IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 5 OF 2011

EDUCATIONAL BOOKS PUBLISHERS LTD ..... PLAINTIFF

VERSUS

HASHAM KASSAM & SONS LTD
ISSA LTD
UNIONAIRE LTD ..... **DEFENDANTS**
BANK M TANZANIA LTD

5th May & 4th June 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a preliminary objection raised by Mr. Shirima, learned counsel for the defendants Hasham Kassam & Sons Ltd, Issa Ltd, Unionaire Ltd and Bank M Ltd against the plaintiff Educational Books Tanzania Ltd. The objection has the following two points:

1. This Honourable court has no jurisdiction to entertain the matter; and
2. This suit has extended beyond its speed track without leave of the court.

The Preliminary Objection (henceforth "the PO") was argued before me on 05.05.2015 during which the plaintiff was represented by Mr. Ogunde, learned advocate and the defendants had the services of Mr. Shirima, learned advocate.

On the first point of PO, Mr. Shirima adopted the skeleton arguments earlier filed and argued that going through the plaint and the reliefs prayed it is obvious that the suit filed by the plaintiff is not one of commercial significance. He relies on the definition of the term commercial significance as appearing at rule 2 of the High Court Registries (Amendment) Rules, 1999 – GN No. 141 of 1991 and ***Stanbic Bank Limited Vs Malawi Freight Forwarders Ltd***, Commercial Case No. 2 of 2007 (unreported) to drive this point home. The reliefs prayed; declaratory orders, punitive and general damages are not of commercial significance are also under attack; claiming that they could be entertained by a subordinate court. Mr. Shirima therefore states that the quantum of damages prayed they being grantable at the discretion of the court; the court thus lacks pecuniary jurisdiction to entertain this suit. To reinforce this point, he relies on ***John Mallya Vs Zantel (T) Ltd & Another***, Civil Case No. 62 of 2007 (unreported). Mr. Shirima

has also cited ***M/S Tanzania - China Friendship Textile Co. Ltd.* Vs *Our Lady of the Usambara Sisters*** [2006] TLR 70 to drive home the point that it is the substantive claim and not the general damages which determines the pecuniary jurisdiction of the court.

Mr. Shirima has also attacked reliance on mesne profits, their not being special damages, cannot be used to determine the jurisdiction of this court.

On the second point of PO, Mr. Shirima submitted that the suit is incompetently before the court in that the speed track assigned to the case had long expired. The learned counsel submitted that the case was assigned Speed Track II on 28.07.2011 and that in view of Order VIIIA rule 3 (b) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"), the speed track assigned expired on 27.07.2012. It is now 2015 and the plaintiff has not applied for departure from the scheduling order to have the speed track extended. In the premises, the learned counsel submitted that the suit is incompetently before the court and made a prayer that it be struck out. The prayer was made on the strength of Order VIIIA rule 5 of the CPC and ***Tanzania Fertilizer Vs National Insurance Corporation of Tanzania & another***, Commercial Case No. 71 of 2004 (unreported) was cited to support this proposition.

Mr. Ogunde, learned counsel for the plaintiff did not file any skeleton arguments before the *viva voce* hearing. He did not do so not out of contempt but that he did not know the nature of the PO. I think Mr. Ogunde is right because the nature of the notice of the PO filed is such that one would not know the gist thereof. But that defence is true as far as the first point of the PO is concerned. On the second point, it is vividly clear from the notice that the challenge was pegged on the expiry of the lifespan of the case. For the foregoing reason (in respect of the first limb of the PO) and for the reason that this case commenced before the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") came into force and for the further reason that failure to file skeleton written arguments, under the Rules, does not necessarily warrant adjournment of a hearing, I allowed Mr. Ogunde to respond. I shall revert to this point later in this ruling.

In response to the first point, he submitted that the point that the suit did not involve a commercial dispute was raised on 23.04.2012 and argued. That the court made a ruling on 09.05.2012 and dismissed the objection. This court (Nyangarika, J.) relied on rule 2 of the High Court Registries (Amendment) Rules, 1999 which is a replica of rule 3 of the Rules and ruled out that the matter was of commercial significance. That objection was dismissed with costs thus raising it again is not proper as the court is *funtus officio*, he submitted. If the defendants

were not satisfied with the ruling, he submitted, they ought to have appealed against it.

With regard to the pecuniary jurisdiction, the learned counsel submitted that as evident at paragraphs 14 and 15 of the plaint, the plaintiff is challenging the mortgage of the disputed property which was used to secure credit facilities extended to the second and third defendants and a declaration that the said mortgages were null and void. The value of the property in dispute which has been wrongly mortgaged to the 4th defendant by the first defendant is Tshs. 400,000,000/= which does not fall within the pecuniary jurisdiction of the subordinate courts.

