IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And KEREFU, J.A.,)

CIVIL APPEAL NO. 113 OF 2018

NATIONAL BUREAU OF STATISTICS ..... APPELLANT

VERSUS

THE NATIONAL BANK OF COMMERCE ..... 1ST RESPONDENT

EVA SHOO .....2ND RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania at Dar es Salaam)

(Mugasha, J.)

dated the 30th day of March, 2015

in

Civil Case No. 139 of 2005

.....

JUDGMENT OF THE COURT

4th & 18th May, 2021

LILA, J.A.:

National Bureau of Statistics, the appellant, was aggrieved by the decision of the High Court, Dar es Salaam Registry (Mugasha, J. as she then was) striking out the suit on account of expiry of its life span. She now, in this appeal, seeks to have the decision quashed and set aside.

The background of the matter is brief. National Bureau of Statistics, the appellant, an executive agency of the Government charged with the

responsibility to compile, analyze both economic and social statistics to mention but a few, entered into banker- customer relationship with the National Bank of Commerce (1st respondent), an institution carrying out banking business, whereby the former sometimes in the year 2000 opened and operated two accounts that is, Collection Account and Expenditure Account at the latter's Corporate Branch at Dar es Salaam. On several occasions, the appellant noted differences between the bank statement balance and the actual balance in its books of accounts. The appellant communicated the anomalies to the 1strespondent to which initially confirmed to the problem attributing it to technical errors on their part and promised to rectify the same. However, the appellant claimed that, the 1st respondent refuted the appellant's claims linking the transfer of funds from Collection Account to Expenditure Account and later withdrawal of the funds was with the fraudulent acts of the appellant's officials.

The 1st respondent's response triggered the institution of Civil Case No. 139 of 2005 by the appellant praying for; **One**, a declaration that the respondents authorized withdrawal of Tanzania Shillings Four sixty Six Million Eight Hundred Sixty one Thousand three Hundred Eighty (TZS.

466,861,381.00) from the appellant's accounts without the appellant's authority and a declaration that the defendant did not exercise due vigilance, diligence and care in handling the appellant's accounts; **two**, payment of Tanzania Shillings Four sixty Six Million Eight Hundred Sixty one Thousand three Hundred Eighty (TZS. 466,861,381.00) owing to the 1st respondent to the appellant; **three**, payment of Tanzania Shillings Two hundred Fifty Million (TZS. 250,000,000.00) being the amount of costs, damages and loss incurred by the appellant in obtaining alternative revenue to facilitate the loss; **four**, payment of Tanzania Shillings Two hundred Fifty Million (TZS. 250,000,000.00) being advocate's costs incurred as a result of blatant and negligent acts of the respondent; **five**, payment of Tanzania Shillings One Hundred Eight Million One Hundred Thirty Eight Thousand Six Nineteen (TZS. 108,138,619.00) being general, punitive and aggravated damages for negligence and breach of contract and; **six**, interest and costs of the case. These claims were disputed by the 1st respondent in its written statement of defence. In addition, the 1st respondent lodged a third party notice against Eva Shoo (2nd respondent) claiming for indemnity and contribution in full of the amount withdrawn and all other claims of the appellant. On her part, the 2nd respondent flatly

denied signing for endorsement any of the cheques relating to withdrawals of any money claimed by the appellant against the respondent.

Initially, on 11/9/2006, the suit was assigned in speed track 2. Upon realizing that the speed track had expired before the case was concluded, on 12th May, 2011, a rescheduling order was made and the suit was assigned to speed track 4. As it were, the trial began before Utamwa, J. before whom PW1 testified. Unfortunately, for undisclosed reasons, he could not conclude the trial. The record bears out that the trial was taken over by Mugasha, J. (as she then was). Having noted that the speed track had already lapsed, on the first day to appear before her, she invited the learned counsel of the parties to address her on the issue of speed track. Mr. Sylivatus Sylivanus Mayenga, Mr. Gasper Nyika and Mr. Mashaka Mfala, learned counsels, who entered appearance for the appellant, 1st respondent and 2nd respondent, respectively, duly complied with the judge's directive. Came the date of ruling, the learned judge, apart from appreciating that the purpose of Order VIII A of the Civil Procedure Code Cap. 33 R. E. 2002 (the CPC) is to ensure speedy disposal of cases; she was of the view that speed tracks were not introduced for fun or as

decoration to the CPC. She further observed that extension of the speed track can only be sought before expiry of the former speed track and in the event no such extension is sought the remedy is to strike out the suit. She, accordingly, struck out the appellant's suit. The present appeal seeks to fault that decision.

