kilanga communicated with and met the Applicant and he knew that the Applicant would not attend Court on that day but did not indicate to the Applicant that he intended to seek an amendment of the response to the Reference. That his actions thereafter were fraudulent and were intended to halt the Scheduling Conference slated for that day.

23. On the invocation of the inherent powers of the Court by the Respondent, the Applicant submits that such powers cannot be invoked to circumvent specific and laid down Rules of this Court. That therefore, the Court should find that improper rules were invoked by the Respondent and the order to amend should be reviewed as prayed.

**Determination**

24. Before we determine the only issue in disputed before us, one minor issue requires quick resolution; the preliminary objection raised by Mr. Kilanga and which the Applicant submitted that he had no notice of. Notice or no notice, the question whether the Applicant lied about Mr. Kilanga acting fraudulently and intent on sabotaging the Scheduling Conference, is not a matter of law which is what a preliminary objection should be about. Those are matters of fact that require interrogation as to their veracity. Lies or truth are matters of evidence and are the reason why cross-examination of witnesses is allowed in terms of Rule 64 of the Rules.

25. In the event, on the purported Preliminary Objection, we can but only reiterate the holding in **Mukisa Biscuits vs. West End Bakery [1969] EA 696** that unless a preliminary objection is premised on a pure point of law and where the facts are uncontested, then the same is no more

than a waste of precious judicial time. Mr. Kilanga's Preliminary Objection falls in the latter category and is overruled.

26. Having so stated, what is before us is the issue whether the order to amend the Respondent's Response to **Reference No.2 of 2016** was properly obtained and if not, whether it should be reviewed and set aside. We note however, with respect to the Applicant and Respondent, that irrelevant matters of evidence to be properly adduced at the hearing of the Reference were raised and unnecessarily convoluted the Application. It is good practice for parties coming before this Court to be focused, succinct and clear in their pleadings and not to lose track and struggle in explaining irrelevancies.

27. Having so stated, it is the proceedings of 21st November, 2016 that triggered the filing of the present Application. But what exactly happened on that day?

28. From the record, Mr. Kilanga initially stated that *"he would like to make an application before this Court. The application is based on Rule 21 sub Rules 2 and 3 together with Rule 48 (c) of the ... Rules".* He then added as follows:

> ***"............ What we pray from this Court in this application is to allow us to get an ex parte order so that we can file a formal application to amend our response. So, once we get this order we will be able to file a formal application to amend our Reference"***

29. Mr. Kilanga upon directions being issued by the Court, proceeded to make an oral application and explained why he had to amend the Response to Reference i.e. that *"from the time [he] prepared [the] response, [he] had not yet got information from the relevant department*

*of the government from which [he] had been compiling this application [sic]".* He then went on to name the said departments and stated that with the proposed amendments in place, the Court would be able to get *"the real points for determination in this Reference"* and the order for amendment was then granted by this Court on that basis.

30. In addressing the Applicant's complaints regarding grant of the order to amend therefore, we must begin by addressing the Rules cited by the Respondent's Counsel in his oral application i.e. Rules 21(2) and (3) as read with Rule 48 (c) of the Rules. Rules 21(2) and (3) provides as follows:

    **Rule 21(2) and (3)**

    ***"(2) No motion shall be heard without notice to the parties affected by the application.***

    ***Provided, however, that the First Instance Division, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable injustice, may hear the motion and make any ex parte order upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Division deems just.***

    ***(3)* Upon making an *ex-parte* order the First Instance Division shall set down the application for *inter partes* hearing within thirty (30) days of the *ex-parte* order. "**

31. Looking at the proceedings of 21st November, 2016, the above Rule was partly complied with when the *ex-parte* order was made but sub-Rule (3) was not complied with since the *ex-parte* order was in fact final in nature although it was given in the absence of the Applicant who had

however indicated his inability to attend Court for the listed Scheduling Conference and who had no notice of the oral application to amend the response to Reference. To that extent only Rule 21(2) and (3) is inapplicable to the present issue and the Applicant's objection to aforesaid to the invocation of the said Rule is justified.

32. What of Rule 48(c)? That Rule provides as follows:

> ***"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any pleading, a party may amend its pleading: -***
>
> *(a)............................;*
> *(b)............................; **or***
> *(c)* ***with leave of the Court."***

33. From the record, the Respondent had clearly made his application under Rule 48(c) which must then for clarity be read with Rule 50(1), (2), (3) and (4) of the Rules which provides thus:

> ***"(1) The Court may, at any stage of the proceedings, allow any party to amend its pleadings in such manner as it may direct and on such terms as to costs or otherwise as may be just.***
>
> ***(2) The Court may, in the following circumstances, grant such leave to amend notwithstanding that any relevant period of limitation current at the date of instituting the case has expired, if it thinks it is just so to do:***
>
> *(a)* ***where the amendment is to correct the name of a party even if it has the effect of substituting a new party, if the Court is satisfied that the mistake sought to be corrected was a genuine mistake;***

*(b)* ***where the amendment is to alter the capacity in which the party is or is made party to the proceedings, if the altered capacity is one which that party could have been or been made party at the institution of the proceedings;***

*(c)* ***where the amendment adds or substitutes 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.***

***(3) Whenever a formal application is made to the Court for leave to amend any pleading, the amendment for which leave is sought shall be set out in writing, lodged with the Registrar and served on the opposite party before the hearing of the application.***

