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

COMMERCIAL CASE NO.92 OF 2009

TANZANIA INTERNATIONAL CONTAINER

TERMINAL SERVICES LIMITED (TICTS).....APPLICANT/DEFENDANT

VERSUS

NGOIE MUBANZO t/a ETS MUBANZO.....RESPONDENT/PLAINTIFF

Date of last Order: 09/11/2011
Dates of oral submissions: 09/11/2011
Date of ruling: 20/12/2011

RULING

MAKARAMBA, J.:

On the 23rd day of March 2011, the Applicant filed in this Court a Chamber Summons under Section 95 and Orders VIIIA Rules 4 and 5 and XLIII Rule 2 of the Civil Procedure Code [Cap.33 R.E 2002] supported by the affidavit of Mr. Dillip Kesaria learned Counsel for the Applicant/Defendant seeking for among other orders that this Court be pleased to depart from the scheduling order made at the initial pre-trial scheduling and settlement conference herein and that this suit be struck out.

The application by consent of Counsel for the parties was disposed of orally, Mr. Tarimo, learned Counsel for the Respondent/Plaintiff and Mr. D. Kesaria, learned Counsel assisted by Mr. Rwehumbiza learned Counsel for the Applicant/Defendant.

Mr. Kesaria learned Counsel for the Applicant/Defendant submitted that the Plaintiff instituted this suit in this Court on the 29th day of October 2009 by a Plaint filed, and following closure of the pleadings and the Defendant's application for security for costs having been disposed, an initial pre-trial scheduling and settlement conference was convened, by which the case was assigned at Speed Track Three, meaning that the case was required to be concluded within a period not exceeding fourteen (14) months.

According to Mr. Kesaria, the life span of the case started to run from the date of its commencement, that is, on the 29th day of October 2009 and expired sometimes in December 2010. Mr. Kesaria submitted further that the Court record shows that no any application has been made by the Plaintiff or any order has been made by this Court for enlargement of the speed track. It is therefore necessary to depart from the scheduling order in order to determine the legal status of these proceedings, Mr. Kesaria proposed and prayed that all the proceedings after the speed track had expired are a nullity and this case has to be struck out with costs. In buttressing his argument, Mr. Kesaria referred this Court to various decisions both of the High Court and the Court of Appeal of Tanzania, particularly that of Hon. Justice Kimaro in **Civil Case No.124 of 1998 between ABSOLOM L.S MASAKA V. PETER T. MASSAWE AND ANOTHER** and that of Hon. Justice Rweyemau in **Civil Application No. 17 of 2005 between MWANZA CITY ENGINEERING AND MWANZA CITY COUNCIL V. ANCHOR TRADERS LTD.**

The main controversy in this application is as on which date the speed track of this case starts to run, Mr. Kesaria pointed out. This case was filed on the 29th day of October 2009. The Respondent contention is that the speed track of this case should start to run from the 26th of March 2010, the date of the First Pre-trial Conference. Mr. Kesaria on his part contends that that is not correct, and referred this Court to the decision of Hon. Massati, J. (as he then was) in **Commercial Case No. 70 of 2002 between DALFORWARDING (T) LTD V. NIC (T) LTD & PSRC** where His Lordship held that:

> *"The date of presentation of plaint is therefore the date of commencement of the suit."*

In reply, Mr. Tarimo, learned Counsel for the Respondent/Plaintiff submitted that by the time this application was filed in this Court, the speed track of this case had yet to expire for the reason that although the suit was filed on the 29th day of October 2009, the first Pre-trial Conference was conducted on the 26th day of March 2010, and this is the date on which the speed track of the case starts to run. Mr. Tarimo stated further that the decision by Hon. Justice Massati in **Commercial Case No. 70 of 2002 between DALFORWARDING (T) LTD V. NIC (T) LTD & PSRC** cited by Mr. Kesaria is distinguishable from this suit. Mr. Tarimo submitted further that the Speed Track Three which was set for this case is provided for under Rule 3(c) of Order VIIIA of the Civil Procedure Code which stipulates that:

"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."

