IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO.40 OF 2008

1. JARED NYAKILA..... 1ST PLAINTIFF

2. NYAKILA TRANSPORTERS AND GENERAL SUPPLIES .....2ND PLAINTIFF

VERSUS

1. SHANTI SHAH.....1ST DEFENDANT
2. SURESH BHASIN .....2ND DEFENDANT
3. NELOFER ABDUL.....3RD DEFENDANT
4. NEW FISH FILLETTERS LIMITED.....4TH DEFENDANT

Date of last order: 08/06/2010
Date of final submissions: 09/07/2010
Date of ruling: 15/03/2011

RULING

MAKARAMBA, J.:

On the 02/11/2010, this suit came for continuation of hearing of the Plaintiff's case having been adjourned before Hon. Justice Werema (as he then was) on the 03/08/2009. On the date the matter came for continuation of hearing, Mr. Kesaria, learned Counsel for the Defendants, brought to the attention of this Court a procedural issue, that the Speed Track Two of twelve months from when the suit commenced allotted to the case on 03/10/2008, has long expired, and therefore proceeding with the hearing of the case will constitute a nullity, unless the Plaintiff applies to

the Court to have the scheduling order extended or amended as required under the law. Mr. Marando, learned Counsel for the Plaintiff, promptly seized the opportunity and made an oral application for extension or amendment of the scheduling order, which this Court duly granted and set the 03/11/2010 for the hearing orally of the application.

The learned Counsel for the parties marshaled submissions with great zeal and industry, with which I have carefully listened to and followed with keen interest, and for which I am very grateful as it has somehow eased my deliberation on the matter at hand particularly, the various authorities cited.

Let me point out here that in principle Mr. Kesaria is not objecting to the application for enlargement of the scheduling order. However, his only problem is that the application has been preferred out of time and without leave of this Court extending the time within which to make the application and therefore it ought to be dismissed for being time barred. I shall revert back to this argument later.

Let me first associate myself with the words of his Lordship Massati, J. (as he then was) at page 5 of his ruling in **Commercial Case No.70/2002 DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (unreported) thus:

> *"Although the objection as framed appears to be simple in my view, it raises a number of complex issues regarding the scope, application and interpretation of VIIIA Rule 4, which is a relatively new provision in our midst."*

As Mr. Kesaria correctly pointed out in his submissions and as His Lordship Massati observed in **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (unreported) (supra) regarding the complexity inherent in the application and interpretation of Order VIIIA Rule 4 of the Civil Procedure Code, which is at the centre of the controversy in the present application, the following issues fall for determination:

(i) ***Whether there is any time limitation within which a party may apply for departure from the scheduling order?***

(ii) If there is any time limitation, what is the period?

(iii) If so, when does the period of limitation begin to run?

The main argument of Mr. Kesaria is that the present application for extension or enlargement of the scheduling order has been preferred out of time and without leave of this Court. The general principle emanating from **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (unreported) (supra) is that an application for extension or enlargement of the scheduling order be it oral or written, being an application under the Civil Procedure Code [Cap.33 R.E. 2002] has to have regard to the limitation period. It is in this respect, in my view, that the first hurdle the Plaintiff's Counsel has to cross in this application in order to satisfy this Court to exercise its discretion and enlarge the

scheduling order is *whether the present application for the enlargement of the scheduling order has been made within time.* In my view, and as correctly observed by Mr. Kesaria, Mr. Marando learned Counsel for the Applicant has spent quite a considerable amount of time submitting on whether or not the application for extension or enlargement of the scheduling order should be granted by this Court exercising its inherent powers under section 95 and powers to extend time under section 93 of the Civil Procedure Code respectively but not on whether the application has been made within time.