In this appeal the appellant has lodged a memorandum of appeal comprised of six grounds which states as follows:

> *"1. The Honourable trial Judge erred in her finding by failure to hold that the speed track of the case was already extended by the Court; it was a grave error for the same court to rule that the speed track was expired and no extension sought.*
>
> *2. The matter being already set for hearing at the instance of the Court itself and the case file being in court custody for all that long, it was an error by the trial Judge for her failure to appreciate the efforts by the parties in diligence prosecution of the matter.*
>
> *3. Order VIIIA of the Civil Procedure Code Cap 33 R.E 2002, which governs the issue of speed track of case being imposing costs as the highest penalty*

when the speed track of the case expires, it was an error of the trial judge to import her own conviction in totai disregard of the statutory provisions governing expiry of speed track.

4. *The triai court erred in law and in fact by its failure to appreciate that since the case was set under quick disposal programme (commonly known as BRN programme) with single aim of finalizing the old cases pending in the registry, it was an error for the High Court to reach the erroneous decision that the speed track of the case has expired while in actual fact the same was already impliedly extended by the court.*
5. *The Honourable trial judge erred in her finding by failure to interpret the import of Order VIIIA of the Civil Procedure Code, Cap 33 R.E 2002, which in essence its inaction did not intend the dismissal or striking out of the case rather to have proper and efficient way in the administration of judicial activities.*
6. *The Honourable trial judge erred in her finding by presiding and determining the matter in which she has no jurisdiction for lack of the proper assignment."*

Subsequent to lodging the grounds of appeal, the appellant and the 2nd respondent filed written submissions pursuant to Rule 106 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Before us for hearing, the parties were duly represented. Mr. Edward Mwakingwe, learned advocate, entered appearance for the appellant. On the other side, Mr. Joseph Nuwamanya and Mr. Mashaka Mfala, both learned counsel, entered appearance for the 1st and 2nd respondents, respectively.

At the inception of the hearing of the appeal, Mr. Mwakingwe intimated to the Court that he was withdrawing grounds 1, 2, 4 and 6 of appeal and the submission thereof. We granted the prayer. To that end, he remained with only ground 3 and 5 of appeal to argue to which he adopted the submission thereof without more. The gist of the complaint in those two grounds as can be gleaned in the written submission is that the learned judge erred in law in striking out the suit due to the expiry of the scheduled speed track.

It is the appellant's contention in the written submission that Order VIIIA of the CPC which governed issues related to speed track was not

intended to cause the suit to be struck out because of failure to abide to a speed track to which the case is assigned. Even where no extension is sought and granted by either party, the party contributing towards the delay to have the case finalized within the scheduled speed track will only be condemned to pay costs to the other party. The appellant bolstered his assertion by citing the case of **R.N. Jadi and Brothers vs Shubaschandra** (2007) 9 scale 202 where it was insisted that procedural enactments should be construed in a manner that enhances the dispensation of justice instead of impeding it. He also made reference to the Court's unreported case of **Nazira Kamru vs MIC Tanzania Limited**, Civil Case No. 111 of 2015 in which the Court made a pronouncement that expiry of the speed track should not affect the parties' substantive rights to be heard.

Contrary to what the 1st respondent had submitted in the written submission earlier on lodged, Mr. Nuwamanya changed goal post before us contending that **Nazira Kamru's** case (supra) cited by the appellant is the proper proposition of the law on the consequences of lapsed speed track. He accordingly supported the appeal. Likewise and for the same reason,

Mr. Mfala, who did not file written submission, took side with Mr. Nuwamanya to support the appeal.

Given the concurring stance taken by the respondents' learned counsel, which course we definitely expected, the matter need not copiously detain us. It is trite that assignment of a suit to a certain speed track is governed by Order VIIIA Rule 4 of the CPC which provides: -

> *"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 Court had an occasion to consider the import of the provisions of Rule 4 of Order VIIIA of the CPC in **Naziru Kamru's** case (supra) and, with lucidity, stated that: -

> *"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."

In the light of the above proposition of the law, the spirit embraced in assigning a suit to a certain speed track is only to facilitate the expeditious disposal and management of the case. It is thus not expected that failure to adhere to a scheduled speed track will have serious consequences of having a suit struck out. Instead, a judicial officer presiding over the suit is enjoined to ensure that substantive justice is done to the parties by affording them opportunity to be heard and the matter to be determined on merit. Cognizant of that right, Order VIIIA did not directly impose any legal consequence in the event the scheduled speed track expires. Counsel for the parties are at one that the cited Rule does

not provide for the legal consequences of lapse of a speed track without an application being made to extend the same. We entirely agree with them. That said, we need not overemphasize that the inescapable inference and conclusion is that striking out a suit is not a resultant effect envisaged by the law, for, had it been the intention, it would have been expressly stated so. Instead, the trial court, either upon being moved by either of the parties or *suo motu* has to amend the scheduling order and where the highest speed track is attained and yet the case is yet to be finalized to enlarge the time frame until the case is concluded. It is only by doing so, that we shall be according due regard to the dictates of the law.