It is the further contention of Mr. Tarimo that there is a difference between the wording of Rule 3(c) and Rule 3(a) and (b) of the Civil Procedure Code, since it is specifically provided under Rule 3(a) and (b) of the Civil Procedure Code that ten months and twelve months respectively start to be counted from the day of the institution of the suit. According to Mr. Tarimo, the decision of Hon. Massati, J. in **DALFORWARDING (T) LIMITED V. NIC (T) LTD & PSRC** (supra) cited by Mr. Kesaria is no longer applicable in this application because it does not say when the speed track starts to run. The limitation period of fourteen (14) months starts to run from the date of setting the speed track, Mr. Tarimo insisted. There is nowhere in the provisions of Order VIIIA Rule 3(c) of the Civil Procedure Code, where it is stated that the speed truck starts to run from the commencement of the suit, Mr. Tarimo pointed out, and added that where the statute is silent then the starting time could be applied differently. The speed track should start to run from the date of fixing of the speed track of the case where the statute is silent, Mr. Tarimo proposed.

As for Rule 3(c) and (d) of Order VIIIA of the Civil Procedure Code, it was intentionally set so for the purposes of accommodating complex cases different from the first and second one because they are simple cases, Mr.

Tarimo suggested. If the legislature intended all cases set under Rule 3(C) of Order VIIIA of the Civil Procedure Code to starts from the date of the commencement of the suit, it would have expressly stated so as is the case under Rule 3(a) and (b) of the Civil Procedure Code, where the words "***commencement of the suit***" are expressly stated, otherwise it could then be applied differently, Mr. Tarimo opined. Mr. Tarimo argued further that the speed track of this suit was set on the 26th day of March 2010 and the application for striking it out was filed on the 6th day of April 2011, almost 12 months, thus, making the application to have been filed two (2) months before the expiry of the speed track of this suit. This application, according to Mr. Tarimo, has therefore been filed prematurely and ought to be struck out with costs.

Mr. Tarimo submitted further that even if it is to be assumed that the speed track of the suit starts to run from the commencement of the suit and that the speed track of the case has already expired, then the remedy prayed in the chamber summons of striking out the suit is not maintainable or is not a remedy available in law. Mr. Tarimo referred this Court to the decision of Hon. Justice Ramadhani, J.A. (as he then was) in **TANZANIA HARBOUR AUTHORITY V. MATHEW MTALAKULE AND OTHERS, Civil Appeal No. 46 of 1999**, where his Lordship stated that "*the remedy for non-compliance with the speed track of the case is provided for under Order VIIIA Rule 5 of the Civil Procedure Code.*" His Lordship continued to hold in that case as follows:

"The Court is given a very wide discretion of what Order it could give. The question is can a Court order a default Judgment? We think not. The clause including an order for costs indicated to us that the legislature regarded costs to be more serious than such orders a Court could deem fit to give. It is abundantly obviously that a default judgment, and when it is against the defaulting party, is by far more serious than costs. So, default judgment could not be given in such a situation."

Mr. Tarimo submitted further that costs are only the maximum penalty against the defaulting party because striking out the suit is more serious than awarding costs. Mr. Tarimo therefore asked this Court to depart from its previous decisions because it is not bound by them and further that this is merely a procedural matter, as it does not go to the substantive part of the suit. Mr. Tarimo referred this Court to the decision of the Court of Appeal of Tanzania in **SAMSON NGW'ALIDA V. THE COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY, Civil Appeal No. 86 of 2008**, where the Court interpreted the provisions of Article 107A (2) (e) of the 1977 Constitution of United Republic of Tanzania to the effect that "*the Court has to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice.*" According to Mr. Tarimo, the issue of being out of the speed track is not a matter for the Defendant or the Plaintiff alone, as it may also be due to the Court itself. The Plaintiff was in Court all the time and to strike out the Plaintiff's case on the reasons not caused by him is very unjust, Mr. Tarimo further submitted and referred this Court to the decision of Hon. Shangwa, J. in the case of **ELECTRICS INTERNATIONAL CO.LTD V.**

