

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

**MISCELLANEOUS COMMERCIAL CAUSE NO. 162 OF 2015
(Arising from Commercial Case No. 128 of 2014)**

**RELIANCE INSURANCE COMPANY (T) LTD APPLICANT
VERSUS
RUVU GEMSTONE MINIG CO. LIMITED RESPONDENT**

3rd September & 1st October, 2015.

RULING

MWAMBEGELE, J.:

Against an application by Reliance Insurance Company (T) Ltd seeking an order of this court for extension of time to file the witnesses' statements, the respondent, through a law firm going by the name Chuwa and Co. Advocates, filed a notice of preliminary objection challenging the application to the effect that it has been proffered under wrong provisions of the law.

The hearing of the preliminary objection was done on 03.09.2015 during which the applicant had the noble services Mr. Turyamwesiga, learned

counsel and the applicant was advocated for by Mr. John Mushi, learned counsel. This is a ruling thereof.

The application has been made under section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC") and any other enabling provisions of the law. Mr. Mushi for the respondent is of the view that this is a wrong provision in respect of the present application because the provision is about the inherent powers of the court which are not applicable where there is a specific provision to cater for the problem. He cited ***Aero Helicopter (T) Ltd V F.N. Jansen*** [1990] TLR 142 to support this argument. In Mr. Mushi's view, the proper provision to have been applied in the present instance should have been section 14 (1) of the Law of Limitation, Cap. 89 of the Revised Edition, 2002. In the premises, Mr. Mushi, learned counsel for the respondent submitted that the application is incompetent for citing a wrong provision supporting it. The learned counsel thus invited the court to have the application struck out for being incompetent like was the case in ***Anthony J. Tesha Vs Anita Tesha*** Civil Appeal No. 10 of 2003 (unreported)..

In response, Mr. Turyamwesiga, learned counsel for the applicant, stated that the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") have just provided for time within which witnesses' statements can be filed. But they have not provided what should be done in situations when a party has not filed the statements within the prescribed time. As rule 2 (1) of the Rules directs that a resort should be made to the CPC in case of *lacuna* in the Rules and in view of

the fact that there is no specific provision in the CPC which caters for an application for extension of time to file witnesses' statements, that is the reason why the provisions of section 95 of the CPC were resorted to; they could not make a resort to any other law, he submitted. In the premises, Mr. Turyamwesiga, learned counsel submitted that the application is appropriately supported by the provisions of section 95 of the CPC and prayed for the dismissal of the preliminary objection with costs.

In a short rejoinder, Mr. Mushi, learned counsel, conceded that the provisions of rule 2 (1) of the Rules dictate that in cases of *lacuna* a resort should be made to the provisions of the CPC but was quick to reiterate that the proper provision to be used was section 14 (1) of the Law of Limitation Act but not section not section 95 of the CPC.

I have considered the rival arguments by the learned counsel for the parties with keen interest. In my view, the correct position of the law is as stated by Mr. Turyamwesiga, learned counsel for the applicant and as elucidated in the decision of this court (Mansoor, J.) in ***Alliance Ginneries Limited Vs Kahama Oil Mills Limited***, Miscellaneous Commercial Cause No. 14 of 2015 (Mwanza unreported). As correctly stated by Mr. Turyamwesiga, learned counsel and as conceded by Mr. Mushi, learned counsel, the Rules, under rule 49 (2), the witnesses' statements must be filed within seven (7) days of the completion of mediation. However, once a party fails to file the statements within seven days as prescribed by the sub-rule, the Rules are silent as to the course of action to be taken if a party still wishes to have the statements filed. That

is when the provisions of rule 2 (1) of the Rules come into play; to resort to the CPC. A resort to the CPC does not unveil any solution to the filing witnesses' statements out of time. The provisions of section 95 of the CPC become relevant in the circumstances. As correctly stated by my sister at the Bench Mansoor, J. in the ***Alliance Ginneries*** case (supra), the provisions of sections 95 of the CPC are the correct provisions to support an application for extension of time to file witnesses' statements.

Likewise, my brother Nyangarika, J. once grappled with the point in ***Fauzia Jamal Vs Lilian Onael Kileo***, Miscellaneous Commercial Cause No. 70 of 2014 (unreported) and concluded as follows:

"Section 95 would be relevant to base this application [for extension of time within which to file witnesses' statements] in the absence of proper provision in the law that provides for the filing of witness statement."

Mr. Mushi, learned counsel for the respondent thought that the provisions of section 14 (1) of the Law of Limitation Act are the ones that should be applied to support an application of this nature. I do not think so. Let me quote the subsection for clarity:

"Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, **extend the period of limitation for**

the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.”

