IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CIVIL APPEAL NO. 111 OF 2015

NAZIRA KAMRU.....APPELLANT

VERSUS

MIC TANZANIA LIMITED.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mruma, J.)

Dated the 25th day of September, 2012
In
Civil Appeal No. 25 of 2011

JUDGMENT OF THE COURT

26th & 30th May, 2016

JUMA, J.A.:

On 1st day of May, 2003, the appellant NAZIRA KAMRU entered into a Dealership Agreement with the respondent MIC TANZANIA LIMITED wherein she was appointed to market and carry out sales of the respondent's MOBITEL. The agreement took effect from 1st May, 2003 and was scheduled to end on 1st May, 2006. The appellant's exclusive area of

operation under the Dealership Agreement covered Mwanza, Musoma, Shinyanga, Bukoba and Sirari.

Almost twelve months into that agreement on 4th February, 2004, the respondent served the appellant with a one month's notice of termination of the agreement. The impending termination was explained to be because the appellant had materially breached clauses of the agreement pertaining to— the business infrastructure (clause 11); the minimum operating standards (clause 14); and the performance monitoring (clause 15). The respondent followed this notice up with another letter dated 13th February, 2004 wherein the appellant was to be paid Tshs. 5,235,419.62 as settlement for outstanding commercial undertakings. By the same letter, the appellant was asked to hand over the premises and property to a new Principal Dealer.

By the plaint filed on 8th March, 2004 in the District Magistrate's Court of Mwanza at Mwanza, the appellant sued

the respondent praying *inter alia* for an order to restrain the respondent from terminating their agreement and an order to refrain the respondent from entering into a new Dealership Agreement with another person till the determination of the then subsisting Dealership Agreement. In the alternative, the appellant prayed to be paid Tshs. 97.5 million shillings for the material breach of the agreement.

The respondent, in its Written Statement of Defence defended the termination of the Dealership Agreement contending that as confirmed by an audit report, the appellant was in breach warranting the termination. Respondent referred to the contractual minimum operating standards which the appellant as a dealer failed to meet the agreed business goals. Amongst the operating standards, the appellant had failed to sell the minimum 2600 BUZZ kits as opposed to only 1200 BUZZ kits he sold.

Before the trial began on 24/8/2005, Mr. Gallati the learned counsel who appeared for the defendant (respondent herein)

proposed three issues for the trial court's determination which were all agreed upon by Mr. Kabonde, the learned advocate who represented the plaintiff (the appellant herein). The three issues were:

> *1. Whether the defendant breached the contract dated on 1st April 2003 signed between the defendant and the plaintiff.*
>
> *2. If the first issue is in the affirmative, whether the plaintiff suffered damages and how much.*
>
> *3. What are the rights the parties are entitled to, if any.*

At the conclusion of the learned trial magistrate found the respondent in breach of the contract and was ordered to pay the appellant Tshs. 72,300,000/= as special damages and Tshs. 10,000,000/= as general damages.

Aggrieved, the respondent filed an appeal before the High Court at Mwanza in Civil Appeal No. 25 of 2011. In a judgment dated 25th September, 2012, the learned first

appellate Judge (A. Mruma, J.) allowed the appeal noting that the plaintiff (the appellant herein) was duty bound to alert the trial court before the speed track expires. The first appellate Judge expunged from the trial court's record the evidence that was recorded after the expiry of the speed track. He then considered the remaining evidence where he said that there is no scintilla of evidence to support the appellant's claims.

Aggrieved with the decision of the High Court, the appellant appealed to this Court. In the Memorandum of Appeal, the Court is urged:-

> *1. That the honorable appellate judge erred in law to hold that failure to extend scheduled order after mediation failed, renders the case for plaintiff impotent during trial.*
>
> *2. That the honorable appellate judge erred in law to interpret the provision of Rule 4 Order VIIIA of the Civil Procedure Code Cap. 33 R.E. 2002 that proceedings immediately after the*

expiry of the scheduling order were a nullity despite uncontested renewal by parties.

