

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 59 OF 2012

FBME BANK LIMITED.....PLAINTIFF

VERSUS

LUPEMBE TEA ESTATE CO. LIMITED.....1ST DEFENDANT

YUSUF NAWABU MULLA.....2ND DEFENDANT

LUSHOTO TEA CO. LIMITED.....3RD DEFENDANT

RULING

Mansoor, J:

Date of hearing – 09th MARCH 2015

Date of Ruling- 13th MARCH 2015

Under Order VIIIA Rule 3 of the Civil Procedure Code, Cap 33

R:E 2002 “CPC”, the Court is required to conduct pretrial

conferences in consultation with the parties and their attorneys/advocates and any unrepresented parties to assign a speed track for a case. This is particularly provided under Order VIIIA Rule 3 (1) and (2), of the CPC, it reads:

3. (1) *In every case assigned to a specific judge or magistrate, a first scheduling and settlement conference attended by the parties or their recognized agents or advocates shall be held and presided over by such judge or magistrate within a period of twenty-one days after conclusion of the pleadings for the purpose of ascertaining the speed track of the case, resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial.*

(2) *In ascertaining the speed track of the case, the presiding judge or magistrate, shall after consultation with the parties or their recognized agents or advocates, 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.

This case was assigned to Speed Track III by the Court (Bukuku J.), after consultation with Advocate Nguluma for the Plaintiff, and Advocate Kilindu, who appeared for the Defendant. This was on 10th December 2012. The plaint was presented in Court on 06th June 2012. Order VIIIA Rule 3(c) of the CPC, provides:

“Speed Track Three shall be reserved for cases considered by the judge or magistrate to be complex cases capable of being or are required in the interests of justice to be concluded within a period not exceeding fourteen months.”

Rule 3 (c) of Order VIIIA does not say at which point the speed track starts to run, thus if The Speed Track started to run from the commencement of the case i.e. at the institution of the plaint, the Speed Track so fixed would have expired on 05th August 2013, and if the Speed Track started to run from the

date the Speed Track was fixed by the Court, i.e. on 10/12/2012, the Speed Track would have expired on April 2014.

In either case we take it, the Speed Track has already expired since long ago, and as it is now, there exists no case before me. However the Civil Procedure Code under Order VIIIA Rule 4 provides for the modification of the schedule or the speed track for good cause and with the judge's consent. It provides:

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 or amendment is necessary in the interests of justice and the party in favor of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the Court directs otherwise.

None of the parties in this case had asked for a change of scheduled dates, and on 9th March 2015 Advocate Josiah representing the Defendant raised an objection that the life

span of the case has expired and the Court lacks jurisdiction to entertain a suit whose life span has expired. To support his arguments he cited a number of cases including the case of **African Medical and Research Foundation vs. Steven F Emmanuel & 3 others Land Case No. 17 of 2011 (unreported)** by his Lordship F. Twaib J, “the AMREF Case”.

Generally, almost one year have passed since the deadline of the speed track so fixed and as per the case decided by Hon. Makaramba J. in **Jared Nyakila & Another v Shanti Shah & 3 Others**, Commercial Case No. 40 of 2008 (unreported) the date to allow the party to apply for amendment or departure of the scheduling order to be filed had already passed since April 2014 or June 2013, as such an application should have been made within 60 days from the date the scheduling order had expired.

Order VIIIA Rule 4 of the CPC allows the Court to make amendment or departure to the scheduling order fixed during the first pretrial conferences upon good cause and for the

interest of justice. None of the parties to this suit has presented either written or oral application asking for amendment or departure of the scheduling order or to make such a payer out of time. This Court cannot hold a hearing to determine whether good cause and/or excusable neglect existed to extend the schedule and therefore revive the case as there is no such an application before it.

Advocate Josiah who appeared for the plaintiff and in support of his arguments to dismiss the case for reasons of expiry of Speed Track cited the case of **African Medical and Research Foundation vs. Steven F Emmanuel and 3 others, Land Case No. 17 of 2011** (unreported) by Hon. F. Twaib J, “the AMREF case” and urged this Court to adopt the first and the second approach of that case which states as follows:

1. *“The first school (the strict approach) opines that once the speed track has been fixed, any departure therefrom can only be for an aggregate period of 24 months and no more. Once the speed track has expired, the Court’s jurisdiction likewise expires as there is nothing left on record;*

2. *The second school (the moderate or middle-of-the-lane approach), would grant extension when the Court is properly moved by a party to do so within the limitation period. This school determines the period of limitation to be sixty days, per item 21 of the Schedule to the Law of Limitation Act, Cap 89 (R.E. 2002);*

The Counsel said, since the Speed Track had expired since a year ago, the Court's jurisdiction to entertain the case expired, he also said, the Court is not moved to grant the amendment of the speed track, and even if it was moved the time for doing so had long expired and there is no leave of the Court granted allowing the plaintiff to apply for amendment or extension of Speed Track out of time.

Mr Sinare who appeared for the defendant, urged the Court to adopt the third approach of the AMREF Case, which states:

"The third school (the liberal approach), places the primary responsibility to order a departure from, or amendment of, the

scheduling order on the Court. Under this school, the Court may do so suo moto , and at any time without limitation, so long as, considering the circumstances, it is satisfied that justice so requires. The Court has no power to dismiss or strike out the suit simply on grounds of expiry of the speed track.”

Advocate Sinare said since the delay is not attributed to the plaintiff but the defendant and the Court, the Court should have amended the speed track suo moto, and extended the speed track to a further date, and the Court could do so at any time without limitations if it is satisfied that justice so requires, and that the Court has no power to dismiss or strike out the suit simply on grounds of expiry of the speed track.

A rule pertaining to scheduling orders and trial settings is beneficial to both the bench and the bar. Order VIIIA requires the Court to hold a pre-trial conference in consultation with all parties. After any such conference, the Court enters a pre-trial scheduling order to further promote the ends of justice and facilitate the just, efficient, and speedy determination of

every action. This is the purpose why the legislature introduced O. VIIIA to the CPC.

Rule 4 of Order VIIIA of the CPC discourages departure from or amendments to the scheduling order, and this is why it used the strict language, “no departure from or amendment of the scheduling conference order shall be allowed unless the Court is satisfied that such departure or amendment is necessary in the interest of justice”. The amendments are discouraged and shall only be granted for good cause. Applications to amend are governed by Rules of Civil Procedure and Law of Limitation Act, Cap 89 R: E 2002, as clearly stated in the case of Jared Nyakila (*supra*) by Hon. Makaramba J.

A failure to comply with any of the provisions of Order VIIIA i.e. the Scheduling Conference Order or an amendment to scheduling order may result in sanctions being imposed by the Court pursuant to Order VIII Rule 4, and 5 of the Civil Procedure Code including limitation and payment of costs.

The preliminary objection raised by the Counsel for the plaintiff is tenable. The lifespan of the suit has long expired and there is no application by any party to this suit for its amendment or extension. The life span of the case has been left to survive despite its expiry since 2013 with total disregard of the provisions of Order VIIIA, the party who is to benefit for the extension, the plaintiff herein did not apply for departure as early as possible as prescribed by the statutes of limitations. No application has been made before the Court to extend the time for making the application for departure or to amend the scheduling order. The life span of this case has expired and the Court lacks jurisdiction to entertain it as there is no suit left on record.

One more point to consider is whether or not the Commercial Rules do apply in a suit instituted before the Commercial Rules were made operational. As in any other law, the Commercial rules would not be made to apply retrospectively, thus in this suit, as correctly pointed out by Advocate Josiah,

the Rules applicable are those contained in the Civil Procedure Code, Cap 33 R:E 2002.

The case is therefore struck out for it has crossed its speed track earlier set, and no application for its extension or re-scheduling has been made. I also order costs to the defendant.

DATED at DAR ES SALAAM this 13th day of March, 2015

MANSOOR
JUDGE
13TH March 2015