[Emphasis mine].

My interpretation of the subsection has it that it is used in filing an application or an appeal out of time. It does not cater for applications to file witnesses’ statements out of time. A witness statement is neither an application nor an appeal which are envisaged by the subsection. In the premises, the provisions of section 14 (1) of the Law of Limitation cannot be applicable.

There also arose in the course of arguing the preliminary objection the issue whether the provisions of section 93 of the CPC can be applicable in the circumstances of the present application. I do not think so. For the easiness of reference, let reproduce the said section:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

[Bold added].

Again, as already alluded to above, I have serious doubts if this section can be applicable in seeking extension of time to file witnesses' statements. The provision, in my well considered view, refers to extension of time on matters in which the court has fixed or granted any period. On this stance, I find fortification in the commentary by Sir Dinshah Fardunji Mulla in **Mulla: the Code of Civil Procedure** (18th Edition) on the provisions of section 148 which is *in pari materia* with our section 93 of the CPC at page 1353 at which it is stated:

"Section 48 provides for enlargement or extension of time fixed or granted under the orders of a court. The power is discretionary and the court is entitled to consider the conduct of the party applying for extension. It must be remembered that the section only applies where the time fixed for doing of an act is prescribed or allowed by the Code."

The learned author goes on to give rules which may be covered within the ambit of section 148 (section 93 of our CPC) as, *inter alia*, applications under Order VI rule 17 respecting amendment of pleadings and Order VII rule 11 (b) requiring the plaintiff to correct the valuation of suit. For the avoidance of doubt, those provisions of the Indian Code of Civil Procedure

are *in pari materia* with Order VI rule 17 and Order VII rule 11 (b) of the CPC.

The section is therefore not applicable in applications of this nature – see also the discussion and conclusion on this point in the ***Fauzia*** Case (*supra*).

To recapitulate, I may summarize the foregoing discussion as follows: the Rules provide for time within which witnesses' statements must be filed but they do not provide for recourse to be taken by a party which has failed to file the statements within the prescribed time and wishes to file the same. In the circumstances, as per rule 2 (1) of the Rules, a resort should be made to the CPC. But because the CPC does not have any provision to cater for an application for extension of time within which to file witnesses' statements, and in view of the fact that the provisions of section 14 (1) are not applicable to applications of this nature, the provisions of section 95 of the CPC respecting inherent powers of the court must be brought into play. The present application is therefore appositely proffered under section 95 of the CPC on inherent powers of this court.

Before I pen off, let me say something about the use of the phrase "any other enabling provision of the law" which the applicant has used along with section 95 of the CPC in support of the application and it arose in the course of arguing the PO. Mr. Mushi, learned counsel for the respondent was of the view that the application could not stand on the phrase if the provisions of section 95 of the CPC were not applicable. He is right. I

have had an opportunity in some of my previous rulings at the Bench to discuss the point. It is my considered view that the use of the phrase "any other enabling provisions of law" cannot provide enough legs on which an application can stand in court. This court (Mihayo, J.) has observed on occasions more than once that the phrase "any other enabling provisions of law" is now meaningless, outdated, irrelevant and an unnecessary embellishment. In ***Janeth Mmari Vs International School of Tanganyika and Another***, Miscellaneous Civil Cause No. 50 of 2005 (unreported), His Lordship had an opportunity to make an observation on the phrase. His Lordship observed:

"This song, '**any other enabling provisions of the law**' is meaningless, outdated and irrelevant. The court cannot be moved by unknown provisions of the law conferring that jurisdiction. That law must therefore be known. Blanket embellishments have no relevance to the law nor do they add any value to the prayers to the court."
(Emphasis not mine).

In yet another case; ***Elizabeth Steven & Another Vs Attorney General***, Miscellaneous Civil Cause No. 82 of 2005 (also unreported) His Lordship observed on the phrase in as follows:

"The phrase any other provision of law is now useless embellishment, the law is now settled."

In the light of the foregoing, if the applicant had cited wrong provisions of the law to move this court, the application could not have stood on "any other enabling provisions of law". To properly move the court, it is imperative that proper provisions of the law under which the application is made must be cited. The court cannot be moved by unknown provisions of the law.

In the upshot, I find and hold that the preliminary objection raised by the respondent is devoid of merit and is consequently overruled with costs. The applicant's application for extension of time within which to file its witnesses' statements in Commercial Case No. 5 of 2013 is to proceed for hearing on merits on a date to be slated today.

Order accordingly.

DATED at DAR ES SALAAM this 1st day of October, 2015.

J. C. M. MWAMBEGELE
JUDGE