IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 160 OF 2007

LEONIDAS MACHUMI & 25 OTHERS ..... PLAINTIFFS

VERSUS

YONO AUCTION MART & ANOTHER ..... DEFENDANTS

4th & 11th April, 2013

RULING

MWAMBEGELE, J.:

On 12.02.2013, before Mziray J., Mr. Masaka Counsel for the second Defendant orally took a plea in *limine litis* that the speed track assigned to this suit filed by the Plaintiffs had expired. He thus submitted that the court had no jurisdiction to entertain the case. The Court ordered him to file a formal application to this effect which he did two days later and this ruling is in respect of it.

Mr. Masaka has filed two points of preliminary objection. These are:

1. That the present suit is time barred; and

2. *That the Honourable Court has lacks jurisdiction over the matter in that the speed track set on 12.05.2007 had lapsed and there is no extension of time.*

The application was argued before me orally on 04.04.2013 during which the Applicant/Defendant was represented by Mr. Masaka; learned counsel while the Plaintiffs/Respondents were represented by Mr. Mkilya, learned counsel. Both Counsel expended commendable effort to represent their parties. I commend them for the industry demonstrated which has made my ruling simple.

Mr. Masaka had filed two points of preliminary objection as shown hereinabove but when this matter came up for hearing, he abandoned the first preliminary point. He thus remained with the second point on which he accordingly submitted. In his submissions, Mr. Masaka was very brief and focused. He submitted that on 12.05.2009 on which the First Pre-Trial Conference was convened, the case was assigned Speed Track III. He submitted that as per the speed track assigned, the case was supposed to be concluded within fourteen months. He submitted further that it is now well over fourteen months since the speed track was assigned. Having been no application from the plaintiffs to depart from the speed track assigned, he submitted, this court lacks jurisdiction to entertain the suit. In the absence of such an application, Mr. Masaka stressed, the suit is incompetent and the court therefore has ceased to exercise jurisdiction on the matter. To bolster his argument, Mr. Masaka referred this court to the

Tanzania Fertilisers Company Ltd Vs National Insurance Corporation & Another, Comm. Case No. 71 of 2004 (unreported) in which Massati, J. (as he then was) held that a case out of the scheduling order is incompetent. Mr. Masaka submitted in conclusion that the suit should be struck out with costs.

On his part, Mr. Mkilya for the Respondents was very lengthy in his submissions and in My view rightly so. He was, it seems, attempting to save a sinking boat on which his twenty six clients were aboard. He started, quite eloquently, with enumerating from the bar a chronology of events that led to the non compliance of the speed track set. He also challenged the irregularities in the present suit including the first Defendant not being involved in the pre-trial conference and non compliance of Order VIIIA Rule 3 (1) and (2) of the Civil Procedure Code, Cap 33. He also ascribed the delay of the case to ill health of the advocate who initially represented the Plaintiffs before he was engaged in September, 2012.

On the authority cited by Mr. Masaka, Mr. Mkilya submitted that the same is distinguishable from the present case in that in the ***Tanzania Fertilisers*** case (supra), all the requirements under Order VIIIA Rule 3 (1) & (2) were complied with, which is not the case in the present case. Mr. Mkilya, quite reluctantly, seemed to suggest the court was also contributory to the delay and non compliance of the speed track assigned to the case. He thus prayed that this court exercise the powers conferred upon it by Rule 4 of Order VIIIA and extend the speed track previously assigned to the case.

Mr. Mkilya, learned counsel went further – he submitted that questions of speed

tracks are questions of technicalities which are not known to the Plaintiffs and therefore, under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977, this court should not be bound by such technicalities. He thus submitted that the preliminary objection be overruled.

In rebuttal Mr. Masaka submitted that Mr. Mkilya is admitting the non adherence to the Scheduling Order in the present case. Those reasons for delay stated by Mr. Mkilya, he argued, should have been reasons in praying for departure from the scheduling order in an appropriate application. On the exercise of the court powers under Order VIIIA Rule 4 of the Civil Procedure Code, Cap 33, Mr. Masaka submitted that the course will be pre-empting the preliminary objection. He thus reiterated his prayer to have this suit struck out.

I have given due consideration to the rival submissions by both counsel. I am in agreement with the powerful argument by Mr. Masaka, learned counsel that this court cannot exercise the powers conferred upon it by Order VIIIA Rule 4 of the Civil Procedure Code, Cap 33. As rightly pointed out, the course will be tantamount to pre-empting the preliminary objection filed by the Applicant. There is a string of Court of Appeal decisions in this jurisdiction which hold that where a preliminary objection has been lodged, it will be improper for the adverse party to defeat the objection by pre-empting it anyhow. These include ***D. P. Valambhia Vs Transport Equipment Ltd*** [1992] TLR 246 (CA), ***The Minister for Labour and Youth Development and Shirika la Usafiri Dar es Salaam Vs Gaspa Swai and 67 Others***, Civil Appeal No, 101 of 1998 (unreported), ***Frank Kibanga Vs ACU Limited***, Civil Appeal No. 24 of 2003 (unreported) and ***Alhaji***

Abdallah Talib Vs Eshakwe Ndoto Kiweni Mushi [1990] TLR 108 to mention but a few. In the light of these decisions, Mr. Mkilya's prayer to the effect that this court should use its powers conferred upon it by Order VIIIA Rule 4 of the Civil Procedure Code, Cap 33, cannot be legally maintainable, for such course will have the effect of pre-empting the preliminary objection lodged by the Applicant.

Now back to the crux of the matter. Order VIIIA of the Civil Procedure Code, Cap 33 (R.E 2002) is relatively new in our legislation. It was entrenched in the Civil Procedure Code in 1994 vide the Civil Procedure Code (Amendment of Schedules) Rules, 1994 - GN No. 422 of 1994 and later improved by the Civil Procedure Code (Amendment of the First Schedules) Rules, 1999 - GN No. 140 of 1999. The Concept is therefore about two decades in our midst. However, to the best of my knowledge, unfortunately, there is a dearth of Court of Appeal decisions interpreting it.

According to Order VIIIA, cases are assigned Speed Tracks taking due regard to their nature. A case is assigned a speed track in consideration of its being fast, complex as well as its being a special case. There are four categories of Speed tracks as provided for by Clause (3) of Rule 3 to Order VIIIA as amended by the Civil Procedure Code (Amendment of the First Schedules) Rules, 1999 - GN No. 140 of 1999. These are Speed Tracks One, Two, Three and Four.

Speed Track One is reserved for fast cases which are considered by the Judge or Magistrate to be fast cases capable of being or are required in the interest of justice to be concluded fast within a period not exceeding ten months from

commencement of the case.

Speed Track two is reserved for cases considered by the judge or Magistrate to be normal cases capable of being or are required in the interests of justice to be concluded within a period not exceeding twelve months from commencement of the case.

Speed Track three is reserved for cases considered by the judge or Magistrate to be complex cases capable of being or are required in the interest of justice to be concluded within a period not exceeding fourteen months from commencement of the case.

Speed Track four is reserved for cases considered by the judge or Magistrate to be special cases which are neither considered to be fast, normal nor complex which nonetheless need to be concluded within a period not exceeding twenty four months from commencement of the case.

It is therefore evident from the foregoing that, in this jurisdiction, cases must be concluded at most within twenty four months from commencement of the case. As already said, in assigning speed track to a case, the judge or magistrate will take cognisance of the nature of the case if it is fast, normal, complex or abnormal.

I wish to stress at this juncture that after a suit is assigned a speed track specifying a period of time within which it must be finalised, that period starts to

run "from commencement of the case"; that is from the day on which it was instituted in court and not from the day it was assigned the relevant speed track [see ***Tanzania Fertilisers Company Ltd Vs National Insurance Corporation & Another***, Comm. Case No. 70 of 2002 (unreported) Massati, J. (as he then was)]. Should the plaintiff realise the case cannot be finalised within the speed track set, he is at liberty to apply for departure or amendment of the same. Ordinarily, when a scheduling conference order is made, no departure from or amendment of such order is allowed unless the court, upon application by a party to the suit, is satisfied that such departure or amendment is necessary in the interests of justice.

I need not overemphasize that scheduling conferences are part of case management intended to expedite disposition of cases. They are also intended to improve the quality of trial through a more thorough preparation and discourage wasteful pretrial activities. Once a scheduling conference is done, no applications, interrogatories etc will be allowed. This course saves the precious time of the court and of the parties and is consistent with the parties' interest to have litigation completed in the shortest possible time and at the least possible cost.

In the case at hand, the plaintiffs presented their plaint for filing on 28.06.2007. This means that the period of fourteen months allotted to the case on 12.05.2009 during the First Pre-trial Conference, started to run on that date (28.06.2007); and not on 12.05.2009. Therefore, the case having been assigned Speed Track III, ought to have been concluded within a period not exceeding fourteen months from commencement of the case. I agree with Mr. Masaka, that the case is not

properly before this court the plaintiffs having not sought and obtained leave to depart from the scheduling order. The provisions of Order VIIIA of the Civil Procedure Code are couched in mandatory terms. Strict adherence to scheduling orders is therefore a must in our jurisprudence.

Mr. Masaka; learned counsel has urged this court to strike out the suit. I am afraid, I will not be able to follow such a course; I will refrain from granting such a prayer. This court, being a court of justice, will not dismiss or strike out the case for expiry of time assigned to the case within which it ought to have been concluded. I think this is a fit case in which I should employ discretionary powers granted to me by the provisions of Section 95 of the Civil Procedure Code, Cap 33 and allow the plaintiffs to rectify the anomaly. I think justice will triumph this way. I am inspired by a persuasive decision of the Court of Appeal of Kenya in ***DT Dobie Vs Joseph Mbaria Muchina & Another*** [1982] KLR 1 in which Madan, JA in an obiter dicta observed at page 9. [quoted in ***Benja Properties Limited Vs Savings And Loans Kenya Limited*** High Court at Nairobi (Milimani Commercial Courts) Civil Case No. 173 of 2004 (available at www.kenyalaw.org] as follows:

> *"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it"*

It is my considered view that a litigant wishing to pursue his suit to its finality should be allowed to do so as long as no prejudice will be occasioned to the

adverse party. In the case at hand, it does not appear to me that the Defendants will be prejudiced if the Plaintiffs are allowed to rectify the anomaly so that the case proceeds on merits. Let the Plaintiff's case be prosecuted.

Before I conclude my Ruling, I wish to make a comment on Mr. Mkilya's submission to the effect that questions of speed tracks are questions of technicalities which are not known to the Plaintiffs and therefore, under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977, in the interest of justice, this court should not be bound by such technicalities. I agree that procedural irregularities and legal technicalities in our jurisdiction are not used to thwart justice. This stance was articulated by the Court of Appeal in ***the Judge In-charge High Court Arusha Vs N.I.N. Munuo Ng'uni,*** Civil Appeal No. 45 of 1998 (unreported) and ***Zuberi Mussa Vs Shinyanga Town Council*** Civil Application No. 100 of 2004 (unreported). However, I need not remind Mr. Mkilya of a Latin maxim that goes *ignorantia juris non excusat* (ignorance of law in no excuse). And in addition, it is a principle of constitutional law that the Constitution should be resorted to sparingly. I am alive to the decision of this court in ***Shabani Msengesi Vs National Corporation***, MWANZA Civil Appeal No. 44 of 1994, Lugakingira, J. (as he then was) quoted a Zimbabwean case of ***Minister of Home Affairs Vs Pickle and Others***, (1985) LRC (Const) 755 in which it was held:

> *"It is a cardinal principle of constitutional law that where an issue can be resolved without recourse*

to the Constitution, the constitution should not be involved".

Much as it is the practice of courts in this jurisdiction to ignore procedural irregularities which are formal and cause no prejudice to the other party, it is my considered view that the Constitution should be resorted to only in circumstances where there is no clear provision in the law that can cater for a particular situation. In the instant case, the issue under dispute can be resolved without making a resort to the Constitution. The Constitution should therefore not be involved. The Constitution, as the highest law of our land and *grund norm*, is "sacred". It should be resorted to sparingly. It is my humble view that counsel are duty bound to jealously guard this principle.

In the upshot, in view of what I have endeavoured to state hereinabove, the preliminary point of objection is sustained with costs to the extent I have stated. The Plaintiffs, if they so wish, should rectify the anomaly by filing relevant application(s) within seven working days (that is; *dies non* exclusive) from the date of this ruling. I think, as already said, this course will leave justice smiling. It is so ordered.

DATED at DAR ES SALAAM this 11th day of April, 2013.

J. C. M. MWAMBEGELE

JUDGE