

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 185 OF 2013

MOTO MABANGA **PLAINTIFF**

VERSUS

1. OPHIR ENERGY PLC **1st DEFENDANT**
2. OPHIR SERVICES PTY LTD **2nd DEFENDANT**
3. BRITISH GAS TANZANIA **3rd DEFENDANT**

RULING

Date of the Last Order: 13/12/2017

Date of the Ruling 12/02/2018

SEHEL, J.

This is a ruling on an application for extension of the lifespan of the suit made orally by counsel Mnyele representing the plaintiff. The prayer was made on 13th day of December, 2017 when the matter was scheduled to come for orders.

The counsel for plaintiff told this Court that on 20th day of February, 2017 the court extended the lifespan of the case to another ten months. He said the ten months are about to expire on

20th day of December, 2017 when the Court will be on vacation and given the stage the case has reached it is unlikely that it will be concluded by 20th day of December, 2017. He said both parties have contributed to the delay in finalizing the case timely. He submitted that since the rules are silent then in terms of Rule 2 (2) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules") and Sections 93 and 95 of the Civil Procedure Act, Cap.33 (hereinafter referred to as "CPC") he prays for the extension of the lifespan.

Counsel Kameja representing the 1st and 2nd defendants heavily objected to the prayer by submitting that lifespan of commercial cases is governed by Rule 32 of the Rules thus there is no reason for the counsel to resort to the provisions of CPC. He argued Rule 32 (3) clearly provides for the party to make an oral application for extension of lifespan within thirty days before the expiry of the prescribed period. He said in the matter at hand the lifespan of the case was extended to ten months more on 20th February, 2017 which means that the ten months is the prescribed period for the purposes

of Rule 32 (3) of the Rules. In that respect, the counsel said, the plaintiff ought to have made his application at latest by 30th November, 2017. With these submissions, the counsel contended that the application is time barred. He thus prayed for the application not to be entertained.

Counsel Nangi representing the 3rd defendant joined hands with the submissions made by the counsel for the 1st and 2nd defendants and added the following: it is wrong to invoke rule 2 (2) of the Rules as there is no lacuna; the application is pursued under wrong provision of the law because Section 93 of CPC is applicable to any act prescribed or allowed by the court so when the court was extending time, it was not acting under Section 93 of CPC. Further, he argued Section 95 of CPC is equally not applicable because there are specific provisions in the Rules that cater for extension of the lifespan of the suit. The counsel further contended that the plaintiff has not advanced any sufficient reason for the extension of the lifespan since the reasons that it is not realistic to finalize the suit and that both parties contributed to the delay are not sufficient. He

concluded his submissions by referring the Court to the case of **Makamba Kigome and Another Vs Ubungo Farm Implements Limited and Another**, Civil Case No. 109 of 2005 that quoted in approval the case of **John Cornel Vs A. Grevo (T) Ltd**, Civil Case No. 70 of 1998 wherein Kalegeya, J (as he then was) stated:

"However unfortunate it may be for the plaintiff, the law of limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."

On the applicability of Rule 32 of the Rules, Counsel Mnyele rejoined that it is applicable specifically within the first ten to twelve months of the lifespan of the suit as such it is not applicable to the matter at hand where there had been several extensions. Therefore, to the counsel's view Rule 32 is silent regarding the matter at hand thus the invocation of Sections 93 and 95 of CPC was proper. Regarding Section 95 of CPC he said it provides for an inherent powers of the Court to act in the interest of justice. He argued that it is in the interest of justice that the suit is concluded on merit. On

Section 93 of CPC he said it provides for general powers of extension of time. He contended there are sufficient cause since there is application pending and that the delay was caused by defendants who have been filing preliminary objections and huge affidavits to oppose the application. On the case of **John Cornel (Supra)** he said it is not applicable as there is no issue of time limitation. He thus prayed for the application to be allowed for the interest of justice.