***(4) Where the Court grants leave for the amendment of any pleading, the amendment shall be made or be lodged within the time specified by the Court and if no time is so specified then within fourteen (14) days of the granting of leave." (Emphasis added)***

34. The above Rule needs no more than a literal interpretation; that where leave is sought under Rule 48(c) then under Rule 50(1), such an amendment may be allowed *"in such manner"* as the Court *"may direct and as on such terms as to costs or otherwise as may be just".* The leave may also be sought *"at any stage of the proceedings"* as opposed to leave under Rule 48(a) which must be made "*before the close of pleadings".*

35. Of further note is Rule 50(3) which refers to formal applications for leave to amend a pleading and which, if made, would require that the same be in writing and ought to be served on opposite party before hearing. But in that context, what was the nature of the application before the Court on 21st November, 2016? While initially Mr. Kilanga had wanted to make a formal application for leave to amend his Response to the Reference, the Court directed him to make an oral application which he did. Was that an error on the part of both Mr. Kilanga and the Court as was strongly submitted by the Applicant? Can fraud be thereby attributed to Mr. Kilanga as alleged? We think not.

36. We have taken that position because we reiterate that Rule 50(1) as read with Rule 48(c) which was invoked by Mr. Kilanga, are couched in discretionary terms and the formality expected of both a party and the Court under Rule 50(3) do not apply in such informal or oral applications. Nothing would have been easier than for the drafters for the Rules to obligate parties and the Court to the filing of formal applications for leave to amend under Rule 50(1) which formality does not exist therein.

37. By way of comparative jurisprudence on the subject, we take note that the above finding is in line with the Ruling in **Johnson Akol Omunyokol vs. The Attorney General of Uganda, Application No.3 of 2016** where this Court, in determining a formal application for leave to amend the Applicant's Reference under Rules 48(c) and 50(1), stated as thus: -

***"The above provisions expressly proved that this Court has discretionary power to allow amendment of pleadings at any***

***stage of proceedings for purposes of determining the real question or issue in controversy between the parties. That discretionary power is exercised so as to do justice to the case and must be exercised judiciously with due consideration of all the facts and circumstances before this Court".***

38. We reiterate the above finding and we therefore have no reason for fault either Mr. Kilanga or the Court itself for the events of 21st November, 2016 which have caused the filing of the present Application.

39. In any event, what is the purpose for which amendment of pleadings is granted at the discretion of a court? As is the language of Rule 48 of the Rules, it is *inter alia "for the purpose of determining the real question in controversy between the parties."* We are in the event satisfied that the proceedings of 21st November, 2016 were conducted within this Court's Rules and discretionary mandate and there is no reason to review the orders made on that day and we so hold notwithstanding that Rule 21(2) and (3) invoked by the Respondent is not applicable to the oral application made on the said date. That fact alone cannot in any event invalidate the proceedings as Rule 48(c) properly applies thereby and we have said why.

40. We must also add that no prejudice would be caused to the Applicant as he has been given an opportunity to formally respond to any issues to be raised by the Respondent in the Amended Response to the Reference and to challenge any of those issues at the hearing of the Reference and in Submissions at the hearing. Specifically, the two issues regarding the Applicant's suspension from employment, the dispute relating to his plot of land and alleged death threats directed at



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him, are matters well within his knowledge, have been raised in pleading and he can, without much difficulty, respond to them within the period granted by this Court.

41. One other issue requires our consideration in explaining our decision above; the Applicant in correspondence to this Court, has explained his difficult personal circumstances that have precluded him from either engaging an advocate or personally attending to the Reference and Application before us. The wider interests of justice would necessitate that to alleviate those difficulties, the Reference should be determined on its merits at the earliest opportunity and interlocutory applications, whatever their merits, cannot aid the Court or the Parties in that regard.

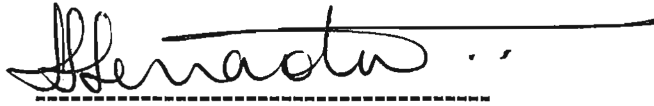
## Disposition

42. For the above reasons, it is obvious that we find no merit in the Application before us and the same is dismissed.

43. Regarding costs, although they ordinarily follow the event under Rule 111 of the Rules, noting the Applicant's personal circumstances that are well documented on the record and since the substantive dispute before us is yet to be resolved, let each party bear its own costs.

44. It is so ordered.

**Dated, Delivered and signed at Arusha this 7th day of July, 2017.**



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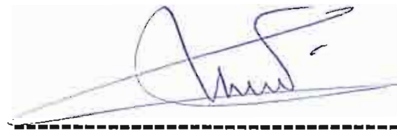
**Hon. Justice Isaac Lenaola**

**DEPUTY PRINCIPAL JUDGE**



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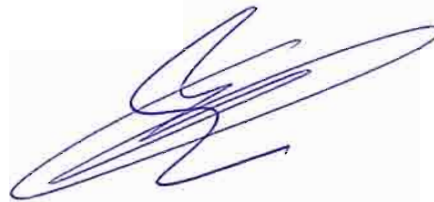
**Hon. Justice Faustin Ntezilyayo**

**JUDGE**



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**Hon. Justice Audace Ngiye**

**JUDGE**