In **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (supra) the Plaintiff therein had filed an application for departure from the scheduling order which in that case had also expired as is in the case at hand. Mr. Mbamba, learned Counsel for the 1st Respondent/Defendant therein, raised a preliminary objection that the application was hopelessly time barred, arguing that essentially an application for departure under Order VIII Rule 4 of the Civil Procedure Code is covered under Item 21 of Part III of the Schedule to the Law of Limitation Act [Cap.89 R.E. 2002], under which the prescribed limitation period for application whose limitation period is not specifically provided for in the Act or any other written law is 60 days. Alternatively, Mr. Mbamba further argued in that case, and relying on the authority of the decision of the Court of Appeal of Tanzania in the case of **LOSWAKI VILLAGE COUNCIL AND ANOTHER VS SHIBESHI ABEBE AR Civil Application No.23 of 1997** (unreported), that if no period of

limitation is prescribed then such an application ought to have been filed within a reasonable time.

In the present matter, the application for extension or amendment of the scheduling order which Mr. Marando, learned Counsel for the Plaintiffs, made orally before this Court on 02/11/2010 is not being objected to by Mr. Kesaria, learned Counsel for the Defendants. However, as correctly submitted by Mr. Kesaria, irrespective of his consent to the application, the legal position is *whether the course of action pursued by the Plaintiff's Counsel is permitted under the law.* I join hands with the statement of my learned brother Judge Hon. Mr. Justice Massati (as he then was) in **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (supra) that application for enlargement of the speed track under Order VIIIA Rule 4 of the Civil Procedure Code being an application under the Civil Procedure Code has to have regard to the law of limitation, a fundamental issue, which as I have intimated to earlier, and as correctly pointed out by Mr. Kesaria in his reply submissions, Mr. Marando did not touch upon at all in his submissions in support of the application.

In his submissions, Mr. Marando concerned himself largely with trying to convince this Court to exercise its discretionary powers to grant extension or enlargement of the scheduling order in terms of its inherent powers under section 95 and enlargement of time under section 93 of the Civil Procedure Code [Cap.33 R.E. 2002] respectively. Mr. Marando also made very elaborate submissions on the reach and import of Order VIII Rule 4 of the Civil Procedure Code [Cap.33 R.E. 2002], and cited to this

Court a number of cases on extension or enlargement of the scheduling order, including the decision of Hon. Justice Kimaro, (as she then was) in **Civil Case No.124 of 1998 between ABSOLOM L.S. MSAKA VS PETER T. MASSAWE AND N.I.C. (T),** where she struck out the suit for failure by the Plaintiff's Counsel to seek leave of the Court to have the scheduling order extended. The other decision on the issue of extension or enlargement of the scheduling order came for consideration by Hon. Justice Rweyemamu at Mwanza, in **Civil Appeal No. 17 of 2005 between MWANZA CITY ENGINEER AND MWANZA CITY COUNCIL VERSUS ANCHOR TRADERS LTD**, where the matter was an appeal, and in fact the decree holder had already had a decree, and Her Ladyship went back to the question of scheduling order with the result that she struck out the proceedings which had taken place in the lower court because the scheduling order had expired. I wish here to quote from the ruling of Her Ladyship Rweyemamu in that case at page 3 on the legal issue inherent in Rule 4 of Order VIIIA of the Civil Procedure Code, where she stated as follows:

> *"There are a number of legal issues raised by the parties in this appeal but I will deal with only one, which in my opinion is fundamental and itself disposes off the appeal. That issue is centers(ed) (sic!) on the application of the case track system under Order VIIIA Rule 4 of the Civil Procedure Code [Cap.33 R.E. 2002]. Simply stated the issue is* ***who between the parties has a duty to apply for extension of time once the case life span has expired." (the emphasis is of this Court)***

In the present matter the application for extension and enlargement of time has been made under Order VIIIA Rule 4 of the Civil Procedure Code, which does not provide directly as between the parties who has a duty to apply for departure or amendment of the scheduling order. Mr. Marando submitted further that Order VIIIA Rule 4 does not provide that the case be struck out if there is failure to comply with the scheduling order but only mentions that the court has power to make orders against the **defaulting party** as it deems fit, which orders may include order for costs. In Mr. Marando's interpretation, the order for costs seems to be the highest penalty the legislature thought of against the defaulting party. Mr. Marando insisted that the fact that there is no mention in that section about striking out or dismissing the suit is significant in that if the legislature had intended that the suit may be so dealt with, it is such a drastic measure that could not have been forgotten. Mr. Marando did not go far to tell this Court who in the instance case is the defaulting party against whom the court should penalize in costs, if it determines so. I wish however, to pick a leaf from the wise words of Hon. Justice Rweyemamu in **MWANZA CITY ENGINEER AND MWANZA CITY COUNCIL VERSUS ANCHOR TRADERS LTD** (supra) where she made the following observation at page 3 of the typed ruling:

> *"According to the trial court, because the life span expired after closure of the plaintiff's case, the duty to apply for extension of time shifted to the defendant and failure to do so amount to failure to enter a defence. Apart from the peculiar facts of this case where the defence had actually been permitted to commence defence after expiry of time; the trial court conclusion seems to be premised on a*

principle that the plaintiff's case is complete after closure of their case but before defence. My understanding of the law is that the plaintiff's case is not done until the whole case is done.

I do not interpret the law as meaning that once a life span of the case expires whoever has had his day in court until that stage wins, unless the other party moves the court for an extension of time. It would be strange if that was so, particularly in circumstances similar to the present case where the case overshot its life span due to adjournments moved by both parties and sometimes the court."

r. Marando insisting on his understanding that Rule 4 and 5 of Order VIIIA that they convey only one meaning that the highest penalty the court will mate upon the defaulter is an order for costs and therefore the drastic measures which have the effect of ending the suit were not in the thinking of the legislature. Rule 4 of Order VIIIA of the CPC which deal with prohibition of further amendment to an order stipulates as follows:

"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 emphasis is of this Court).*

Mr. Marando insisted further that the idea of penalizing a defaulter also by costs is also manifest in Rule 5 of Order VIIIA which stipulates thus:

"5. Where a party to a case or the party's recognised agent or advocate fails without good case to comply with a scheduling order, or to appear at a conference held under subrule (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 emphasis is of this court).*

The general principle in civil litigation is that he who alleges must prove. In a civil matter, it is the Plaintiff who moves the court for orders against the Defendants and in the event of a counterclaim being made, the Defendant moves the Court for orders against the Plaintiff. Logically since in the present case it is the Plaintiffs who moved this Court for orders against the Defendants, then in terms of Rule 4 of Order VIIIA of the CPC is "*the party in favour of whom such departure or amendment is made*" who is to bear "*the costs of such departure or amendment, unless the court directs otherwise.*" It would be strange to try to suggest that the Defendants, in the absence of a counterclaim, will be the party in favour of whom such departure or amendment is made. With due respect to the submissions by Mr. Marando, there is nothing in Rule 4 of Order VIIIA to suggest that costs is the highest penalty a defaulting party will suffer for failing to abide by the scheduling order. My reading of that provision is that in the event the Court makes an order for departure or amendment it may order costs unless it directs otherwise. The costs to be ordered by the Court under the provision in my view, is not meant to penalize the defaulting party as Mr. Marando would seem to suggest otherwise it would mean that costs which follow the event in civil matter are meant to penalize the party against whom it is ordered.

In **Civil Case No.124 of 1998 between ABSOLOM L.S. MSAKA VS PETER T. MASSAWE AND N.I.C. (T),** Justice Kimaro, (as she then

was) in her decision delivered on 28th April, 2001 struck out the suit for non-compliance with an order she had given, but mainly because the scheduling order had already expired. In the other case **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** Commercial Case No.70 of 2002, His Lordship Mr. Massati, J., (as he then was) agreed with the submissions of Mr. Mbamba, learned Counsel for the 1st Respondent/Defendant therein, that where there is expiry of a scheduling order there remains nothing before the court. However, His Lordship continued to analyze the reasons for the expiry of time, one of which was that, for a long time the matter had been laying in the court of appeal and his Lordship found that in fact, the time as per scheduling order has actually not expired, and excluded that time during which the matter was laying in the Court of Appeal. His Lordship also found that **commencement of proceedings as far as he was concerned begins from the date when the suit was presented to the court**.