From the submissions of the counsels it is not disputed that the lifespan of the present suit was last extended on 20th February, 2017 to a further period of ten months, that is, up to 20th day of December, 2017. Since the lifespan was set to expire within seven days from the date when the case was called for orders, counsel for the plaintiff felt prudent to invoke the provisions of rule 2 (2) of the Rules; Sections 93 and 95 of CPC and made a prayer for an extension of lifespan. Counsels for defendants in objecting the prayer reasoned that the provisions of the laws are not applicable since there is specific provision in the Rules that caters for extension of lifespan and this is none other than Rule 32. It is therefore for this

Court to determine as to whether Rule 32 caters for the plaintiff's situation.

The present issue should not detain me much because I have held before in this same suit that sub- rule 3 of rule 32 refers to the time prescribed under sub-rule 2. The time prescribed under sub-rule 2 ranges from ten to twelve months from the date of commencement. The date of commencement of the suit was explained by this Court in its several decisions to mean "the date of presentation of the plaint or lodging of the plaint" (See the cases of **Sinyoma Company Ltd Vs. Bulyanhulu Gold Mine Ltd, Commercial Case No. 30 of 2013** and **FBME Bank Ltd Vs. Lupembe Tea Estate Co. Ltd and 2 Others**, Commercial Case No. 59 of 2012 (both Unreported)). Therefore the right to make the application for extension of the lifespan stipulated under Rule 32 (3) is limited to the first ten or twelve months from the date of the institution of the suit and not to subsequent applications like the matter at hand. In that regard, I totally agree with counsel Mnyele that Rule 32 of the Rules is not applicable to the matter at hand. Further, Rule 32 is silent

regarding subsequent applications. Consequently, resort has to be made to the provisions of CPC in terms of rule 2 (2) of the Rules.

I am alive that counsel for plaintiff is pleading for the court to act in the interest of justice as provided for in Section 95 of CPC. Interest of justice needs to be balanced between the parties to the suit. On the one hand, the Court needs to see that the main suit is decided on merits and it should not go off a tangent by a side wind as it were due to expiration of the life span. After all a party cannot have any interest in getting his own suit be strike out for affluxion of time. On the other hand, there are times when there will be unscrupulous parties who would not wish for the case to come to its finality. It is for this reason that the law as it stands requires for any party to the suit to make an application, by adducing sufficient reasons, for extension of the lifespan of the suit. As such the Court is enjoined to weigh the interest of justice according to the facts and circumstances of each case.

The facts of this case are such that the last extension of the lifespan was made on 20th day of February, 2017 by extending it to a

further period of ten months. At that time the suit was at a stage of first scheduling order wherein scheduled order was made and the suit went for mediation. Mediation was completed on 19th day of April, 2017 with no settlement agreement hence parties were directed to file their witness statements as required by Rule 49 (2) of the Rules which they dully complied with. On 5th day of May, 2017 the suit came for final pre-trial conference wherein the trial of the case was fixed to commence on 7th day of June, 2017. On 7th June, 2017 counsel for the plaintiff prayed for adjournment of hearing of the suit with the reason that the plaintiff has filed an application which has implication to the main suit. Therefore the hearing of the suit was adjourned so as to pave way for finalization of the hearing of the application filed by the plaintiff. The plaintiff was further condemned to pay costs for adjournment. Since then the suit was stalled and the application filed by the plaintiff is yet to be finalized.

It be noted here that the main purpose of enacting the provision of Rule 32 was for the expedition hearing and determination of commercial cases so that the goal to speedy

administration of justice would be achieved. From the above facts it is obvious that the suit was ripe for hearing on 7th June, 2017 but it failed to proceed due to the plaintiff's action of instituting an intervening application. To me interest of justice requires that the application for extension of the lifespan should not be entertained. I am alive that rule 32 of the Rules is silent on what should be done in case where the lifespan of the suit has expired. But as I said by the time the suit was fixed to proceed with the hearing, it was stalled by the plaintiff by filing an application which is yet to be finalized. Rule 29(3) of the Rules clearly provides that after the court having made directions and if any party defaults in complying with the direction then, the court on its own motion or upon application dismiss the suit, or strike out the defence or counter claim or enter judgement or make such order as it considers fit. The plaintiff in the matter at hand defaulted in complying the court's direction. I therefore proceed to dismiss the suit under rule 29 (3) of the Rules. Defendants shall have their costs. It is so ordered.

Dated at Dar es Salaam this 12th day of February, 2018.



B.M.A Sehel

JUDGE

12th day of February, 2018.

