



IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Fakihi A. Jundu, Audace Ngiye and Charles O. Nyawello, JJ)

APPLICATION NO. 1 OF 2018

(Arising from Reference No. 10 of 2013)

THE ATTORNEY GENERAL OF

THE REPUBLIC OF RWANDA APPLICANT

VERSUS

THE UNION TRADE CENTRE

(UTC) RESPONDENT

29th MARCH, 2018

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RULING OF THE COURT

Background

1. This is an Application by the Attorney General of the Republic of Rwanda ('the Applicant') to strike out all or part of the Amended Reference of the Union Trade Centre (UTC) ('the Respondent') that was filed on 13th December 2017. The Application is premised on Rules 1(2), 47(1)(c) and (2), and 48 of the East African Court of Justice Rules of Procedure. A brief background is pertinent.
2. On 22nd November 2013, UTC filed Reference No. 10 of 2013 challenging the legality of certain actions of the Kigali City Abandoned Property Management Commission with regard to its mall in Nyarugenge District ('the UTC mall'). The Reference was heard by the First Instance Division of the East African Court of Justice and partially decided in favour of the Republic of Rwanda, whereupon UTC appealed the decision to the Appellate Division of the Court and the Republic of Rwanda cross-appealed the same decision.
3. On 20th November 2015, the Appellate Division of this Court ordered the retrial *de novo* of the Reference *inter alia* to allow for the incorporation of affidavit(s) in support thereof. On 4th November 2016, an Amended Reference ('the First Amended Reference') was duly filed in the Court pursuant to this Court's Order of 6th September 2016 that sought to give effect to the Appellate Division's Order with regard to supporting affidavits.
4. On 15th November 2017, when the Reference was due for a Scheduling Conference, it did transpire that the UTC mall had since been auctioned off by the Rwanda Revenue Authority for defaulting on its tax obligations thereto. On that day, this Court heard both Parties in an oral application for the further amendment of the Reference to address the above development and did allow the same. On 13th December 2017, UTC did file another Amended Reference in this Court (the Second Amended Reference).
5. The present Applicant now seeks to have the Second Amended Reference struck out in its entirety or in part on the premise that it violates the rules governing the amendment of pleadings. At the hearing of this Application, the Applicant was represented by Mr. Nicholas Ntarugera, while Mr. Isaac Bakayana appeared for the Respondent and Mr. William Ernest held brief for the Interveners.

Applicant's Submissions

6. It was the contention of Learned Counsel for the Applicant that, under the guise of the amendment of pleadings, the Respondent had filed a new Reference that introduced a new cause of action contrary to the rules that govern the amendment of pleadings. It was his submission that whereas the First Amended Reference had challenged the assumption of the UTC mall's management by the Nyarugenge District Commission, the Second Amended Reference had introduced a second cause of action, to wit, the auction of the UTC mall by the Rwanda Revenue Authority.
7. Mr. Ntarugera enumerated the following principles governing the amendment of pleadings as laid out in the case of Martha W. Karua vs. African Broadcasting Corporation & 2 Others High Court Civil Suit No. 288 of 2004 (Kenya). First, only such amendments as would enable the court determine the real questions in controversy between the parties should be allowed. Secondly, the proposed amendments should not alter or substitute the cause of action that formed the basis of the original pleadings. Thirdly, inconsistent and contradictory allegations that purport to negate admitted facts would not be allowed by means of amendment. And finally, the proposed amendments should not cause prejudice to the opposite party.
8. It was learned Counsel's argument that by introducing the facet of Rwanda Revenue Authority's auction of the mall, the Second Amended Reference had introduced a new cause of action and thus violated the second principle enumerated above. Further, we understood it to be his contention that the said Amended Reference was prejudicial to his client in so far as it sought to defeat his pleading on time limitation.

Respondent's Submissions

9. Mr. Bakayana opposed the Application on three (3) grounds. First, he contended that the Applicant had not opposed the oral application for amendment of the Reference when it was made before this Court. He then cited Rule 48 of the Court's Rules in support of his argument that the amendment was necessary for the determination of the real issues in controversy between the Parties. It was learned Counsel's contention that the real issue in controversy between the Parties was the appropriation of his client's private property by the Republic of Rwanda.
10. Secondly, Mr. Bakayana argued that Rule 50(2)(c) of the Court's Rules did not prohibit an amendment that introduced or substituted a new cause of action,

provided that it arose from the same facts. He maintained his assertion that the appropriation of private property by the Republic of Rwanda was what was in issue in Reference No. 10 of 2013, and the auction of the same property by the Rwanda Revenue Authority simply entailed a continuation of a complaint that, in his view, was already before the Court. Learned Counsel argued that his client still sought to rely on the same Articles of the Treaty, facts and subject matter that had been articulated in the First Amended Reference, only seeking to add additional facts in respect of the same cause of action in the Second Amended Reference. He cited the case of Auto Garage vs. Motokov (1971) EA 514 to augment his argument that no new cause of action had been introduced, as well as Mulwoza & Brothers vs. Ensha & Co. Ltd, Supreme Court Civil Appeal No. 26 of 2010 (Uganda) in support of the decision therein that 'an amendment should be allowed even where it introduces a new cause of action to avoid a multiplicity of suits.'

11. Finally, Mr. Bakayana argued that the Applicant had not demonstrated what prejudice it stood to suffer by the Second Amended Reference, contending that a retrial *de novo* did not bar an amendment to pleadings.

Interveners' Submissions

12. On his part, Mr. Ernest (holding brief for the Interveners) supported the Application arguing that a new cause of action had been introduced contrary to Rule 50(2)(c). It was his contention that whereas the original cause of action was the assumption of management of the UTC mall by Nyarugenge Abandoned Property Management Commission, the Second Amended Reference had introduced the auction of the said mall by the Rwanda Revenue Authority. In his view, this amounted to the introduction of a new cause of action because, first, the auction was done by a different entity and therefore a different party; secondly, it was done on a different date from the impugned action of Nyarugenge Abandoned Property Management Commission and, thirdly, the facts were different given that the assumption of management of a mall was different from the auction thereof.
13. Mr. Ernest cited the following decision in Central Kenya Ltd vs. Trust Bank Ltd & 4 Others, Civil Appeal 222 of 1998 (Kenya) in support of his contention that an amendment that enables the determination of the real issues in controversy and avoids a multiplicity of disputes is only tenable where it does not introduce a new or inconsistent cause of action:

A party is allowed to amend its pleadings as may be necessary for determining the real question in controversy or to avoid a

multiplicity of suits, provided there has been no undue delay or that no new or inconsistent cause of action is introduced.

14. Learned Counsel argued that the new cause of action changed the nature of the Interveners' case, and maintained that the Second Amended Reference should be struck out.

Submissions in Reply

15. In a brief reply, Mr. Ntarugera denied consenting to the amendment of the Reference so as to introduce a new cause of action. He clarified that the prejudice posed by the Second Amended Reference lay in the introduction of a new cause of action therein that would affect his client's Response thereto.

Court's Determination

16. The Ruling of the Appellate Division in reference above remitted **Reference No.10 of 2013** for trial *de novo*. According to Black's Law Dictionary (9th Edition), 2009, p.500, the term *de novo* means 'anew.' On the other hand, trial *de novo* means 'a new trial on the entire case - that is, on both questions of fact and issues of law - conducted as if there had been no trial in the first instance.' Accordingly, we deduce two (2) interpretations to the expression 'trial *de novo*': first, is trial of the Reference without amendment, which would be the narrow interpretation of that expression; or secondly, the re-consideration of the matter in a way that exhausts all the issues and settles the real matter in dispute between the parties, which would be the wider interpretation thereof. None of the parties cited any authority in favour of one interpretation or the other. In our considered view, the wider interpretation is pertinent to the ends of justice that characterises the inherent power of the Court under Rule 1(2) of our Rules. It does also reflect the purpose of amendments before this court as stipulated in Rule 48 of the court's Rules, to which we shall revert shortly. It is on that basis, therefore, that we proceed to determine the Application before us presently.
17. The amendment of pleadings in this Court may be undertaken with or without leave of the Court and is, in general terms, governed by Rule 48 of the Court's Rules of Procedure. It reads:

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) Without leave of the Court, before close of pleadings;

- (b) With the consent of all parties, and where a person is to be substituted as a party, that person's consent; or
- (c) With leave of the Court.

18. In the present case, the question of amendment of the Reference arose well after close of the pleadings. Further, despite Learned Respondent Counsel's assertions to the contrary, a perusal of the Court record on the day the application for amendment was made (15th November 2017) indicates that there was no consent from the Applicant for the sought amendment. Mr. Ntarugera neither objected to nor supported the application, preferring to leave the decision therefor to the Court thus:

It is the applicant's right to amend the pleadings or leave them as they stand today for this Honourable Court. 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.

19. Consequently, in the absence of consent by the Parties, the amendment in issue presently is subject to Rule 50 of the Court's Rules. We reproduce Rule 50(1) and (2) for ease of reference.

50. (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 just so to do:

(a)

(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.

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20. We do state from the onset that the cardinal principle in Rule 48 of the Court's Rules is that the amendment of pleadings before this Court is for purposes of "determining the *real* question in controversy between the parties, or of correcting any defect or error in any pleading." This Rule resonates quite firmly with the practice of amendment of pleadings in international proceedings as elucidated in V. S. Mani (Ed.), 'International Adjudication: Procedural Aspects', Developments in International Law (Vol.4), 1980, Brill Archives, p. 137 below:

Amendment of pleadings in international proceedings perform three important functions. One, they offer the parties an opportunity to rectify genuine mistakes which may have crept into the pleadings. Two, as the case proceeds and the evidence and argumentation gradually unfold themselves illuminating the diverse aspects of the case, amendments enable the parties to develop their respective defences in the context of changed perspectives. Three, amendments help the parties and the tribunal to identify the areas of agreement and those in controversy.

21. In the instant case, Reference No. 10 of 2013 was the subject of an order for retrial *de novo* issued in November 2015 in respect of actions that had allegedly ensued in July 2013. Owing to the passage of time, the status of the subject matter therein inevitably arose as an issue at the retrial. Indeed, at the commencement of the Scheduling Conference in respect thereof, it did transpire that the status of the subject matter therein had changed with the auction of the UTC mall by the Rwanda Revenue Authority. Hence, the oral application for the amendment of the Reference was intended to address the changed circumstances, and simultaneously enable the determination of the real issues in controversy between the parties as provided by Rule 48 of the Court's Rules of Procedure. The question would be whether the Amended Reference that was subsequently filed by the Respondent pursuant thereto does in fact violate the Court's Rules or established principles governing the amendment of pleadings, as has been alleged.
22. Rule 50 of the Court's Rules succinctly addresses that question. Rule 50(1) encapsulates the general mandate of the Court to allow the amendment of pleadings on such terms as it considers just. Rule 50(2), on the other hand, specifically addresses scenarios where an amendment to pleadings is sought

against the backdrop of an expired limitation period. The import of that Rule is that regardless of the expiration of any limitation period by law prescribed, the Court may grant a party leave to amend its pleadings in designated circumstances. The Rule thus obliterates considerations of limitation as a basis for denying an amendment in the designated circumstances. We do not find the circumstances in Rule 50(2)(a) applicable to the Application before us because the amendment in issue here is not a mere change of names. However, Rule 50(2)(b) and (c) are quite pertinent thereto. We therefore revert to a consideration thereof.

23. It seems to us that the bone of contention in the present Application is the filing of an Amended Reference that allegedly introduces a new cause of action and seeks to obliterate the Applicant's claim to time limitation as a defence to the Respondent's allegations. In that regard, the Applicant apparently seeks to rely upon the provisions of Rule 50(2)(c) of the Court's Rules in support of its case. This position was buffered by the submission of Mr. Ernest for the Interveners. We have carefully considered Rule 50(2)(c) of the Rules. It mandates the Court to allow an amendment that adds (or substitutes) a new cause of action, notwithstanding the expiration of a limitation period in respect thereof, provided that the new cause of action **'arises out of the same facts or substantially the same facts'** as the cause of action in the original pleadings. Consequently, a party that seeks to rely on that Rule to object to a proposed amendment would be required to demonstrate that the new cause of action does NOT arise from the same facts or substantially the same facts as the one in the original Reference. However, a question inherent in Rule 50(2)(c) and indeed in the present Application is whether the Second Amended Reference does in fact introduce a new cause of action, in the first place, as has been extensively argued.
24. A cause of action in this Court's legal regime has been held to exist **'where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty.'** See *Sitenda Sebalu vs. The Secretary General of the East African Community & Others* EACJ Ref. No. 1 of 2010, *Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda*, EACJ Ref. No. 11 of 2013 and *British American Tobacco (BAT) vs. Attorney General of the Republic of Uganda* EACJ Application No. 13 of 2017. Suffice to note, contrary to the submission of learned Counsel for the Respondent, that a cause of action in our Community Law is not premised on the definition of a cause of action in *Auto Garage vs. Motokov* (supra) given that a claimant in this legal regime is not claiming a common law right such as would necessitate the demonstration of a right or interest that was

infringed and the culpability of the defendant therefor. See Sitenda Sebalu vs. The Secretary General of the East African Community & Others (*supra*).

25. In the matter before us, it had been pleaded in the Original Reference that was filed on 22nd November 2013 that the assumption by the Kigali City Abandoned Property Management Commission of the management of the UTC mall was a blatant contravention of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty, as well as contrary to the Republic of Rwanda's obligations under the Treaty to enhance and strengthen partnership with the Private Sector and Civil Society in order to achieve sustainable socio-economic and political development. See paragraphs 13 and 14 of the Original Reference. Consequently, under the Community law espoused hereinabove, the cause of action in the Original Reference would have been the alleged contravention of the cited Treaty provisions by the Respondent therein, the Republic of Rwanda. The act of taking over the management of the mall by the Committee would simply have been the manifestation of the alleged contravention or breach of the said Treaty provisions.

26. On the other hand, the First Amended Reference essentially substituted the Kigali City Abandoned Property Management Commission, the actions of which were in issue in the Original Reference, with the Committee in Charge of Unclaimed Properties in Nyarugenge District Property Management Commission. It attributed the same actions it had challenged with regard to the Kigali City Abandoned Property Management Commission to the said Committee. See paragraphs 6 - 13 of the said Reference. It was also pleaded in that Amended Reference that the proceeds from the management of the mall had been placed into an account that the Republic of Rwanda had control over, and Law No. 28/2004 Relating to the Management of Abandoned Property, on which the Committee's actions had been premised, was inapplicable to UTC. See paragraphs 16 and 18. However, the cause of action in the First Amended Reference remained the same as that in the Original Reference, to wit, the contravention of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty by the Respondent State. The First Amended Reference was not challenged by the present Applicant therefore, for present purposes, it is the substantive yardstick against which the allegations raised in respect of the Second Amended Reference will be interrogated.

27. On that premise, with due respect, we are unable to agree with the averment in paragraph 9 of the present Application that the cause of action pending before this Court is that in respect of the impugned actions of the Kigali City Abandoned Property Management Commission. The First Amended Reference having

see,

substituted the Kigali City Abandoned Property Management Commission with the Committee in Charge of Unclaimed Properties in Nyarugenge District Property Management Commission, the former entity is not in contention any more. Rather, on the basis of the definition of a cause of action espoused in Sitenda Sebalu vs. The Secretary General of the East African Community & Others(supra), Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda (supra)and British American Tobacco (BAT) vs. Attorney General of the Republic of Uganda (supra), the substantive cause of action before us presently is the contravention of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty provisions by the Republic of Rwanda on account of the impugned actions of the Committee in Charge of Unclaimed Properties in Nyarugenge District Property Management Commission. We so hold.

28. Conversely, the Second Amended Reference that is in contention presently essentially introduces four (4) new facets to the First Amendment: one, the shareholding of the Respondent Company (paragraphs 3 – 5); two, a credit facility in the sum of 1,300,000 Rwandan Francs (paragraph 20); three, a new law relating to abandoned property, namely, Law No.39/2015 (paragraphs 28 – 30), and four, the actions of the Rwanda Revenue Authority (introduced in paragraph 19, but the substance of which is in paragraphs 31 – 32). However, the Second Amended Reference did also retain the cause of action in the Original and the First Amended References, to wit, the contravention of the same Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty by the Respondent State.

29. Suffice to note that the Applicant herein did not take issue with the amendments in respect of either the shareholding of UTC, the credit facility it allegedly had or Law No. 39/2015. It only seeks to challenge the amendments that introduced the actions of the Rwanda Revenue Authority, which it contends amounts to the introduction of a new cause of action. This is set out in paragraphs 10 – 12 of the Notice of Motion before us presently. We reproduce them below.

10. *That new introduced cause of action in the 2nd amended reference is 'the action of the Rwanda Revenue Authority other (than) that of the Nyarugenge District Commission in charge of the abandoned property which arose on 29th July 2013, the action of Rwanda Revenue Authority is auctioning the mall due to the unpaid taxes which arose 27th September 2017 was never part of the existing reference No 10 of 2013 pending before this Honourable*

Court and in this manner the court cannot handle two different causes of action that arose in different periods and from and by different bodies in the same reference.

11.
12. *That it is in the interest of justice that the Court should strike out or expunge all the pleadings introducing a new cause of action in the same Reference pending before this Honourable Court under the cover of leave of amendment, such that the Respondent may have a chance of filing a new and independent Reference if it still has interest in the actions of the Rwanda Revenue Authority.*

30. Against that background, we now interrogate the question as to whether indeed the amendments in issue presently do amount to a new cause of action viz the cause of action in the First Amended Reference. **Blackstone's Civil Practice 2005, para. 31.15, p.318** provides a most persuasive guide on this subject. It states:

In assessing whether proposed amendments in fact amount to a new cause of action (rather than a clarification of the existing cause of action), it is necessary to consider the statement of case as a whole (Leeds and Holbeck Building Society vs Ellis (2000) LTL 5/10/2000). ... If the new plea introduces an essentially distinct allegation, it will be a new cause of action. ... Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action (Savings and Investment Bank Limited vs. Fincken (2001) EWCA Civ. 1639).

31. In the same vein, we consider most persuasive and quite instructive the established practice in the International Court of Justice (ICJ) whereby the court routinely allows substantial amendments to pleadings, provided that they do not substantially alter the nature of the case. This practice is well articulated in **V. S. Mani (Ed.), 'International Adjudication: Procedural Aspects', Developments in International Law (Vol.4), 1980, Brill Archives, p. 138** as follows:

The Court has also invoked quite frequently its 'general power' under Article 48 of the Statute to permit substantial amendments to pleadings. However, its established practice demonstrates that the Court has always been wary about observing at least two operational rules before granting permission for such

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amendments. One, the amendments sought should not substantially change or alter the nature of the case. Two, a party should not be permitted to take the opposite party by surprise through the strategem of amendment of pleadings, and therefore the latter should be heard before a motion for amendment is granted.*(Our emphasis)*

32. We have carefully considered both the First and Second Amended References in Reference No. 10 of 2013. We have also carefully considered the arguments of all Counsel. We find that the actions complained of in the First Amended Reference with regard to the Committee in Charge of Unclaimed Properties in Nyarugenge District Property Management Commission (hereinafter referred to as 'the District Commission's Committee') are incidences of alleged breach that can be summed up under the impugned assumption of the mall's management. These actions substantiate the cause of action in that matter which, as we have stated hereinabove, is the alleged violation of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty.
33. On the other hand, in paragraphs 31 and 32, the Second Amended Reference seeks to introduce the act of the mall's auction, and purports to hold the Respondent therein responsible for the said action alongside the District Commission's Committee and the Rwanda Revenue Authority. We reproduce paragraphs 31 and 32 of the Second Amended Reference below.

Second Amended Reference

31. *The high handed manner of take over of the mall by the Rwanda Revenue Authority and its eventual sale when the same was purportedly being well managed by the State of Rwanda is a well orchestrated plan by the State to seize the company from its rightful owners evidenced as follows:*

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)

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32. *That the above actions of both the Committee in Charge of Unclaimed Property, Rwanda Revenue Authority, and on the whole, the State of Rwanda are blatant contraventions of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the East African Community Treaty as amended.*
34. Quite clearly the Applicant Company in the First Amended Reference is essentially aggrieved by its deprivation of proceeds from the mall as a result of the assumption of management therefor by the District Commission's Committee, an agency it seeks to hold the Respondent State responsible for. The alleged deprivation of the use of the Company's property is the crux of the matter therein. In the Second Amended Reference the said deprivation is extended to the eventual sale of the property by another agent that the Applicant Company seeks to hold the Respondent State similarly responsible for. The complaint therein does still gravitate around the deprivation of the Company's use and enjoyment of its private property. Accordingly, we take the view that the amendments do not substantially change the nature of the case. If, as was opined in Blackstone's Civil Practice (supra), the amendments had introduced an essentially distinct allegation in respect of an entirely different subject matter, we might have considered them to have substantially altered the nature of the Reference and thus introduce a new cause of action. However, in the instant case, the central issue in both Amended References remains the exemption of the purported owners of the UTC mall from its enjoyment and utilisation. Further, the Second Amended Reference is clearly premised on the violation of the same Treaty provisions as were relied upon in the First Amended Reference. We are, therefore, satisfied that the Amended Reference does not raise a new cause of action but, rather, introduces another incidence of breach in respect of the pre-existing cause of action. We so hold.
35. Be that as it may, for completion, had we determined the Second Amended Reference to have introduced a new cause of action, it is abundantly clear to us that that in itself would not bar the proposed amendments given the express provisions of Rule 50(2)(c), which do permit the introduction of a new cause of action within certain parameters. Whereas we were quite extensively addressed on the principles espoused in case law from the domestic courts of individual Partner States, in the face of binding Community law as enshrined in the Court's Rules of Procedure, such case law shrinks in relevance and applicability. The question before the Court for purposes of Rule 50(2)(c) would be restricted to whether such new cause of action arises from the same facts or substantially the same facts as did

the original cause of action. The test of substantiality in this context is fairly well articulated in Blackstone's Civil Practice 2005¹ as follows:

Whether amendments involve the same or substantially the same facts as those already in issue is largely a matter of impression (*Darlington Building Society vs. O'Rourke James Scourfield (1999) PNLR 365*). ... It was held in *Hoechst UK Ltd vs. Commissioners of Inland Revenue (2003) EWHC 1002 (Ch)* that it is not enough that the background facts of the two claims are the same: the central facts of both causes of action must be the same or based substantially the same facts. In making this assessment the judge must not confine himself to the original statements of the case, but must consider the facts that would have had to be litigated in the original statement of the case (*Hemmingway vs. Roddam (2003) EWCA Civ. 1342*). (Our emphasis)

36. Applying that test to the matter before us, as we did state hereinabove, in this case the central question is UTC's deprivation of the management, use and ownership of its mall: the appropriation thereof by the Applicant. This property rights question is substantially the same in both the original and purportedly new causes of action.
37. Further, the prejudice likely to be suffered by a defendant has been proposed as another important factor that is taken into account by courts when considering whether or not to allow amendments that introduce a new cause of action despite the expiration of a limitation period. More especially, the degree to which the defendant is prejudiced in being unable to investigate the facts of the new claim through the disappearance of evidence. See Blackstone's Civil Practice 2005, para. 31.19, p.320. However, in the present Application it is not readily apparent to us what prejudice the Applicant would stand to suffer by way of loss of evidence or at all. We find no averment that the loss of evidence owing to the passage of time since the auctioning of the mall was prejudicial to the Applicant. The Applicant did cite the obliteration of its defence of time limitation as the prejudice it stood to suffer by the Amended Reference. However, as we have stated earlier herein, quite explicitly Rule 50(2) provides for the amendment of pleadings regardless of the expiration of a limitation period. In the result, with respect, we find Rule 50(2)(c) inapplicable to the present Application. We so hold.

¹ Ibid. at para.31.18, p.319

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38. Rule 50(2)(b), on the other hand, does address the amendment in issue presently. That Rule pertains to a scenario where an amendment would have the effect of altering the capacity in which a party is or would be made party to proceedings before the Court, provided that **'the altered capacity is one which such party could have been or could have been made party at the institution of the proceedings.'** In the matter before us, UTC originally sought to hold the Republic of Rwanda responsible for the action by the District Commission's Committee of taking over the management of the UTC mall. Through the Second Amended Reference, however, UTC seeks to alter the capacity in which it makes the Respondent State party to the proceedings in Reference No. 10 of 2013, by purporting to also hold it responsible for the auction of the mall by the Rwanda Revenue Authority. The altered capacity is one in which the Respondent State could have been in at the institution of the Reference had the said auction transpired then, as UTC could even then have sought to hold it responsible for the said action. Stated differently, had the auction that is now in issue arisen in 2013 alongside the assumption of management, UTC could have sought to hold the Republic of Rwanda responsible for both alleged incidences of breach.
39. Indeed, in our considered view, Rule 50(2)(b) does resonate with the second function of the amendment of pleadings in international proceedings, to wit, enabling parties to develop their respective cases in the context of changed perspectives or circumstances. It does also appear to equate amendments that alter the capacity in which a party is or becomes a party to proceedings before this Court to non-substantial alterations to the gist of a case, a persuasive albeit pertinent consideration in the grant of amendments in proceedings before the ICJ. See V. S. Mani (Ed.), 'International Adjudication: Procedural Aspects', Developments in International Law (Vol.4), 1980, Brill Archives, pp. 137,138. We are, therefore, satisfied that the Amended Reference is properly on the Court record under Rule 50(1) and (2)(b) of the Court's Rules.

Conclusion

40. Rule 47(1) of the Court's Rules does provide for the striking out of all or part of any pleading before this Court, as has been sought by the Applicant. It reads:

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 trial of the case;**
- (b) is scandalous, frivolous or vexatious, or**

(c) is an abuse of the process of the Court.

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 'a matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense'²; while a vexatious suit is defined as one 'instituted maliciously and without good cause'³. 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 court as an abuse of process.

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 47(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 neither prejudice nor delay the fair trial of Reference No. 10 of 2013, but rather, clarifies the real issues in controversy between the Parties.
43. In the result, we would disallow the Application to strike out the Amended Reference. We make no order as to costs.

² Ibid. at p. 1372

³ Ibid. at p. 1596

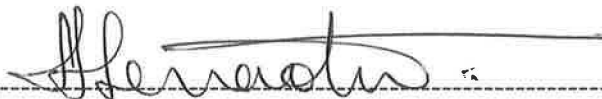
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Dated, signed and delivered at Arusha this 29th day of March, 2018.



HON. LADY JUSTICE MONICA K. MUGENYI

PRINCIPAL JUDGE



HON. ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE



HON. JUSTICE FAKIHI A. JUNDU

JUDGE



HON. JUSTICE AUDACE NGIYE

JUDGE



HON. DR. JUSTICE CHARLES O. NYAWELLO

JUDGE