Further to the above, we find it not out of context, to, albeit briefly, demonstrate that imposition of costs to a defaulting party has been taken by the Court to be more desirable in other matters directly connected to Order VIIIA of the CPC. Of particular interest is a situation where a party abstains from attending a mediation conference or for some reasons, fails to comply with the scheduling order. Rule 5 of Order VIIIA of the CPC enacts the legal consequences that may befall on the defaulting party. That Rule states: -

> *"Where a party or the party's recognized agent or advocate fails without good cause to comply with a scheduling order, or to appear at a conference held under sub-rule (1) of rule 3 or is substantially unprepared to participate in such conference, the court shall make such orders against the defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for not making such orders."*

The import of the above provision was tested in **Tanzania Habours Authority vs Mathew Mtulakule and 8 Others** [2002] TLR 385. In that case the learned judge entered a default judgment following the defendant's failure to attend at mediation although his advocate was present. Having considered the import of Rule 5 of Order VIIIA of the CPC, the Court held that such provision applies only where both, a party and his advocate, are absent. It also held that the learned judge could have not acted under that sub-rule at all. Further, the Court stated that even when a party, its recognized agent and its advocate are all absent, as there is no list of other orders the court could give, the clause "including an order for

costs" indicates that the legislature regarded costs to be more serious than "such orders" the court could deem fit to give.

It is a fact that expiry of the scheduled speed track is often caused by the parties, the trial court and sometimes by other circumstances quite independent of the court's and/or parties' control. On the causes of delay, we find it relevant to recite a highly persuasive observation by Msoffe J. (as he then was) in **Mrs. Asha Ramadhani Laseko vs Ramadhani Ali Laseko**, Civil Case No 40 of 1996 (HC unreported) where he stated that: -

> *"While the policy reason for speed track is weakened or over defeated if they (the speed tracks) are not strictly observed yet non-observance can be occasioned by a party to a case or by the court itself, sometimes for unavoidable reason. If, for example, a case lasts beyond the assigned speed track because the court itself could not finalize it in time why should the plaintiff as a result be deprived of a decision of the court for no fault of his own? Surely Order VIIIA of the Civil Procedure Code, 1966 as amended by GN. No. 422 of 1994 was intended to improve the quality of civil justice by making it speedier, not to provide occasion for*

depriving justice to the parties without any fault attributable to them."

Plain and elaborative as it is, we find nothing to add to the above observation. They constitute a true and proper position of the law. Like in the cited cases, they too insist that a suit will not be let to suffer the wrath of being struck out or dismissed simply because the speed track has, for some reason, lapsed. Instead, they infer other order to be made that does not affect the parties' rights. It is for this reason that the above Rule makes it plain that inordinate delays by the parties which contribute towards the expiry of the assigned speed track are to be punished by imposition of costs.

For the foregoing reasons, we have no hesitation to hold that the learned judge strayed into an error to strike out the suit because there is no provision in the CPC authorizing such a course of action. The action she took was contrary to the dictates of the law. Instead, she ought to have condemned the party who had contributed towards the delay which led to the lapse of the speed track to pay costs.

We accordingly allow the appeal. We hereby quash the proceedings in respect of the lapse of the speed track and the resultant ruling and set aside the order striking out the suit. The trial court record has to be remitted back to the trial court for it to proceed with the hearing of the suit according to law from the stage where it had reached before the order striking it out. Each party shall bear its own costs.

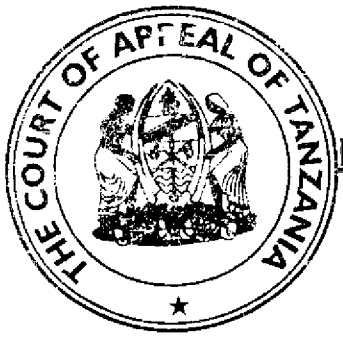
DATED at **DAR ES SALAAM** this 13th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 18th day May, 2021, in the presence of Mr. Joseph Nuwamanya, holding brief for Mr. Edward Mwakingwe, learned counsel for the appellant and also appeared for the 1st respondent and Mr. Mashaka Mfala, learned counsel for the 2nd respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL