

**IN THE HIGH COURT OF TANZANIA**  
**AT IRINGA**

**CIVIL CASE NO. 5 OF 2008**

**MARTIN NASHOKIGWA ..... PLAINTIFF**

**Versus**

<p><b>MARCUS MDEMU</b> <b>THE EDITOR, NIPASHE NEWSPAPER</b> <b>THE MANAGING DIRECTOR,</b> <b>THE GUARDIAN LIMITED</b></p>	}	<b>..... DEFENDANTS</b>
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23<sup>rd</sup> & 2<sup>nd</sup> May, 2014

**RULING**

**MWAMBEGELE, J.:**

When this case came up for hearing on 23.04.2014, Mr.Mushokorwa learned Counsel for the Plaintiff addressed and prayed to the Court on two issues as follows. First, according to the Pre-Trial Conference (PTC) held on 29.04.2010 before Mkuye, J., the case was assigned Speed Track II which was to be finalized by 28.04.2011 in view of Order VIIIA rule 3 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the Civil Procedure Code"). He submitted that the case was not finalized within the scheduled period for two main reasons – first, that his colleague Mr. Mwamgiga for the defendant had been in India for treatment and secondly, that there was as well transfer of judges from this station.

Based on this submission, Mr. Mushokorwa prayed to the court to extend the time within which this case can be finalized. The prayer was made under Order VIII A rule 4 of the Civil Procedure Code. Mr. Mushokorwa had another prayer to make: that he be allowed to file an application for amendment of the plaint under Order VI rule 17 of the Civil Procedure Code Act. He was armed with the relevant documents to file.

Mr. Mwamgiga, learned Counsel for the defendant, in effect, had no objection to the first prayer, he only was of the view that Mr. Mushokorwa himself was to blame for the delay in that more often than not, on several excuses, has not been entering appearance when this case was being called for hearing. On the second prayer, Mr. Mwamgiga submitted that after the PTC was conducted he has no option to file another document. He stated that if his prayer is granted it will have the effect of delaying the case and would be inappropriate in view of the First Pre-Trial Settlement and Scheduling Conference which is already conducted. Mr. Mwamgiga pressed the Court not to grant said prayer.

In rejoinder submission, Mr. Mushokorwa contended that Mr. Mwamgiga has not raised a provision of the law which objects him to bring an amendment at this stage. That, he has not commented anything on the provisions of Order VI rule 17 which he stated in his submission. That, the said provisions state that amendment can be made at any time before judgment. Mr. Mushokorwa went further to submit that Order VIII A was inserted in our Civil Procedure Code in 1994 and spared Order VI rule 17 thereby connoting that amendment can be allowed at any time before

judgment. That, under the provision he can use the chance to amend his Written Statement of Defense as well. That, the amendment they intend to bring is not new; that they intend to quantify the special damages as in the plaint they did not put in the figure.

I have given due consideration to the submissions canvassed by both learned Counsel. There are two prayers that are being brought to the fore by Mr. Mushokorwa. The first one, as seen above, is for extension of time within which the case can be finalized in this court. As rightly pointed out by Mr. Mushokorwa, learned Counsel, the provisions of Order VIIIA of the Civil Procedure Code, Cap 33 (R.E 2002) are relatively new in our legislation. Order VIIIA 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. Rule 4 thereof, under which Mr. Mushokorwa is making the application, 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 or 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.”

In the light of the foregoing rule, departure from a scheduling order is therefore allowed in the interests of justice. Having scanned the record of this case, I am of the considered view that it was not entirely the fault of the Plaintiff that the speed track assigned to this case expired. Both parties contributed to the delay in hearing and disposal of this case within the allotted timeframe. In view of the fact that Mr. Mwamgiga, learned Counsel for the defendants has not objection and in further view of the fact that it is in the interest of justice that suits like the present one be heard and determined on merits rather than on technicality, I would agree that that it will be in all fairness to extend time within which this case can be finalised. I feel irresistible to associate myself with the 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](http://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 accorded that opportunity inasmuch 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 case is reassigned the speed track after the one assigned to it have expired so that the case proceeds on merits. That is perhaps the reason why Mr. Mwamgiga, learned Counsel for the Defendants does not object to the prayer. Let the Plaintiff's case be prosecuted.

Mr. Mushokorwa's second prayer was in respect of filing an application to have the plaint amended. He made that prayer, he so intimated to the court, after the High Court Registry Officers refused to accept the documents for filing. In arguing this point, I think both learned Counsel are placing the cart before the horse. Mr. Mushokorwa's was just a prayer to have the documents filed. The arguments presented by both learned Counsel to the effect that amendments are allowed at any stage before judgment in view of Order VI rule 17 or that no application is allowed after the First Pre-Trial Settlement and Scheduling Conference in view of Order VIIIA were presented as if the application for amendment had been filed already. I think it will be apposite to allow Mr. Mushokorwa to have his application filed so that the arguments are presented on which the court can make a decision on whether or not amendments envisaged by the Plaintiff's Counsel can be allowed. Without the application being filed, the court lacks material upon which to make a sound decision.

In the end result, as observed above, I find merit in the prayer to extend time within which this suit can be finalised in this court. This case is reassigned Speed Track II commencing from the date of this Ruling. As for the second prayer, Mr. Mushokorwa is allowed to file his application for

leave to amend the plaint. The application should be filed within seven days from the date of this Ruling. Let the case be mentioned on 05.05.2014 with a view to seeing the way forward. In the meantime, no order is made as to costs. Order accordingly.

DATED at IRINGA this 28<sup>th</sup> day of April, 2014.

**J. C. M. MWAMBEGELE**  
**JUDGE**