ARCHPLAN INTERNATIONAL LTD AND 4 OTHERS, Civil Case No. 16 of 2003, where His Lordship stated that:

> *"There is no provision of law which compels the Court to strike out the suit where the speed track has expired? I have gone through the provisions of Order VIIIA Rule 3(1) of the Civil Procedure Code and Order VIIIA Rule 3(2) of the same Code but I have not found any single line under which the Court is obliged to strike out the suit where scheduling order or the speed track fixed by the Court has expired as Counsel for the 1st, 2nd and 4th Defendants has vehemently and forcefully urged this Court to do."*

Mr. Tarimo submitted further that the same position was taken by the same Judge in another case, that of **MWANANCHI GOLD CO LTD AND 3 OTHERS V. REGINALD ABRAHAM MENGI & 4 OTHERS, Civil Case No. 131 of 2006**, in which the judge declined to grant a prayer to strike out the case because the expiry of the speed truck was not only of the default of the Plaintiff but also of the other party or even of the Court itself. In the said case it was also stated that there is no limitation period for lodging an application for an extension of the speed truck since it can be made before or after expiry of the speed track Mr. Tarimo added. Mr. Tarimo also referred this Court to the decision of Hon. Mruma J., in the case of **BIDCO OILS AND SOAP LIMITED V. SAVINGS AND FINANCE COMMERCIAL BANK, Commercial Case No. 84 of 2006** where His Lordship declined to strike out the case due to various reasons which also applies to this Case. Mr. Tarimo stated further that the status of the case at the moment is that the speed track of the case has already expired. The

Respondent is aware of the expiry of the speed track of the case but it was not possible for the Respondent to address this Court given the existence of the application by the Applicant which was still pending in this Court, Mr. Tarimo submitted. Therefore the Respondent is now in Court praying for leave of this Court that after of dismissing the present application, the Court should be pleased to extend the speed track of the case suo motu, as this Court has such discretional powers under section 93 and 95 of the Civil Procedure Code, Mr. Tarimo further submitted.

In rejoinder Mr. Rwehumbiza submitted that at the time of lodging the suit the Court is not able to determine whether the case is a simple or complex one so as to determine under which speed track is to placed. If the legislature had an intention of putting the speed track of complex cases to start from the day of the First Pre-trial Conference it could expressly have stated so in Order VIIIA rule 3(c) of the Civil Procedure Code, Mr. Rwehumbiza further argued. The date of the pre-trial conference is not a date of the commencement of the suit, Mr. Rwehumbiza insisted and argued further that the decision of Hon. Kimaro, J. in the case of **ABSOLOM L.S MASAKA V. PETER T. MASSAWE AND ANOTHEr, Civil Case No.124 of 1998** and the decision of the Court of Appeal in **Civil Appeal No. 46 of 1999 between TANZANIA HARBOUR AUTHORITY V. MATHEW MTALAKULE AND OTHERS** are distinguishable from this case because the matter which was addressed in those cases could result into striking out the suit. Mr. Rwehumbiza submitted further that striking out the suit is not more serious than dismissing it. As a matter of procedure, once the limitation period has expired, the Court is not even

allowed to entertain the matter as per section 3 of the Law of Limitation Act, Mr. Rwehumbiza pointed out. Striking out the suit gives the Plaintiff the opportunity to institute the suit afresh, Mr. Rwehumbiza contended. Expiry of the speed track is not a matter of procedure since it determines the jurisdiction of the Court, Mr. Rwehumbiza insisted and referred this Court to the decisions in **Commercial Case No. 84 of 2006 between BIDCO OIL AND SOAP LTD V. SAVINGS AND FINANCE COMMERCIAL BANK** and the **Commercial Case No. 86 of 2007 between LEONARD REMIJUCE WANDAO V. MWALIMU NYERERE AND ANOTHER** where the Court in both cases struck out the suit after the speed track had expired.

I have followed the submissions of learned Counsel in support and rival. Clearly, they bring to the forefront for yet another time the controversy inherent in the interpretation of Order VIIIA rule 3(c) of the Civil Procedure Code concerning the time from which the period of the speed track of a suit is to be reckoned. It is without controversy that the speed track of fourteen months to which this suit was allocated on the 26th day of March 2010 has long expired, which is why Mr. Kesaria, learned Counsel for the Defendant lodged the present contested application seeking for departure by this Court from its previous scheduling order. One would be compelled to reason that the intention to depart from the previous scheduling order would be to extend the expired speed track of the suit. As it has turned out however, this is not what Mr. Kesaria had in mind when lodging his application. In his affidavit in support of the application, Mr. Kesaria states specifically at paragraph 5 that it is

necessary to depart from the scheduling order in order to determine the legal status of the proceedings in this suit and then he proceeded to pray that since the initial speed of this suit has expired this Court be pleased to strike it out with costs. It would seem to be that the intention of Mr. Kesaria in seeking for departure from the initial speed track is to enable this Court to strike out the suit but not to extend its life span.

The main controversy in this matter is as from which particular point in time the speed track of a case is to be reckoned? Mr. Tarimo on his part has argued that Rule 3(c) of Order VIIIA of the Civil Procedure Code does not expressly provide as at which date or stage of the suit the speed track is to be reckoned from. Mr. Tarimo attempted to offer a solution to this legal quagmire by proposing that the speed track should therefore be reckoned from the date of determining the speed track during the first pre-trial scheduling and settlement conference. Mr. Kesaria thinks otherwise arguing that the speed track of the suit is to be reckoned from the date the suit is filed in court.

In any event in my view so far as this suit is concerned whether we take the position that the speed track of this suit is to be reckoned from the commencement of the suit or from the date of the first pre-trial scheduling and settlement conference, the speed track of this suit, which was set at three on the date of the first pre-trial conference, that is, fourteen months, has long expired. This gives rise to three controversies. First, who has the obligation to apply for amendment of or departure from the scheduling order? Secondly, how is the application to be preferred? Thirdly, what is the remedy where the speed track of a suit has expired? I

must point out here from the outset that the answers to these questions by court decisions have been anything but fairly conflicting, resulting in some suits being struck out and in others the life span of the case being extended. So far there is no decision from the Court of Appeal settling the legal position on this point. I shall however, revert to these controversies in due course. But let me first address the legal basis for the amendment or departure from the scheduling order as provided under Rule 4 of Order VIIIA of the Civil Procedure Code, which states as follows:

> *"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).*

The provisions of Rule 4 of Order VIIIA cited above mandates that no departure or amendment of the scheduling order is allowed unless the court is satisfied that such departure or amendment is "*necessary in the interests of justice.*" The said Order stipulates further that the "*party in favour of whom such departure or amendment is made*" is the one to bear the costs of such departure or amendment, unless the court directs otherwise. There is nowhere in the Civil Procedure Code however where the terms "***amendment***" or "***departure***" are defined. Resort therefore can be had to ***Black's Law Dictionary*, 8th Ed by Bryan A. Garner at pg 469** where the term "departure" is defined to mean *"a deviation or*

divergence from a standard rule, regulation, measurement or course of conduct." Departure in the context of Rule 4 of Order VIIIA of the Civil Procedure Code therefore would mean deviating or diverging from the initial scheduling order made by the Court when setting the speed track of the case at the first pre-trial scheduling and settlement conference. According to ***Jared Nyakira's*** **case (supra),** the purpose of the rescheduling order is "***to make things right from the time the speed track of the case expired."*** In my considered opinion the purpose of a Court granting a departure from or amendment of the previous scheduling order is to enlarge the life span of the case but is not for the purpose of determining the status of the proceedings so that it can ultimately strike out the suit as intimated to by Mr. Kesaria. This essentially brings me to consider the argument for and against the time for reckoning the speed track of a case. According to Mr. Tarimo, it should be from the date of the First Pre-trial Scheduling and Settlement Conference, while as per Mr. Kesaria, it should be from the date of the filing of the suit. These arguments need not detain us any longer than is necessary.

I wish to point out here that whereas the provisions of Rule 3(a) and (b) of Order VIIIA of the Civil Procedure Code provide expressly that the cases allocated to speed track one and two are supposed to be concluded within a period not exceeding ten and twelve and months respectively "***from commencement of the case***", the provisions of Rule 3(c) and (d) of Order VIIIA of the Civil Procedure Code, which are for speed track three and four respectively for suits which are required to be concluded within a period not exceeding fourteen and twenty four months respectively, do not

mention the phrase "***from commencement of the case***" appearing in Rule 3(a) and (b) of Order VIIIA of the Civil Procedure Code. A long list of authorities from ***Jared Nyakira v. Shanti Shah and Another*** case (supra); ***Absolom L.S. Msaka v. Peter T. Massawe*** case (supra); to ***Dalforwarding (T) Ltd v. NIC (T) Ltd & PSRC*** case (supra), all demonstrate that the intention of the legislature under Order VIIIA Rule 3(a) and (b) of the Civil Procedure Code is for the life span of the case to start to run from "*the commencement of the suit.*" In all of these case authorities the court held that the life span of the case starts to run from the date on which the plaint was filed in Court. I wish to add here that the argument by Mr. Tarimo that the life span of the case starts to run as from the date of the first pre-trial scheduling and settlement conference has been a source of confusion in our courts thus leading to conflicting decision thus making the law unsettled particularly given lack of any decision in that regard from the highest court in the land.

In my view, the wording of Rule 3(1) of Order VIIIA of the Civil Procedure Code suggests that the first pre-trial scheduling and settlement conference is to be held 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.***" This confusion is further confounded by the wording in Rule 3(2) of Order VIIIA of the Civil Procedure Code which is to the effect that in ascertaining the speed track of the case, the presiding magistrate or judge in consultation with the parties or their advocates, has 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.***"

According to the law it is very clear that the speed track of a case is to be made by the court "***within a period of twenty-one days after conclusion of the pleadings.***" The controversy is as to when exactly pleadings are said to have been concluded. The practice in our courts however has been to consider the pleadings as concluded where there are no further applications, preliminary objections, interrogatories, discoveries etc. This approach in my view has been the source of the confusion being experienced by courts in determining the speed track of the case and particularly when dealing with prayers for departing from or amendment of the scheduling order. It is not entirely surprising therefore to come across some cases where the first scheduling conference for determining the speed track of case has been held two years down the lane after the filing of the case and after all the known speed tracks under Order VIIIA have been exhausted.

Flowing from the foregoing, two conclusions can be drawn. Firstly, that the speed track of the case, is for resolving the case through negotiation, mediation, arbitration or "***such other procedures not involving a trial.***" Secondly, that the scheduling order is for, "***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." The practice in our courts has to a large extent been to blatantly flouting the express provisions of the law as to the requirement for and the purpose of the first scheduling and settlement conference where the court is supposed to make a scheduling order setting the speed track of the suit for purposes of mediation and all other procedures involving even trial, which were supposed to be covered in the last pre-trial settlement and scheduling conference as provided under Rule 3 of Order VIIIB of the Civil Procedure Code, which is meant for "***framing the issues according to provisions of Order XVII of the Code, and fixing the trial date or dates and generally providing for matters necessary for the expeditious trial of the case according to the relevant Speed Track.***"

In my considered view, the first scheduling and settlement conference where the court makes an order setting the speed track of a case was meant only for "***such other procedures not involving a trial***" and the last pre-trial scheduling and settlement conference was meant for "***fixing the trial date or dates and all other matters for the expeditious trial of the case according to the relevant Speed Track.***" This comes out clearly under Rule 3(1) of Order VIIIB of the Civil Procedure Code which stipulates as follows:

> "3(1) *Where,* ***after full compliance*** *with the directions made under subrule (2) of rule 3 of Order VIIIA,* ***the case remains unresolved****, a* ***final pre-trial settlement and scheduling conference*** *shall be held, presided over* ***by the judge or magistrate assigned to try the case*** *for the purpose of giving the parties a last chance to reach*

an amicable settlement of the case and for enabling the Court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including the date or dates of trial."

In terms of Rule 3(1) of Order VIIIB of the Civil Procedure Code, the final pre-trial settlement and scheduling conference is to be held following the case remaining unresolved after full compliance with the directions made under sub-rule 2 of rule 3 of Order VIIIA, "***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.***" The final pre-trial settlement and scheduling conference is geared at two things. First, to give the parties a last chance to reach an amicable settlement of the case and secondly, to "***enable the Court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including the date or dates of trial.***" The court is enjoined under Rule 3(2) of Order VIIIB of the Civil Procedure Code when making a final pre-trial conference order to be guided by the Speed Track allocated for the specific case. And in terms of Rule 3(3) of Order VIIIB of the Civil Procedure Code, the final pre-trial settlement and scheduling conference is to be held within a period not exceeding thirty (30) days, forty (40) days or sixty (60) days ***"from the time of full compliance with the first pre-trial conference order in respect of cases allocated to Speed Track One, Two or Three respectively.***" The gist of this Rule is that, for example, for cases allocated to Speed Track one, if the case remains unresolved by other means other trial

including alternative dispute resolution, then a final pre-trial settlement and scheduling conference is to be held within a period not exceeding thirty (30) days from the date of full compliance with the directions in the scheduling conference.

I found it trite to outline in detail above the amount of confusion inherent in the various provisions of Order VIIIA and VIIIB of the Civil Procedure Code in so far as the first and last pre-trial scheduling and settlement conferences are concerned so as to shed some light on the future course of events in the event the authorities are minded to reform the Civil Procedure Code, which in my view has been long overdue.

Mr. Kesaria submitted that going by the logic that the speed track of this suit is to be reckoned from the date it was instituted in this Court on the **29th day of October 2009**, the life span of the suit therefore expired in **December 2010.** If this is the case then by the **23rd of March 2011** when Mr. Kesaria brought the application for rescheduling order, the life span of the case had long expired. Mr. Tarimo holds a contrary view that going by the logic that the speed track of this suit is to be reckoned from the date of the first scheduling and settlement conference, which is the 26th of March 2010, then by the time the Applicant/Defendant brought the application for departure on the 23rd March 2011, the life span of the case had long expired. If we go by the logic fronted by Mr. Kesaria that all the proceedings after the speed track had expired are a nullity, then the suit should be struck out as there is nothing before the court worth extending its life span. However, and with due respect to Mr. Kesaria, if the life span of the case has long expired and thus has automatically ceased to exist,

there will then be nothing left for this Court to strike out. This logical deduction is what I probably guess prompted Mr. Kesaria in a very smart way to bring to this Court the present application first to seek a departure from or amendment of the initial scheduling order so as to clothe this Court with jurisdiction to ultimately and finally make an order for striking out the suit. As Mr. Tarimo rightly submitted, it is true that the problem of the life span of the case expiring is not a matter only for the Defendant but also for the Plaintiff, and even it could be due to some reasons beyond the powers of the Court. Punishing the Plaintiff by striking out the case on technicalities in my view would amount to doing injustice on the Plaintiff who as I have intimated is not alone to be blame for the expiry of the life span of the suit since the Plaintiff as is borne out of the Court record has been attending Court sessions almost every date this Court scheduled the matter. In court record, on the 5th day of January 2010, when the matter was scheduled for mention, it had to be adjourned because both parties were absent. Again, on the 19th day of May 2010, when the matter was scheduled for mediation it had to be adjoined before Hon. Revocatus, the Deputy Registrar of this Court, because the Mediator Judge was indisposed. For these reasons, as Mr. Tarimo rightly submitted the Plaintiff cannot be singled out as being solely responsible for the expiry of the life span of this suit as the reasons are varied. In my view it will be highly unjust to lay the whole blame for the expiry of the life span of this suit squarely and singularly on the Plaintiff. In any event, the law does not stipulate expressly as to who has a duty to move the court for rescheduling orders. It could be, as Mr. Tarimo rightly submitted, either of the parties or

even the court suo motu and in the present case, the Defendant has been the first to take the initiative, which prevented the Plaintiff from making a similar move as this would have run the risk of being considered a pre-emptive move against the Applicant's application.

Mr. Kesaria has prayed that the Plaintiff's suit should be struck out with costs. The basis for this prayer by Mr. Kesaria seems to me to be that logically when the speed track of the suit has already expired, then the life span automatically expires thus making the suit also to cease to exist, and therefore the only remedy available is for it to be struck out. I wish however, and with due respect to Mr. Kesaria, to differ with him on this score. In my view, the expiry of the time set for the Speed Track of a suit does not automatically lead to its cessation. In my view the suit continues to exist only that the speed track allocated for it has expired, and this can be cured by an order for amendment or departure, which is why the legislature in its wisdom allowed for a departure from or amendment of the scheduling order under Rule 4 of Order VIIIA of the Civil Procedure Code. In my view, rescheduling order is meant to enable the court to *schedule future events and steps in the conduct of the case, including the date or dates of trial and is* therefore not meant to revive the suit but to make it continue to exist. It is for this reason I take departure from earlier position on this particular matter.

The Court record shows that prior to the Defendant's Application for departing from or amendment of the initial pre-trial scheduling conference and for striking out the suit on the 23rd day of March 2011, no any application had been made by the Plaintiff for the departure from or

amendment of the initial speed track of fourteen months set by the Court for this case on the 26th of March 2010, which is the date of the first pre-trial conference. In any event since this suit was filed in this Court on the 29th day of October 2009, by the time this Court set the speed track on the 26th March 2010, then the life span of the suit had already expired, whether the speed track was to be reckoned from the commencement of the suit on the date it was filed in this Court or from the date of the first pre-trial conference.

In his reply submissions, Mr. Tarimo learned Counsel for the Respondent/Plaintiff made very forceful arguments trying to convince this Court to exercise its discretionary powers to grant extension or enlargement of the scheduling order ***suo motu*** in terms of section 93 and 95 of the Civil Procedure Code Cap.33. R.E.2002. It is true that this Court has discretionary powers under section 95 of the Civil Procedure Code to enlarge among other things the speed track of a suit. The inherent powers of this Court under section 95 of the Civil Procedure Code are meant to make among other orders, an order for the interest of justice. However, and with due respect to Mr. Tarimo, considering that there is a specific provision in the Civil Procedure Code for amendment of or departure from the scheduling order, that is, Order VIIIA Rule 4 of the Civil Procedure Code, section 95 of the Civil Procedure Code essentially will be inapplicable.

Mr. Tarimo learned Counsel for the Plaintiff made application for extension or enlargement of the life span of this suit in the course of making his submissions. The general principle emanating from **DALFORWARDING (T) LIMITED V. NATIONAL INSURANCE**

CORPORATION (T) 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. I wish however take a different view from this approach based on my interpretation of the wording of Rule 4 of Order VIIIA of the Civil Procedure Code which runs as follows:

> *"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).*

There is nothing in my view, under Rule 4 of Order VIIIA of the Civil Procedure Code to suggest that a departure from or amendment of the scheduling order has to be made by way of application, be it oral or written. In my view, trying to suggest that there has to be a formal application for extension or enlargement of the scheduling order be it oral or written, and that being an application under the Civil Procedure Code [Cap.33 R.E 2002], has to have regard to the limitation period is, to say the least, overstretching the law to an unimaginable proportion. The provision of Rule 4 Order VIIIA of the Civil Procedure Code enjoins the Court only to be satisfied that the departure or amendment is "*necessary in the interest of justice.*" The term "*interest of justice*" in my view is fairly broad to

encompass all possible and reasonable reasons for the departure or amendment. The absurdity of dragging into Rule 4 of Order VIIIA of the Civil Procedure Code the requirements of the limitation period under the Law of Limitation Act is that, for example, where the Court itself has a hand or has contributed to the expiry of the life span of the suit, then it may be required to make orders against itself, and thus setting the limitation period against itself. This would, for lack of better words, make the administration of justice rather awkward and embarrassing to say the least. In my view were this to happen it would amount to the court of its own motion and volition shutting out innocent parties from the corridors of justice. In my view, and if there is anything to go by, such departure or amendment can be made at any time even after the expiry of the life span of the suit provided that the court is satisfied upon simple prayer or in its own motion that such departure or amendment is in the interest of justice, which reasons could be varied. I cannot bring myself therefore to agree with the argument by Mr. Rwehumbiza and supporting case law has cited that application for departure from or amendment of the scheduling order under Order VIIIA Rule 4 of the Civil Procedure Code falls under Item 21 of Part III of the schedule to the Law of Limitation Act, [Cap.89 R.E 2002], which prescribes a period of sixty (60) days for application whose limitation period is not specifically provides for in the Act or any other written law. In my view, the question of application for extension or enlargement of the scheduling order being made within 60 days of the expiry of the speed track does not arise. On the strength of the wording of Rule 4 of Order VIIIA of the Civil Procedure Code, an order for departure from or

amendment of the scheduling order may be made by the court upon prayer made in court in the course of the proceedings within reasonable time depending on the circumstances of each particular case and upon the court being satisfied that such order is in the interest of justice.

The circumstances of this case are such that the speed track of the case has long expired, and all the known speed tracks under the law have also been exhausted. The prayer by the Plaintiff for enlargement of time in my view is as good as the prayer by the Defendant for departure from or amendment of the scheduling order, which essentially lead to the same consequence, which is amendment or departure in order to extend the life span of the suit. Of the two evils, the prayer by the Respondent/Plaintiff for extension of the life span of the case is a lesser one compared to that of the Applicant/Defendant for departure from or amendment of the scheduling order by the Applicant/Defendant, with the consequence of striking out the suit. Since the Applicant's/Defendant's application was first in queue it had to be determined first.

This Court finds and holds that there are sufficient reasons in the interest of justice for making an order to depart from or amend the initial scheduling conference and for extending the life span of the suit until it is finalized.

In my considered view, since the Plaintiff and the Defendant in this suit both are parties in whose favour the departure or amendment is being made, this Court shall make no order as costs.

I am also constrained, for the reasons I have explained above, to make an order that this suit be struck out as prayed by the

Applicant/Defendant. The purpose of a re-scheduling order in my view is to make things right from the time the speed track of the case expired. An order to strike out the suit would therefore make things worse. Such order would not serve the ends or interests of justice.

It is for the foregoing reasons that the application partly succeeds to the extent of the prayer for departure from or amendment of the scheduling order, and fails in so far as the prayer for striking out the suit is concerned.

The initial scheduling order of this suit is hereby departed from and amended such that this suit having exhausted all the known speed tracks under the law, I hereby extend its life span until it is finalized.

The circumstances of this suit are such that I shall make no order for costs. Each party shall bear own costs in this application. It is accordingly ordered.

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R.V. MAKARAMBA
JUDGE
20/12/2011

Ruling delivered this 20th day of December, 2011 in the presence of Mr. Magusu, Advocate for the Applicant and Mr. Tarimo, Advocate for the Respondent.

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R.V. MAKARAMBA
JUDGE
20/12/2011

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