3. That the honorable appellate judge erred in law to hold that specific damages pleaded in paragraph 10 of the plaint was not enough when coupled with oral testimony of the appellant to prove the same.

At the hearing of this appeal, the appellant was represented by learned counsel, Mr. Stephen Magoiga, while the respondent was represented by learned counsel, Mr. Cuthbert Tenga. Both learned counsel filed written submissions to support their respective positions in the appeal.

In his submission, Mr. Magoiga does not dispute that in line with Order VIIIA Rule 3 (3) (d) of the Civil Procedure Code (CPC) the trial of the case was assigned to speed track 4 (twenty four months) with the speed commencing from 15th July 2004 and the trial was to be concluded by 14th July 2006. What the learned counsel faults the first appellate judge for expunging from the record part of the evidence of the appellant which was recorded on

12th December, 2007 which was after the expiry of life span of the speed track. According to Mr. Magoiga, the decision of the first appellate Judge has gone far beyond the sanction for expiry of the speed track as provided for under Rule (4) of Order VIIIA of the CPC which provides the following sanction:

> *"**4.** Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure of amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise."*

The learned counsel faulted the first appellate Judge for unilateral expunging of evidence without first weighing the interests of justice. According to Mr. Magoiga, had the learned Judge considered the interests of justice, he would not have merely counted the number of days and drawn a demarcation line. Instead, he would have noticed many adjournments which were not attributable to the appellant alone. A good number of the

adjournments were even initiated by the trial court. Mr. Magoiga wondered why the first appellate Judge interfered while the record shows that the appellant on 8th February 2008 did pray before the trial court for extension of speed track, albeit belatedly. He argued that since the prayer for extension was not opposed by the respondent, the extension must be taken to have been regularized and the learned first appellate Judge erred when he expunged the evidence from the record. He added both the trial magistrate and the learned counsel for the respondent did not oppose the extension of the speed track because they were aware of the so many adjournments the case had suffered. He faulted the first appellate Judge for failing to take into account the prayer for extension of the speed track which the appellant made and which was not opposed.

The learned counsel for the appellant reiterated that the phrase "*bear the costs of such departure or amendment, unless the court directs otherwise*" under Rule 4 of Order VIIIA of the CPC, was neither intended to punish the plaintiff alone nor was it

intended to provide the sanction of expunging of evidence. He argued further that if the legislature had intended that Rule 4 of Order VIIIA of the CPC should provide the sanction of expunging the evidence, the Parliament could have stated so. He also pointed out that there is nothing in the words— *"unless the court directs otherwise"*— which would permit expunging of evidence as a consequence of the expiry of the speed track.

Mr. Magoiga insisted that even with the erroneous expunging of evidence, there was still evidence on record which proved that the respondent had breached the terms of its contract with the appellant. He concluded his submissions by urging us to allow the appeal reverse the judgment of the first appellate court and affirm the decision of the trial court. He prayed for costs.

Mr. Tenga, learned counsel for the respondent opposed the appeal. He urged this Court to find that the first appellate judge was right to conclude that the appellant's failure to extend the duration of the speed track rendered the whole proceedings subsequent to the expiry date null. The learned counsel further

submitted that the intention of the legislature when enacting Order VIIIA of the CPC was to ensure that litigation in courts are brought to conclusion within the scheduled period. Mr. Tenga also defended the decision of the first appellate Judge to expunge the evidence of the appellant (PW1) which was recorded after the expiry of the life of the speed track.

From the submissions made by the two learned counsel in this matter and from the totality of the record of appeal, this is a second appeal and this Court is inevitably concerned with points of law. There are two closely inter-linked points of law which calls for our determination. The first point is whether the scope of Rule 4 of Order VIIIA of the CPC includes the expunging of evidence recorded after the expiry of the speed track. The second point relates to the decision of the first appellate court to disregard the evidence of PW1 which was recorded on 24th August 2005 well before the speed track four expired.