On the question of speed track being expired and the prayer by Mr. Shirima to the effect that the suit be struck out, Mr. Ogunde made a heavy reliance of the decision of this court of ***Africa Medical Research Foundation Vs Stephen Emmanuel & others***, Land Case No. 17 of 2011 (unreported – henceforth "the ***AMREF*** case") to the effect that the court's jurisdiction to entertain a case does not cease upon expiry of a speed track assigned to a case. And that under Order VIIIA rule 4, either party can apply to depart from a scheduling order and that the court can do so *suo motu*. The learned counsel prayed that the court be persuaded by the decision and call the parties and fix a new speed track of the case.

In a short rejoinder, Mr. Shirima submitted that the application made by the learned counsel for the plaintiff to call the parties to address the anomaly and fix the speed track of the case ought to have been made within sixty days after the expiry. This is the import of the ***Fertilizer*** case (supra), he submitted.

Let me, firstly, before going into the nitty gritty of the matter, say something in respect of the skeleton written arguments filed by Mr. Shirima, learned counsel. These are filed pursuant to rule 64 of the Rules. As already said above, the case having been commenced before the birth of the Rules, they (the Rules) are not necessarily applicable to the case. But I allowed and find no injustice has been occasioned in so allowing Mr. Shirima to file and adopt at the hearing the skeleton written arguments he earlier filed. Happily, Mr. Ogunde did not raise any alarm against them.

Having heard the learned counsel for both parties, the ball is now in my court. The first point of PO will not detain me. As rightly pointed out by Mr. Ogunde, this court had already decided on it in its ruling of 09.05.2012. At page 7 of the typed ruling, this court observed:

> "... suffice to affirm the plaintiff's counsel argument that the suit at hand squarely falls under the definition of a commercial case ..."

And at page 10 of the same typed ruling, the court observed:

> "... the mortgage referred in the plaint is based on a loan transaction which is a commercial transaction allegedly tainted by fraud, liability for which the defendants are called to answer to in this court, in the premises of Rule 2 (iv) and (v) [of the High Court Registries (Amendment) Rules, 1999 (GN 141 OF 1999)]."

The foregoing answers the first point of preliminary objection. It is surprising why the learned counsel for the defendant raised it again. I am aware that Mr. Shirima was not in the conduct of this case at that time. It was one Mr. Malima, learned counsel, who argued it and was present when the ruling thereof was delivered on 09.05.2012. But that is not an excuse to Mr. Shirima, for, he ought to have been fully armed with the facts of the case he was hired to defend. He ought to have perused the case file elegantly before filing the objection. The first point of the PO is therefore overruled.

The second point of PO respects expiry of the speed track assigned to the case. As rightly pointed out by Mr. Shirima, on 28.07.2011, the case was assigned Speed Track II. The speed track of this case, having been filed before the coming into force of the Rules on 01.07.2012, is

controlled by Order VIIIA of the CPC. On the other hand, Mr. Ogunde relies on ***Africa Medical Research Foundation*** (supra; henceforth "the AMREF case") to the effect that the court has no jurisdiction to neither dismiss nor strike out the case under the pretext that its speed track has expired.

I have had an opportunity to, in more than one occasion, discuss this point in some of my previous decisions. Such decisions include ***Ayubu Lumuiiko Nguiukia Vs National Microfinance Bank & Another***, Miscellaneous Land Application No. 7 of 2014 (unreported) and a fairly recent decision of ***Soud Eliasa Rashid Vs National Microfinance Bank Ltd,*** Land Case No. 5 of 2012 (unreported) which judgment I handed down in the recent past; on 27.04.2015 to be particular, at Mbeya. In those two cases, I discussed the point at hand in the light of the ***AMREF*** case; a case cited to me by Mr. Ogunde. I still hold the same views discussed in those cases and will reiterate that position in this ruling.

As rightly put by Mr. Shirima, learned counsel for the defendants, the timeframe allotted to this case, within which it ought to have been finalised, had long expired and neither the plaintiff nor his counsel bothered to apply for departure of the speed track or amendment of the same as provided for by rule 4 of Order VIIIA of the CPC.

As good luck would have it, the question what should be done in case a speed track assigned to a case expires, is not a virgin territory in our jurisdiction. It has been traversed before by this court. The only glitch is that there is, to the best of my knowledge, a dearth of Court of Appeal decisions on the subject or to put it more correctly, in my research, I have not been able to lay my hands on any decision of the Court of Appeal which falls in all fours with the present instance. That apart, the High Court, which has some decisions on this point and on which decisions I could lay my hands on, is divided.

In the ***AMREF*** case my brother at the Bench, Dr. Twaib, J., seized with an identical situation, dealt with this issue at some considerable length reiterating his earlier discussion in ***Bakari Yohana Vs Muhimu Awadh & 2 Others***, Civil Appeal No. 123 of 2011 (also unreported). In the ***AMREF*** case, the court revisited a number of decisions of this court on the point and came up with three schools of thought on the subject. The decisions discussed therein include ***Tanzania Fertilizer***, a case relied on by Mr. Shirima to bolster his argument. Other cases discussed therein include ***Dal Forwarding (T) Ltd Vs National Insurance Corporation (T) Ltd. & Presidential Parastatal Sector Reform Commission***, Commercial Case No. 70 of 2002, ***Mwanza City Engineer Vs Anchor Traders Ltd*** Civil Application No. 14 of 1995, the ***Jared Nyakila & Another Vs Shanti Shah & 3 Others***, Commercial Case No. 40 of 2008 and ***Covell Mathew Partnership Ltd. Vs***

Gautam Chavda, Civil Case No. 3 of 2002, all unreported decisions of this court.

In the two cases, the court categorized three schools of thought on the subject. First, is the strict approach school which holds that once the speed track assigned to a case expires, the court lacks jurisdiction to entertain it and the suit must be struck out. The second school is the moderate approach which will extend the speed track assigned to a case if so moved by a party within the limitation period in terms of item 21 of part III of the first schedule to the Law of Limitation. And the third one is a liberal approach school which places on the court a preliminary responsibility to order a departure from or amendment of a scheduling order. Under this school, the court may order departure from or amendment of the scheduling order *suo motu*, at any time, without limitation, and will not strike out the suit on grounds of expiry of a speed track.

I am in agreement with the reasoning and conclusions reached. Most of the High Court decisions on this point fall on the second school of thought. As rightly put by His Lordship Dr. Twaib, J. this school is, again, divided into two sub-schools. The first one imposes the duty upon the plaintiff to apply for amendment of a scheduling order upon realising that the suit cannot be finalised within the allotted speed track while the second places that duty upon any benefitting party. Save for the commencement date of speed track in respect of speed track III

and speed track IV, I entirely share the reasoning in the ***AMREF*** and ***Bakari Yohana*** cases (supra) and wish to adopt them in this case.

The reason why the provisions of Order VIIIA and Order VIIIB of the CPC were introduced into our legislation was not for an embellishment; they were introduced in the CPC with a view to expediting the hearing and determination of suits so that the goal to speedy administration of justice would be achieved. However, the speed intended to be achieved was not meant to offend the ends of natural justice.

As righty observed by Dr. Twaib, J. in the two cases, nothing can be gleaned from the provisions of Order VIIIA of the CPC as to empower the court to dismiss or strike out a suit in case of noncompliance with the provisions. I agree and the reasons are obvious; for allowing that course of action would be tantamount to defeating the purpose for which the very amendment intended to address. His Lordship expounded in the ***AMREF*** case as follows:

> "One thing is clear from these provisions: the law does not empower the court to strike out a suit on grounds that no application has been made by the party benefitting from such amendment or departure. Neither is there anything that can be construed as requiring that there must be an application to that effect

> before the court can move to order a departure or amendment."

I, once again, entirely agree. I find comfort on this stance in the English case of ***Re Coles Ravenshear Arbitration*** [1907] KB 1 wherein Collins M.R. had this to say at page 4:

> "Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

In Tanzania, what was stated in ***Re Coles Ravenshear Arbitration*** (supra) has been codified in article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 (henceforth "the Constitution"). For easy reference, let me reproduce this article as far as it is relevant to the present discussion. It reads (in the official version) as follows:

"(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani:
(a) ...
(b) ...
(c) ...
(d) ...
(e) Kutenda haki bila ya kufungwa kupita kiasi na masharti ya kifundi yanayoweza kukwamisha haki kutendeka".

The above provision was translated by the Court of Appeal in ***The Judge In-charge High Court Arusha Vs N.I.N. Munuo Ng'uni*** [2004] TLR 44 as follows:

"(2) In the determination of civil and criminal matters according to law, the courts shall have regard to the following principles, that is to say:
(a) ...
(b) ...
(c) ...
(d) ...
(e) administering justice without being constrained unduly by technical requirements,

which are capable of preventing justice from being done".

And, to zoom a little bit more into the translation, the same court, in Samson Ng'walida Vs Commissioner General of Tanzania Revenue Authority Civil Appeal No. 86 of 2008 (unreported) interpreted the provision in clearer terms as follows:

> "(2) In the delivering decisions in matter of civil and criminal nature in accordance with the law, the courts shall observe the following principles, that is to say:
> (a) ...
> (b) ...
> (c) ...
> (d) ...
> (e) to dispense justice without being tied up with undue technical provisions, which may obstruct dispensation of justice".

The official version of the Constitution is the Kiswahili version.

I have quoted the above sub-article of the constitution *in extenso* for a better understanding and in order to see whether or not the provision can safely be brought into play in the instant case. The technicalities

that are intended by the Constitution under this provision are, in my considered view, those which if allowed will make justice prosper. It is my well considered view that, this is a proper case in which the provisions of article 107A (2) (e) of the Constitution should, for justice to triumph, be invited into play.

And, in the same line of argument, in respect of scheduling conferences, it was held in a Ugandan case of ***Kigula & others Vs Attorney General*** [2005] 1 EA 132 in the headnote thereof as follows:

> "The purpose of a scheduling conference is to save time of the Court by sorting out points of agreement and disagreement so as to expedite disposal of cases. Like any other rules of procedure, it is a handmaiden of justice not intended to be an obstacle in the path of justice."

While still on the same point, I wish to refer to an Indian decision of ***Sushil Rani Vs Attam Parkash*** (2007) 146 PLR 595 (available at http://indiankanoon.org/doc/401757/) in which Hemant Gupta, J. had the following to say at paragraph 14 of the judgment delivered on 05.04.2007:

> "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

And, to bolster this point further, it may not be out of point to underscore what was stated by the Supreme Court of India in ***R. N. Jadi & Brothers V. Subhashchandra***, (2007) 9 Scale 202 (available at http://indiankanoon.org/doc/1461813/) in which the court considered the procedural law *vis-a-vis* substantive law and observed as under:

> "All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless

> to meet extraordinary situations in the ends of justice."

In view of the foregoing discussion, it is abundantly clear that the procedure enumerated under Order VIIIA of the Civil Procedure is only a handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In the premises, the plaintiff cannot be denied an opportunity of participating in the course of justice just because the speed track within which his case ought to have been finalised has expired. On this conclusion, 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 (Mlimani 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".

I am aware that the foregoing quote is making reference to termination of a case by summary dismissal. However, I am of the considered view that the principle is true in instances, like in the present case, where a

case is terminated for expiry of a speed track assigned to it. Thus, in the same line of argument, to borrow the words of Madan, JA, in the ***DT Dobie*** case (supra), a court of justice should aim at sustaining a suit rather than striking it out on the ground that there is noncompliance with the scheduling order. In my considered view, what the court is supposed to do in such circumstances is to allow a party to apply for amendment of the same so that the suit is prosecuted to its finality. And in appropriate situations, the court can, *suo motu*, amend the same provided that the course does not leave justice crying.

To recapitulate, a party who fails to apply for departure or amendment of the scheduling order, should be allowed so to apply if he so wishes. The court can, in appropriate situations, order departure or amendment of the scheduling order *suo motu*. The test should always be whether any injustice will be occasioned in taking that course of action. The provisions of rule 4 of Order VIIIA of the CPC which allow a party to apply for extension of time upon giving sufficient reasons intends to accord the party applying time to prosecute the suit to its finality. The procedure spelt out at Order of VIIIA of the CPC, like any other rules of procedure, is a handmaiden, not the mistress, a lubricant, not a resistant in the administration of justice.

Mr. Shirima has urged this court to strike this suit out under the provisions of rule 5 of Order VIIIA of the CPC. I am afraid, in the light

of the above discussion, this court has no such powers under the provisions. In the premises, the second point of PO also fails.

Consequent upon the above findings I, *suo motu*, extend the lifespan of this case – Commercial Case No. 5 of 2011 – to ten more months commencing from the date of this ruling. For the avoidance of doubt, the proceedings of this court from the date of expiry of the speed track assigned to this case at the scheduling conference to the date of this ruling, are not illegal as the court did not cease to have jurisdiction to adjudicate the case upon the said expiry.

In the end of it all, both points of the PO raised by Mr. Shirima, learned counsel, fail and are hereby overruled. Costs will be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 4th day of June, 2015.

J. C. M. MWAMBEGELE

JUDGE