In **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (supra) his Lordship Massati (as he then was) observed that the date of presentation of the plaint is the date of commencement of the suit and agreeing with Mr. Mbamba, learned Counsel for the 1st Respondent/Defendant therein, that indeed the speed track allocated for the suit had expired. In that case His Lordship Justice Massati observed however, that until when the suit was

last adjourned after being called to the Court of Appeal no cause of action had arisen for the Plaintiff to lodge an application for departure from the scheduling order, as none of the "***operative facts***" had occurred. Further, that the case was in the custody of the Court of Appeal at the instance of the Respondent and although there was no express order of stay of proceedings, by implication of law, once the record of a suit are dispatched to the Court of Appeal, the proceedings in the trial court are stayed until the matter is dealt with by the Court of Appeal.

In his submissions Mr. Marando submitted that there are two important issues which arise, the first is the question of interpretation, and the second is the right of the citizen of access courts and fair hearing. Mr. Marando relying on ***Bindaz on Interpretation of Statutes*** revisited the cardinal principle of construction of statutes that in interpretation of statute in the first instance the grammatical sense of the words is to be adhered to, in that the words of the statute must prima facie be given their ordinary meaning, unless where grammatical construction is not clear and manifest, that it won't prevail, unless there be some strong and obvious reason to the contrary.

Mr. Marando drew the attention of this Court to Rule 3 (1) of Order VIIIA which gives the purpose of the scheduling conference as being for setting a timetable for completing the many procedures not involving a trial, and Rule 5 of Order VIIIA stipulates that default will be penalized on order for costs. Mr. Marando prayed that when this Court comes to interpret those provisions it will not be fair or legal to impute into the provisions the concept of striking out or dismissal of the suit.

Mr. Marando also fronted some arguments on the issue of the right of access of citizen to justice, stating that in the **MWANZA CITY ENGINEER AND MWANZA CITY COUNCIL VERSUS ANCHOR TRADERS LTD** (supra) decided by Rweyemamu, J., the High Court quashed all the proceedings including the appeal judgment just because the case had overshot its life span and in fact in that case the plaintiff already had a decree in his hands, which was entered by way of exparte judgment. In his submissions Mr. Marando tried to propose what the most fitting order in that case should have been, to which Mr. Kesaria resisted and in my view, rightly so, since as Mr. Kesaria correctly pointed out, that was for the Court of Appeal to determine as this Court cannot sit in revision or appeal of a decision of another judge of the same court. Mr. Marando reminded this Court that in that judgment, the court observed that the lifespan had overshot due also to adjournments, some of which had been moved by the court. Mr. Marando did not stop in his track of trying to implore that in the case **ABSOLOM L.S. MSAKA VS PETER T. MASSAWE AND N.I.C. (T),** (supra) which was decided by Kimaro, J., (as she then was) where the court struck out the suit because it had been in court for more than twenty-four months and the plaintiff did not apply for extension of time, by proposing also that it was a case which in his opinion an order for costs should have been made instead of striking out, and in the absence of sufficient perusal of the proceedings to see whether it was the plaintiff who had caused the delay. Mr. Marando surmised that what he was emphasizing is that, in exercising its discretion under Order VIIIA Rule 4 and 5, the Court should carefully look into and examine proceedings

to apportion delays if any reason thereof, and not simply load it on the defaulting party.

Mr. Marando in his submissions emphasized the constitutional aspect of the concept of access to justice by citizen and fair hearing which are guaranteed under Article 13 (3) and 13 (6) of our Constitution and cited the case **JULIUS ISHENGOMA NDYANABO VS. ATTORNEY GENERAL Civil Appeal No. 64 Of 2001) [Reported in Vol.3 Law Reports of the Commonwealth (LRC)** at page 541 at page 554 and also **[2004] TLR 14],** where the Court of Appeal of Tanzania had opportunity to examine the concept of the right of citizen access to justice vis-à-vis the payment of security for costs in election petitions and observed that the most important point was that the exclusion of a citizens from access to the court must be in clear words of the relevant statute. The Court stated that "*while in England a person's right to access court can limited by mere express, in Tanzania it can limited only by legislation, which is not only clear but which is also not violative of the provisions the Constitution.*" Mr. Marando reminded this Court of the situation where in Tanzania instances of a case being mentioned only twice or thrice in a year in the lower courts are not uncommon and that mention means sometimes appearing before the Registrar who does not even have powers to make substantive orders on the advancement of a case. Mr. Marando insisted that access to justice means effective access, where substantive aspects of a case will be dealt with a trial judge or the magistrate. Mr. Marando submitted further that to interpret Order VIIIA rule 4 and 5 in a manner that terminates the plaintiff's case is as a denial of effective access to the court. Mr. Marando

submitted further that in **JULIUS ISHENGOMA NDYANABO VS. ATTORNEY GENERAL** (supra) Samatta, CJ. (as he then was) said that: *"access to court is undoubtedly a cardinal safeguard against violation of one's right ... without that right there can be no rule of law and therefore no democracy. A court of law is the bastion of the oppressed and citizens should be able to knock on the doors of justice and be heard."*

Mr. Marando insisted that in a situation like ours what he was saying is not that a party has been denied access to justice, but that a statute should not be interpreted with the effect of removing a citizen from substantive access, he or she already has, which is tantamount to denying him access to justice. Mr. Marando submitted further that a case has to be determined meaning the situation where a final decision of the court is reached and that the type of determination which appears in the various decisions of the High Court submitted to this Court are determinations which are contrary to the spirit of our Constitution because the controversies in those cases were not resolved as result of an interpretation not appearing expressly in the statute.

Mr. Marando submitted further that Order VIIIA Rule 3 categorizes cases within four speed tracks and that under Rule 2 of Order VIIIA it is the court in consultation with the parties which ascertains the type of speed track. Mr. Marando submitted further that in all cases the court will have deemed the particular track of the particular case as being capable or requiring the interest of justice to be concluded within a certain period of time. Mr. Marando submitted further that the law does not say that after expiration of the track period any further proceedings are nullity that once

the speed track has expired then further proceedings are nullity, a type of determination which in his view amounts to denial of access of justice contrary to the spirit of our Constitution. Mr. Marando proposed that a careful look on the relevant provisions of the law would suggest that when time expires, it seems that the court has to find a reason why the case has overshot its allocated time and that even if the party is found at fault he or she is penalized and if it is the court, it simply take note of it. Mr. Marando amplified further that there are situations where a judge is transferred, or promoted from the court to the Civil Service to become Attorney General like in this case, and therefore under those circumstance to strike out the suit will not be in the spirit envisaged by the statute, which is to expedite proceedings and not to terminate them before they are concluded. Striking out of a suit is not expediting it but it is terminating it before the issues are properly considered by the court, and it is doubtful whether that was the spirit of these provisions Mr. Marando further pointed out.

Mr. Marando concluded his submissions by praying to this court to exercise its powers under section 95 and make such orders on the defaulter so as to render a penalty without terminating the proceedings. Mr. Marando prayed that under the circumstances, this Court may be pleased to enlarge time to enable the Plaintiff conclude his case, particularly considering that the parties are coming all the way from Musoma, which is very expensive and both are interested in concluding this matter because if the defendant has a counter claim, there are properties involved the future of which has to be determined, and there is also the

question of limitation of time in that if the suit is struck out, time may have expired in terms of the limitation period to re-institute it again.

Mr. Marando, responding to the question put to him by this Court that if indeed his prayer for enlargement of the scheduling order is granted by this Court what time is supposed to be enlarged and from what point in time, submitted that in terms of section 95, the court may make order for enlargement or rescheduling and under section 93 the court can extend the time previously fixed and then the parties will be advised how to move to either speed track two or three or four, as in the discretion of the Court and the time will start counting from the date this Court make the re-scheduling order, which will be a new schedule, fixed as per Order VIII Rule 8. This Court then informed Mr. Marando that the problem is that since time had already expired, and since the purpose of the rescheduling order is to make things right from the time the speed track of the case expired, then from what point in time does is the rescheduling to start. Mr. Marando responded to this question by submitting that time must start from the last date the last scheduling order was fixed. It is at this juncture that Mr. Kesaria offered to assist by proposing that it should be retrospective from the date when the initial twelve months expired for which Mr. Marando was grateful.

Mr. Kessaria, learned Counsel for the Defendant in reply submitted by borrowing the wisdom of Mr. Justice Massati in **Commercial Case No. 70 of 2002**, that although the objection as framed appears to be simple, it raises a number of complex issues regarding the scope of application and interpretation of Order VIIIA Rule 4, which is a relatively new provision in

our law. Mr. Kesaria joined hands with Mr. Justice Massati in his ruling at page 5 second paragraph where His Lordship says that it raises a number of complex issues regarding the scope application and interpretation of Order VIIIA Rule 4. Mr. Kesaria while appreciating everything Mr. Marando has submitted on, specifically his plea that striking out the proceedings will be tantamount to denying effective access to justice to citizen, submitted that throughout his submission, Mr. Marando repeated the plea of the citizen's right to access to justice and that should this Court decide to strike out this proceedings it could be tantamount to denying the plaintiff in this case his effective right of access to justice. Much as this sounds very good, Mr. Kesaria submitted, it is totally against jurisprudence of our legal system and that it was not open to Mr. Marando to criticize the decision of the High Court as that is a reserve of the Court of Appeal.

As I pointed out at the outset Mr. Kesaria in principle does not have any problem with Mr. Marando's application for enlargement of the scheduling order. The purpose of the present hearing is to analyze a legal position and make a decision whether legally this Court is allowed to grant that application or not, Mr. Kesaria pointed out and I am at one with him. However, if the application is legally not permitted then irrespective of his consenting to the application it will not be permitted, Mr. Kesaria insisted.

I am at one with the submissions of Mr. Kesaria when responding to the argument by Mr. Marando that under Order VIIIA Rule 5 the maximum penalty a court should impose is an order of costs, and not an order of striking out, whereupon Mr. Kesaria submitted that the rule actually states that "***the court shall make such orders as it deems fit including an***

order of cost" but it is not saying that the order for cost is the maximum penalty, to the contrary it is saying that the Court is entitled to make any orders that it deems fit. Making reference to the recent decision of this Court in **Commercial Case No.86 of 2007,** where the proceedings were struck out because the speed track had expired and no application had been filed for extension or enlargement of the speed track, Mr. Kesaria submitted further that in that case Mr. Justice Mruma actually emphasized and reiterated what was previously decided by Justice Rweyemamu in **MWANZA CITY ENGINEER AND MWANZA CITY COUNCIL VERSUS ANCHOR TRADERS LTD** (supra), Justice Kimaro (as she then was) in **ABSOLOM L.S. MSAKA VS PETER T. MASSAWE AND N.I.C. (T),** Civil Case No.124 of 1998 and other previous decisions of the High Court quashing or striking out proceedings where the speed track had expired.

In the present case, the application for extension or enlargement of the scheduling order has been preferred and what is more important for this Court to decide in the present case as Mr. Kesaria correctly submitted is whether the application is within time since the question of limitation of time is a fundamental issues this Court has to decide irrespective of Mr. Kesaria's consent to the application. The controversy is whether the application for extension or enlargement of the speed track is properly before this Court having regard to the law of limitation, something which as correctly submitted by Mr. Kesaria was not addressed by Mr. Marando in his submissions. I wish to reiterate that as Hon. Mr. Justice Massati rightly stated in his decision in **Commercial Case No.70 of 2002** any application made under the Civil Procedure Code is subject to the law of

limitation. Much as this Court recognizes that under section 93 of the Civil Procedure Code it has discretionary powers to enlarge the speed track imposed by Order VIIIA, the question as to when this application has been made before this Court is critical. The decision of Hon. Mr. Justice Massati which both Counsel have relied upon in their submissions in **DAL FORWARDING (T) LIMITED VS NATIONAL INSURANCE CORPORATION (T) LTD AND PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION** (supra) Commercial Case No.70 of 2002, and the decision of Makaramba J. in **Commercial Case No.54 of 2007 between USANGU LOGISTICS (T) LTD VS. THE ATTORNEY GENERAL and TANZANIA NATIONAL ROADS AGENCY** (supra) both of which emphasize an application under the Civil Procedure Code for which no period of limitation is provided under the Law of Limitation Act or any other written law has to be made within 60 days pursuant to Item 21 of Part III of the Schedule Law of Limitation Act. However, I am afraid that the decision in **USANGU LOGISTICS (T) LTD VS. THE ATTORNEY GENERAL and TANZANIA NATIONAL ROADS AGENCY** (supra) although it dealt with Item 21 of the 1st Schedule in Part III of the Law of Limitation Act [Cap.89 R.E. 2002] it did not deal directly with the issue of extension or enlargement of scheduling order.

Emanating from the above is that application for extension or enlargement of the scheduling order being an application under the Civil Procedure Code is subject to the law of limitation and this is irrespective of the inherent powers of this Court under section 95 and section 93 of the Civil Procedure Code to extend time. The issue before this Court therefore

is whether the application for the extension or enlargement of the scheduling order made orally before this Court on 02/11/2010 has been made within time.

In his submission Mr. Marando strenuously argued as to at what point in time the speed track of case is to be reckoned, whether it is from the time of commencement of the suit, that is, the date the Plaint was lodged in Court, or from the date the speed track was set after completion of pleadings.

The provisions of Order VIIIA Rule 3(1) set out clearly that the main purpose of holding the first scheduling and settlement conference, which is held within twenty days after conclusion of the pleadings, is "***to ascertain the speed track of the case, resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial.***" It seems to me that as per this provision, the speed track is for resolving the case through alternative dispute resolution mechanism and other procedures not involving trial. This seems to me to be making a whole lot of legal sense particularly considering that after the conclusion of the pleadings and setting the speed track for the case, the case is ripe for mediation which could take a number of days to be completed and if it fails the case then is placed before another judge for the trial, which also may take months to conclude. In such circumstances, it will be burdening the process for an argument that the speed track set at the first scheduling and settlement conference is meant also to govern the conduct of the trial following failure of mediation.

The import and reach of the speed track comes out even more clearly under Order VIIIA Rule 3(2) where the law enjoins presiding judge or magistrate upon ascertaining the speed track of the case, to determine the appropriate speed track for such a case and make a scheduling order, "***setting out the dates or time for future events or steps in the case, including preliminary applications, affidavits, counter affidavits and notices, and the use of procedures for alternative disputes resolution.***" Again the idea of alternative dispute resolution in relation to the speed track is emphasized under this provision.

I should point here that the provisions of Order VIIIA of the Civil Procedure Code, which Mr. Kesaria termed as "*new provisions in our law*" seem to be "pregnant" with a fair share conflicting interpretation given its wording particularly Order VIIIA Rule 3(3), which relates the speed track set for a case with the period within which a case is to be "***concluded,***" to be reckoned from "***commencement of the case.***" In his rejoinder submissions Mr. Marando invited this Court to consider the commencement period of the scheduling order, whether it is the date the suit was filed or the date the scheduling order was made. I did not however, get the benefit or arguments by Counsel on this point.

One possible line of argument which arises out of the inherent conflict of interpretation in Order VIIIA of the Civil Procedure Code is that since a case commences with the lodgment of a plaint, the time allocated for the speed track at the first scheduling and settlement conference therefore begins to run as from the date of the commencement of the case, which is date of the lodgment of the plaint. Mr. Kesaria seems to be

a disciple of this line of reasoning who argued very forcefully before this Court that since the present suit commenced on the 4th of June 2008, the speed track of twelve months allocated for it on 3rd of October 2008 expired on the 4th of June, 2009, and therefore the application for enlargement of the speed track being made on 02 November 2010, which is 16 months after expiry of the speed track was far beyond the 60 days limitation period allowed under the law for bringing application for enlargement of the speed track after its expiry, and therefore the application is time barred and the only remedy available under the law is its dismissal.

The other line of argument which seems to be shared by few disciples including Mr. Marando is that since the speed track allocated for a case at the first scheduling and settlement conference does not "***involve a trial***" but is limited to resolving the case through negotiation, mediation, arbitration, and other procedures, then time for purposes of the speed track does not begin to run as from the date of commencement of the suit but as from the date the speed track is set.

Paradoxically if in the event this Court is minded to enlarge the scheduling order, it will do so as from the date the initial speed track expired and not as from the date of the commencement of the suit, which goes to suggest strongly that the speed track set way after pleadings are complete relates to ***resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial***.

Assuming, as Mr. Marando argues, that the speed track is to be reckoned as from the date it was set, which is the 3rd of October 2008 and not from the date the suit was presented, which is the 4th of June, 2008, the issue of limitation of time would still resurface since the application made on the 02/11/2010 would not be within the 60 days limitation period under the Law of Limitation Act after the expiry date of the speed track. This is so because reckoning twelve months from the date the speed track was set, which is on 03/10/2008, to the date it expired, which is on the 04th of October 2009 and the 02/11/2010 when the Application for enlargement of the scheduling order, the application will be time barred.

I am at one with Mr. Kesaria that the law requires the application for extension or enlargement of the scheduling order to be made within 60 days of the expiry of the speed track and not at any time and therefore irrespective of whether or not Mr. Kesaria has consented to the application, it has to be made within the limitation period prescribed by the law. Since no application for extension or enlargement of the scheduling order has been made under section 14 of the Law of Limitation Act for extension of the limitation period, the application ought to be dismissed. The provisions of section 14 of the Law of Limitation Act as Mr. Kesaria correctly submitted, enables a party to apply for extension of time of limitation period, which has not been done. In the absence of such application or an order extending the limitation period under section 14 of the Law of Limitation Act, as Mr. Kesaria rightly argued, the current application before this Court is time bared and can only be dismissed under section 3 of the Law of Limitation Act. This Court has no discretion on that given the

mandatory nature of section 3 of the Law of Limitation Act. In the event of dismissal as Mr. Kesaria rightly pointed out, it will then be open for the Applicant's Counsel to go and make an application for extension of the limitation period to come back and apply for enlargement of the speed track. In my view it is during the consideration of the application for extension of time that the applicant can come up with a reasonable explanation of the delay in lodging the application for extension or enlargement of the scheduling order in time. Much as this Court has powers under section 95 and 93 of the Civil Procedure Code to extend or enlarge the speed track, unfortunately as rightly submitted by Mr. Kesaria, this Court is not legally permitted to make that order to grant that the application as it currently stands before this Court because that application has been made after the limitation period had expired and without leave of this Court extending the time for bringing the application.

Much as I do not have qualms with the lofty arguments by Mr. Marando on the constitutional right of access to justice by citizens and the right of fair hearing, effective justice presuppose that the laws of the land must prevail. As Mr. Kesaria rightly pointed out, access to effective justice cannot just be casually made, but has to be in conformity with the laws of the land. Compliance with the laws of the land is the hallmark of the concept of rule of law to which every citizen regardless of status or creed is equally bound and protected. The law of the land requires that the application for extension or enlargement of the scheduling order made orally by the Plaintiff's Counsel on 02/11/2010 be dismissed for being time barred.

In the upshot and for the foregoing reasons, the application for extension or enlargement of the speed track is hereby dismissed for reasons of being time barred.

The application for extension or enlargement of the speed track having been dismissed the main suit is no longer maintainable. It is hereby struck out.

The circumstances of this matter are such that they do not call for costs. I shall therefore not make any order for costs. Each party shall bear own costs in this matter. Order accordingly.

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R.V. MAKARAMBA

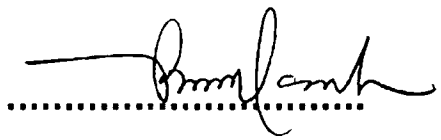
JUDGE

15/03/2011

Ruling delivered this 15th day of March 2011 in the presence of:

For the Plaintiffs: Mr. Rwehumbiza for Marando

For the Defendants: Mr. Rwehumbiza



R.V. MAKARAMBA

JUDGE

15/03/2011