There is no doubt in our minds that the assignment of appropriate speed tracks to different categories of cases

under Order VIIIA of the CPC brought in its wake an important case management tool to assist the trial judges and magistrates. Advantages of having in place case management systems are now well known in Tanzania and beyond. The District Courts Case Management Manual for the Judicial Committee Districts Courts of Delhi, 2005 highlighted the following:

> *"Case management is one of the most important factors in the administration of justice. It helps the Presiding Officer in deciding a case efficiently and quickly. It is not practicable to decide all cases in a day, month or year; hence every court needs to be familiar with techniques of case management and Court management."*

We have taken sometime to closely look at the wording of Rule 4 of Order VIIIA of the CPC which on its opening phrase states that once a speed track has been set—*"no departure from or amendment of such order shall be allowed"* – but soon thereafter the same rule provides for relief when time

overtakes the agreed speed track— *"unless the court is satisfied that such departure of amendment is necessary in the interests of justice."* We think that the words *"in the interests of justice"* under Rule 4 implies that the speed tracks identified under Rule 3 of Order VIIIA of the CPC are not cast in iron. Interests of justice may justify extensions of speed tracks.

We do not think we can go along with the conclusion reached by the first appellate Judge that since it was the appellant who initiated a suit against the respondent she alone has a duty to be vigilant to ensure that the assigned speed track does not expire before the trial comes to a close. In **John Morris Mpaki vs. The NBC Ltd and Ngalagila Mgonyani**, Civil Appeal No 95 of 2013 (unreported), the Court dealt with an appeal which had a single ground of appeal faulting the learned first appellate judge for dismissing the appeal while the appellant had not contributed to the delay which led to the expiry of the scheduled speed track.

The Court made the following remarks which provide a useful guide to the instant appeal before us:

> *"...We have given serious consideration to the submissions of both counsel in this appeal, which, fortunately, are not diametrically opposed. After studying the record of proceedings in the trial court, we have found ourselves constrained to hold that none of the parties was to blame for the adjournments which precipitated the assigned Speed Track to run its course before the trial even started. We have also not failed to notice that by the time the pre-trial conference was held on 2nd March, 2011, ten months had expired since the institution of the suit, if we take the ambiguous words "from commencement of the case" to mean the date of instituting the case. We have also learnt from the C.P.C. that it is silent regarding the legal consequences to follow if the assigned speed track runs its course before the suit is finalized.*
>
> *We shall, however, not pursue here these grey areas as the parties were not heard on them."*

We think, for the interests of justice reiterated under Rule 4, the first appellate judge should have revisited the record on adjournments to determine whether it was the plaintiff (appellant) alone who is to blame for adjournments and subsequent expiry of the speed track. Upon our perusal, the record shows that the speed track four (4) was set on 15/7/2004 and was ordered to end on or before 14/7/2006. The next date of a mention was set at 27/7/2004 which ate away **12** days from the 24 months of the speed track four.

On 27/7/2004, Mtambo (Mediator) who had been tasked to mediate set a date for mention on 12/8/2004 which resulted in taking away another **36** days from the 24 months of the life of speed track four. Come 12/8/2004, both parties were absent and the record is silent whether parties were even summoned in the first place. Another mention was set on 1/9/2004 which ebbed away another **18** days from the 24 months of speed track four. On 1/9/2004, Mr. Gallati the

learned advocate, complained about confusion over dates. It was apparent the summonses were not very clear regarding when the parties and their advocates were called upon to appear for a mention. This confusion ate away **19** days counted from the previous date of mention.

Mediation was then set to take place on 21/9/2004, in effect taking away **20** days from the speed track four. But when the trial court resumed on 21/9/2004, Mr. Gallati was away on safari and mediation had to be rescheduled to 19/10/2004, eroding away **28** days from the life of speed track four. Finally, on 19/10/2004 the Mediation was marked failed. If we can pause for a moment and look back, between 15/7/2004 and 19/10/2004 when mediation failed, a total of 133 days had been taken away from the designated speed track.

After the mediation was marked failed, it took another ten months before the appellant (PW1) began to testify on 24/8/2005. PW1's evidence-in-chief faced several

adjournments and by 12/12/2007 when she finally resumed and completed her examination in chief and cross examination, the speed track had expired.

We think, for the interests of justice, without revisiting the record of adjournments, the first appellate judge was not entitled to expunge the evidence of PW1 from the record.

We next move on to the decision of the first appellate judge that *"..the whole evidence of PW1 which was taken on 12th December, 2007 was a nullity and should have not been taken into consideration."* We would like to point out here that from the record; the learned Judge did not in fact take into consideration the evidence of PW1 which was recorded on 24th August, 2005 which was well before the expiry of the speed track. The evidence of PW1 which was not expunged went as follows:

Court: Hearing on plaintiff's case opens.

PW1, Nazila Kamru, female, Adult, Moslem, Affirmed and states as follows:

XXD by Mr. Kabonde

I reside at Mwanza in Ilemela District. Presently I am a business woman. Prior to that I was a Principal dealer of Mobitel (MIC-Tanzania) since 1st May 2003 to February 4th, 2004. There was an agreement between me and MIC Tanzania Ltd. I can show the agreement in court and I have the original copy. I am ready that the said contract be produced as an exhibit.

Mr. Gallati for Defendant: *I have no objection.*

Court: *A dealership agreement between PW1 and MIC Tanzania Limited is hereby received and marked P.1.*

Sgd: *Rujwahuka-RM*

24/8/2005

PW1 continues: *The relationship between me and MIC there was no any condition attached to the performance of my duties. In my contract I was required to purchase mobitei products i.e. buzz cards and lines, and distributing them to areas covered by Mobiltel in Lake Zone. I used to buy the cards through cash from the bank and send cash money to Dar es Salaam and they would send me cards through Ems. The money that I used to send to Mobitel was my hand cash. My performance was not assessed in any way because there was no such system. The territory Manager*

called Rogers audited my business in January and that was the last report I received. I have here the last auditory report prepared by Rogers. The report generally indicates small shops (outlets) in Mwanza. It shows the % in Mwanza between three (3) companies Mobitel, Vodacom and Celtel. It is a comparative report. The mobitel 85% Voda 90% and Celtel 85%. The auditors' remarks were that it was excellent because, in my view, Vodacom had a wide coverage in Mwanza while Mobitel was not. There was nowhere in the report to suggest that my performance as a Principal Dealer of mobitel was low. I am ready to produce it as an exhibit.....

...

I am ready to produce the said fax dated 04/02/2004 as an exhibit in court.

***Mr. Galati:** I have no objection.*

***Court:** Notice of termination of dealership signed by one John G. Tumelty dated 04/02/2004 is hereby received and marked Exhibit PII.*

PW1 continues:

My lifespan of contract between M & MIC (t) Ltd was from 01/05/2003 to 01/05/2006 (3 years). If MIC (T) wanted to terminate my contract the condition according to our contract was to give three (3) months' notice prior to termination. This is under page 23 para 25:1 the first notice was on 04/02/2004 and the second was on 13/02/2004 and both were sent

by fax. MIC LTD did not follow the terms of contract in terminating my contract.....

...Mr. Kabonde, a lawyer who wrote a letter to MIC (T) LTD .... Mr. Kabonde told me there was a reply which did not agree to my demands. I would want to produce the said annexture as an exhibit in court.

***Mr. Gallati:** I have no objection.*

***Court:** Annexture KLA/D is hereby received and marked P.III*

Sgd: Rujwahuka-RM

24/8/2005

PW1 continues: Following the negative response of MIC (T) Ltd I have suffered damage of 97, 000,000 (97 mill.) including the outstanding which Mobitel had not paid me. The breakdown is as follows: (1) net profit = 64 mill. 64,525,000/=....."

By disregarding the above evidence of PW1, the learned Judge missed the chance to relate the same to the all-important issue— **whether the defendant (respondent herein) breached the contract dated 1st April 2003 signed between the Defendant and the Plaintiff.** We think, without relating what remained of the evidence of PW1 to this issue, it was not proper for the learned Judge to arrive

at the conclusion he did on page 46 of the record, that— **there is no scintilla of evidence remaining on the record that would entitle the plaintiff to recover any damage.** Recovery of damage was predicated on proof of the breach of contract. To that extent, there was a serious misapprehension of evidence by the first appellate court.

Upon allowing the appeal on the reason that the speed track for the trial had expired, the learned first appellate Judge stated:

> *"....In **Civil Case No. 17 of 2005 between Mwanza City Engineering and Another vs. Anchor Traders Ltd** where like in this matter, the matter was on appeal, this court (Rweyemamu, J.) struck out the proceedings of the lower court because the scheduling order had expired. The effect was that in terms of the provisions of Rule 4 Order VIIIA of the Civil Procedure Code proceedings immediately after the expiry of the scheduling order were a nullity. **Applying that principle in the case at hand, this would mean that the whole evidence of PW1 which was taken on 12th December,***

2007 was a nullity and should have not been taken into consideration."[Emphasis added].

With due respect, as we have stated earlier, there are two important limbs in the interpretation of Rule 4 of Order VIIIA. While it begins with a direction that there can be no departure from or amendment of scheduling order, but as Mr. Magoiga has correctly submitted, there is an equally important limb of weighing the interests of justice. Trial courts should not read automatism in Rule 4 to the legal consequence that once the speed track expire the life of everything that followed, including the evidence, becomes inconsequential. We think parties must be heard before trial courts impose any drastic legal consequences which are likely to affect the substantive rights of parties.

Rules 3 (3) and 4 of Order VIIIA of the CPC vests the trial judges and magistrates with case and time management tool wherein the presiding judicial officer must take active rather than passive charge and guide the case as

it moves through its designated speed track. These provisions are purposively designed to serve the best interests of justice to all and are not the concern of the plaintiffs alone.

As this Court said in **John Morris Mpaki vs. The NBC Ltd and Ngalagila Mgonyani** (supra) the law is not quite settled on what legal consequences should follow under Rule 4 when a designated time track expires. The Court hastened to point out that despite the grayness of the legal consequences, the right of the parties to be heard before any legal consequences is imposed is part and parcel of Rule 4. We therefore do not think it was proper for the first appellate Judge in the instant appeal to ignore not only the appellant's application for extension that was made on 8th February, 2008, but also the fact that there were so many adjournments which interfered with the smooth progress of the trial within the designated speed track four.

Because the appellant applied for a belated extension of the speed track on 8th February 2008, it was not proper for the first appellate court to nullify the proceedings as he did. Again, an error of law was committed when the first appellate Judge failed to take into account that part of evidence of PW1, including his exhibits, which were tendered as evidence while within the time provided under speed track four. As a result, the evidence of PW1 which was unaffected by the expunging order was neither re-evaluated nor was it taken into consideration towards proving the issue regarding the breach of contract which the learned counsel had proposed to the learned trial magistrate.

The circumstances of the instant appeal begs for our intervention by way of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. We hereby quash and set aside the proceedings of the HC Civil Appeal No. 25 of 2011 including the Judgment. We order the record to be returned back to the High Court before another

Judge to hear and determine afresh the HC Civil Appeal No. 25 of 2011.

In the upshot of the above, this appeal partially succeeds to the extent we have indicated. Each side shall bear its own costs.

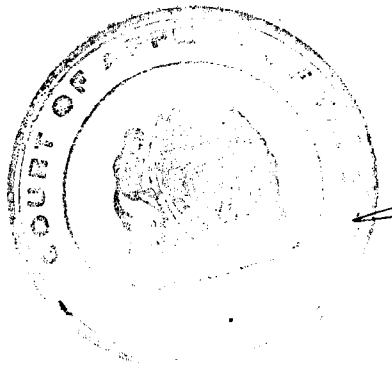
DATED at **MWANZA** this 30th day of May, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL