

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO.29 OF 2016**

**YARA TANZANIA LIMITED.....PLAINTIFF**

**VERSUS**

**LEONARD DOMINIC RUBUYE**

**(t/a Rubuye Agro- Chemical Supplies) .....1<sup>st</sup> DEFENDANT**

**RUBUYE AGRO BUSINESS COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**MRUMA, J.**

On 10<sup>th</sup> March, 2016 the Plaintiff filed Commercial Case No 29 of 2016. The matter went through various stages up to the closure of Plaintiff's case which was done on 8<sup>th</sup> of May, 2017.

The defence case was scheduled to commence on 20<sup>th</sup> March 2017. Unfortunately for the sickness of the Plaintiff's counsel mother it could not proceed therefore it was adjourned to 4<sup>th</sup> April 2017, and again to 8<sup>th</sup> May, 2017, 30<sup>th</sup> June 2017, 7th July 2017 and to 1<sup>st</sup> September, 2017. In most of those dates it was adjourned at the Defendant's instances. As it turned

out, the matter could not proceed on 1<sup>st</sup> September and it was adjourned for defence hearing on 3<sup>rd</sup> October, 2017.

On the scheduled date (that is 3<sup>rd</sup> October, 2017), Mr. Ayubu Mtafya, Advocate appeared for the Plaintiff while Mr. Mtogesewa, Advocate appeared for the Defendant. Mr. Mtogesewa informed the court that though the matter was fixed for defence hearing it had come to his attention that there is a point of law regarding the life span of the case and that he intended to file a notice of preliminary objection against the continuity of the case.

On his part, Mt. Mtafya confirmed that he had been served with a notice of Preliminary Objection and that he had no objection on the setting of a date for hearing of the same. Accordingly the court set the date for hearing of the preliminary objection.

The preliminary objection as raised by Mr. Mtogesewa is to the effect that:-

**'By operation of Law the suit herein no longer subsists or exists for trial in so far as its life span did expire and since then there has been no pending application to extend it as it is expressly sanctioned by the law'.**

Submitting in support of the objection, Mr. Mtogesewa adopted his skeleton written arguments filed in support of the same. In essence his submissions and arguments in the skeleton arguments are to the effect that pursuant to Rule 32 (2) of the High Court (Commercial Division) Procedure Rules, the initial life span of this case lapsed on 10<sup>th</sup> January,

2017 and further that the maximum period of twelve months ended on 10<sup>th</sup> March, 2017, thus in view of that provision of the law this court lacked authority or power to determine the case in absence of an application for extension of the life span. He said that such application ought to have been made by the Applicant because in the adversarial common law jurisdiction, only a litigant or party who benefits from a specific relief is duty bound in law to make such an eventual application. To support his position he cited the decision of this court in the Case of **Louis Dreyfus Commodities (T) Ltd Versus Rubuye Agro Business Company Limited, Commercial Case No 147 of 2015**, in which it was decided that if no application (for extension of life span) is made, the suit should not proceed.

The learned counsel contended further that in the present case there is no application and that even if there was one the same could not stand in view of the decision in the case of **Munawar M.Pardan V Jubilee Insurance Co Limited**, reported in **Tanganyika Law Society Report, 2016 at pg 228** and also in the light of the decision of this court in **SAS Company Limited v Tangamano Transport Ltd & Another, Commercial Case No 28 of 2008**. He accordingly invited the court to invoke Rule 32(2) and strike out the suit with costs.

On his part Mr. Ayub Mtafya for the Plaintiff resisted the objection. He too adopted his skeleton written arguments. He told the court that all the rules and authorities which have been cited by the counsel for the Defendant and particularly Rule 32 do not provide for the consequences

after the expiry of the life span of the case, therefore the suggestion that the case ceases to exist is not provided in law.

The learned counsel submitted that since there is a lacuna in Rule 32(1) , the fall back has to be on the Civil Procedure Code and particularly **Order VIIIA Rule 5** thereof which provides for remedies where the time frame of case has expired. He supported his argument by citing to this court the decision of the Court of Appeal in the case of **Tanzania Harbours Vs Mathew Mtalakule, Civil Appeal No. 46 of 1999,CAT**,and this court's own decision in the case of **Bata Limited Canada v Bora Industries Limited, Commercial Case No.76 of 2005**. According to the learned counsel in both cases courts stated that the consequence of non compliance with the scheduling order is not to strike out or dismiss the case. He accordingly applied for extension of the life span of the case.

In rejoinder counsel for the Defendant submitted that the consequence of expiry of life span is clear by operation of the law. He that this court cannot determine a case which it has no jurisdiction.

Regarding the lacuna in the Rules the learned counsel submitted that there is no lacuna in the rules particularly in respect of the life span of the case.

On the authorities cited, the counsel said that the case of Tanzania Harbours (supra) did not deal with the Commercial Court Rules.

The learned counsel opposed the prayer for extension of the life span of the case on the ground that it is improperly made because the

Defendant has already raised a preliminary objection and also that it has been raised in the skeleton arguments.

In conclusion the learned prayed for the sustainment of the preliminary objection and dismissal of the suit on the ground that the issue of life span goes to the root of the matter.

**Sub-rule (2) of Rule 32 of the High Court Commercial Division Procedure Rules, 2012** under which this objection is pegged and urged provides as follows:-

**"All commercial cases shall proceed and be determined within a period of ten months from the date of commencement and not more than twelve months"**

Under the provision of sub-rule (3), the law provides that:-

**"Thirty days before the expiry of the time prescribed under sub-rule (2), any party to the proceedings may orally apply to the court for extension of life span of the case and the court may upon sufficient reasons be adduced grant the application and the party in favour of whom the extension is made shall bear costs of such extension, unless the court directs otherwise"**

The High Court (Commercial Division) Procedure Rules were promulgated in 2012 with the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution commercial disputes in this division of the High Court.

Admittedly the bridge between substantive law and procedural law is that whereas the former defines the rights and duties of the parties in a proceeding, the later lays down the rules by which those rights and duties are enforced and realized.

The technical based preliminary objection raised in this case revolves around two issues. The first issue relates to obligation to seek extension of life span of the case and the question is on whose shoulder the law puts obligation to seek extension? The next question is about the about the fate of the case after the expiration of its life span.

Starting with the first issue the rule provides crystal clear that any party to the proceedings may orally apply for extension of the life span. In the case at hand neither party did apply. It has been submitted by Mr. Mtogeseva that the system of our courts being adversarial it was the Plaintiff who was supposed to apply and not the defendant because the Defendant has all the time he has denied any liability to the Plaintiff's claims and that she did not raise a counter claim.

With due respect to the learned counsel I do not agree. That is not what the law says. The law as I have just stated puts the burden on both parties to the proceedings. I have no doubt that the Rules Committee which is responsible for making these is very much alive of the adversarial system we have and if it had the intention to place the burden on the Plaintiff it would not have hesitated to put it that way as suggested by Mr. Mtogeseva. In the case of **Tanzania Fertilizer Company Limited Versus N.I.C. and Another; Commercial Case No. 71 of 2004** this

Court (Massati J) as he then was held that a party who finds that time for finalization of his case is about to expire is legally bound to seek for extension and he finds that time has already expired he is required to seek leave of the court to apply for extension. In that case the court was addressing **Rule 4 of Order V111A of the Civil Procedure Code** which is similar both in import and intent of Rule 32 of the High Court (Commercial Division) Procedure Rules. Thus, unlike Mr. Mtogese's view that the burden is always on the Plaintiff, the law puts the burden on the party who finds that the time for finalization of his case is about to expire and in the circumstances where the Plaintiff had closed its case and a prima facie case is made against him it would be more desirable for him have the life span extended than the Plaintiff because it is the Defendant's case which will be out of time than the plaintiff's case.

In summary therefore, like in Tanzania Fertilizers' case (supra), I find and hold that in law the obligation to apply for extension of life span of a case lies with such party who finds that time for finalization of her case is about to expire.

As stated hereinbefore I have gone through the court records. The record shows that this suit was filed on 10<sup>th</sup> March, 2016 and the first scheduling conference was conducted on 19<sup>th</sup> May, 2016. Under the provisions of Rule 32(2) of the Rules all commercial cases are supposed to proceed and be determined within a period of ten months from the date of commencement and not more than twelve months. Counting from the time

when the suit was filed, the maximum time limit of twelve months expired on 10<sup>th</sup> March, 2017.

It is on record that the hearing of Plaintiff's case was commenced on 22<sup>nd</sup> November, 2016 and it was closed on 17<sup>th</sup> February 2017 well within the life span of the case and the defence case was set to commence on 20<sup>th</sup> March 2017. Save that about two months later the Plaintiff's witness was recalled for purposes of tendering some exhibits the Plaintiff's case was completed within the 12 months prescribed by the law.

The defendant's case was scheduled to commence on 20<sup>th</sup> March 2017, however for reason that the trial judge was indisposed, defence hearing was adjourned to 4<sup>th</sup> April 2017 and again to 8<sup>th</sup> May, 2017 when PW1 was recalled to tender some exhibits.

On that same date when the defence counsel was invited to commence the Defence case he informed the court that his witness was not available and accordingly prayed for an adjournment to another date. Defence case was adjourned to 30<sup>th</sup> June 2017 but it had to be adjourned once again to 27<sup>th</sup> July, 2017 at the instance of the Defendant's counsel. On that later date defence case didn't commence as counsel for the Plaintiff was indisposed. Chronologically after the closure of the Plaintiff's case defence case was adjourned three times at the Defendant's instance and once at the plaintiff's instance. Unfortunately neither party applied for extension of life span. Then came 3<sup>rd</sup> October 2017 when the Defence counsel raised the present preliminary objection.



The next issue is what is the fate of the proceedings after the expiry of the life span of the case. It is common knowledge that under Rule 4 of Order VIII A of the Civil Procedure Code the position is not fundamentally different. The new High Court (Commercial Division) Procedure Rules is a new set of rules of procedure with the overriding objective of enabling this fast track division of the High Court to deal with commercial cases speedily but fairly and justly. The rules are not intended to enable the court to take draconian steps such as striking out or dismissing the proceedings on flimsy grounds. The court has to consider what will be likely to happen if it proceeds to strike out the proceedings.

The common experience is that whenever proceedings are strike out on the ground that its life span has expired, the Plaintiff will invariably seek leave to file the suit afresh as there is no law which bars a suit which was strike out on that ground from being filed afresh. The net result will be increase in costs pertaining to litigation as well as waste of judicial time and resources. This wrong (unnecessary wastage of time and costs) must be what the Rules Committee intended to curb by making special rules for this division of the High Court. In the case of **Tanzania Harbours Authority Versus Mathew Mtalakule** Civil Appeal No. 46 of 1999 which was decided before the coming into force of the rules but which is binding in this court, the Court of Appeal of Tanzania had an opportunity to deal with a similar situation though under different law. The Court held that the highest order this court can make (in a case where it finds that the life span or speed track of the case has expired) is an order for costs.

Having observed the above it goes without saying that both parties to the proceedings were duty bound to apply for extension of life span of the case after realizing it had expired. No party will be allowed to cause the delay by buying time while crossing her fingers waiting for the life span to expire and come up to seek benefit from her own eventualities. That was not the intent of the law. I believe that the rules of procedure including rule 32 (3) have considerable value in terms of administration of justice but new challenges brought about by the new rules brings into focus the fundamental purpose of civil procedure which is to enable courts to deal with cases speedy but justly and fairly. The need to dispose of cases speedy cannot override the fundamental underlying principle of dispensing substantive justice.

Now back to the pressing issue of 'what is the fate of the case after the life span has expired' it is clear that by operation of the law after the life span has expired the case is brought to a standstill and all the proceedings done without life span be extended are of no legal value and in an appropriate circumstances they may be expunged from the records or formerly adopted by the court. In **Africa Medical Research Foundation v Stephen Emmanuel & Others, Civil Case No.17 of 2011** (unreported) Twaib, J stated:-

**"One thing is clear from these provisions [relating to speed tracks under the CPC]: the law does not empower the court to strike out a suit on grounds that no application has been made by the party benefiting from such amendment or**

**departure. Neither is there anything that can be construed as requiring that there must be an application to that effect before the court can move to order a departure or amendment”.**

In **Ruvu Gemstone Mining versus Reliance Insurance Company (T) Ltd, Misc .CC.No.21 of 2016** this court (**Mwambegele J**) as he then was faced with the same issue as to what is the fate of the case after the life span of the case as expired, his Lordship observed that:-

**“I have no speck of doubt that jurisprudence under the provisions respecting speed track under the CPC and those respecting life span in the Rules is the same. In both instances, the time frames were put in place in order to expedite the hearing of cases in courts by fixing time frames within which they must be finalized”.**

It would appear from the above cited cases the provisions in respect of speed track (under the Civil Procedure Code) and life span (under the High Court (Commercial Division) Procedure Rules are mere catalyst for speedy disposal of litigations. They were not intended to punish litigants or any of them as counsel for the Defendant would love this court to believe.

In **Bata Limited Canada** (supra) discussing Order VIIIA Rule 5 of the CPC, Makaramba J, had this to say at page 14 and 15 of the ruling :-

**"...considering the fact that in the instant case the non compliance with Rule 5 of Order VIII A of the CPC, was occasioned at the instance of both parties and sometimes even the Court's itself, this Court is left with no option other than drawing inspiration from the decision of the High Court at Arusha in Civil Case No.40 of 1996 between Mrs. Asha Ramadhani Laseko vs Ramadhani Ali Laseko and Another, to find that all the times this court adjourned this case, it was reasonable and justifiable grounds, and therefore singling out the Plaintiff for blame for the delay may amount to injustice in its own right."**

As stated hereinbefore, the delay in concluding this case within the prescribed life span was occasioned by both parties and in most cases by the Defendant and in few instances by the court. Like in Bata Limited Canada's case (supra) it will be unfair to place the blames on the Plaintiff and dismiss or strike out her case.


Finally there is Article 107 (2) (e) of the Constitution of the United Republic of Tanzania requires courts in this country to dispense justice without being tied up with technicalities which may obstruct justice. This Article is not intended to wipe out the rules of procedure of our courts. The article is a reflection of the saying that rules of procedure are handmaids of justice meaning that they should be applied with due regard to the circumstances of each case. I cannot see how in this case Rule 32 (2) can be deployed to bring the case to an end in Defendant's favour in total

disregard of her part in the delay of the case which contributed to the expiry of its life span and the requirement of the law that either party to the proceedings can apply for extension of life span. It is high time for defence counsel to defending a case is not the same thing as obstructing or blocking the case from proceeding to its finality. Being engaged as a defence counsel entails giving professional support to the defendant in defending the Plaintiff's claims. This is different from trying by hook and nail to block or obstruct the claims from being heard and determined on merits.

It should be noted that under Rules, it is only under the provisions of Rule 47, where the court is allowed to dismiss the suit if no application is made within six months of the last adjournment. Here the application has been made.

In view of the above discussion, I partly sustain the preliminary objection to the extent that all proceedings recorded immediately after 8<sup>th</sup> March, 2017 are expunged from the record of this case. However, in order to do substantive justice in this case parties are advised to apply for extension of the life span of the case retrospectively from the date of expiry of the initial life span. I will make no orders as to the costs.

Order accordingly,

  
A.R. Mruma

Judge



**Dated at Dar Es Salaam this 15<sup>th</sup> Day of February 2018**