

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

MISCELLANEOUS COMMERCIAL CAUSE NO. 219 OF 2015
(Arising from Commercial Case No. 36 of 2015)

TOTAL TANZANIA LIMITED APPLICANT
VERSUS
ZENON OIL AND GAS RESPONDENT

16th February & 15th March, 2016

RULING

MWAMBEGELE, J.:

The applicant Total Tanzania Limited filed this application seeking the indulgence of the court to grant her an extension of time within which to file a witness statement of the third witness; a certain Jimmy Sikira. The application has been taken under the provisions of section 14 of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (henceforth "Law of Limitation"), rule 32 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") and section 93 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC").

When the application was called on for hearing on 16.02.2016, only Dr. Onesmo Kyauke, learned counsel for the applicant appeared. The respondent and her advocate did not enter appearance. Dr. Kyauke for the applicant snatched the opportunity to pray to proceed *ex parte* as the respondent's counsel was present on 24.11.2015 when 16.02.2016 was fixed as a hearing date. The record supported the learned counsel for the applicant's averment; indeed, Mr. Patrick Mtani, the learned counsel who appeared for the respondent, was present on that date when the hearing date was fixed. Along with the fixing of a hearing date, there was a flanking order made by the court to the effect that counsel for the parties should file skeleton written arguments at least three working days before the date of hearing as required by rule 64 of the Rules. The record shows that it is only the applicant who has complied with the court order. In the premises, the court granted Dr. Kyauke's prayer to argue the application *ex parte*. This is a ruling thereof.

Dr. Kyauke for the applicant kicked off by adopting the affidavit sworn by Asia Tokutoola in support of the application as well as the skeleton written arguments earlier filed. The gist of the affidavit and the skeleton arguments is that the witness statement of Jimmy Sikira could not be filed in time because he was bereaved and was out of Dar es Salaam the moment it was supposed to be taken and filed. Jimmy Sikira; the intended witness, had travelled out of Dar es Salaam to attend a burial ceremony of "his beloved one". The learned counsel submitted that sufficient cause has been given to warrant the court grant the order sought. ***Benedict Mumello Vs Bank of Tanzania***, Civil Appeal No. 12 of 2002 and ***Yusufu Same & anor Vs Hadija Yusuf***, Civil appeal No. 1 of 2002, unreported decisions of the Court of Appeal were cited in support of the proposition that:

"The term 'sufficient cause' should not be interpreted narrowly but should be give a wide interpretation to encompass all reasons or causes, which are outside the applicant's power to control or influence resulting in delay in taking any necessary step".

The learned counsel for the applicant added that a glance at the counter-affidavit would reveal that the respondent will not be prejudiced if this application is granted. He thus prayed that the application be allowed.

After the submissions by Dr. Kyauke, learned counsel for the applicant, the court asked him; that is, the learned counsel for the applicant, whether the court has been properly moved given that section 14 of the Law of Limitation deals with extension the period of limitation for the institution of an appeal or an application, rule 32 of the Rules does not provide for extension of time and section 93 of the CPC is applicable when the court has fixed the time sought to be extended.

Dr. Kyauke's response was that section 14 of the Law of Limitation is applicable in every situation in which extension of time is sought; including extension of time to file a witness statement. On section 93 of the CPC the learned counsel stated that the same is applicable because in the case at hand, it was the court which fixed the time on 16.06.2015. As for rule 32, the learned counsel stated that it was cited because it is the one specifying the seven days within which a witness statement should be filed. So, he had to cite the rule as well as the provisions providing for extension, he submitted.

I have subjected the learned arguments by the learned counsel for the applicant to serious scrutiny both in his submissions in chief and in his response to the question raised by the court *suo motu*. I will start with determining the issue raised by the court *suo motu*. Let me start by saying that the provisions of rule 32 of the Rules cited by the applicant do not deal with time within which witnesses' statements should be filed. The rule deals the lifespan within which cases in this court – the Commercial Division of the High Court - should be finalized. The rule which deals with time within which the witnesses' statements should be filed is rule 49 (2) of the Rules. Thus, even if the Rules were applicable in applications of this nature, the applicant would certainly have applied a wrong rule.

The Rules, under rule 49 (2) thereof, have just provided for time within which witnesses' statements should be filed; they have not provided what should be done by a litigant in situations when he 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 any *lacuna* in the Rules, that is perhaps the reason why the applicant resorted to the CPC and the Law of Limitation.

But the provisions of sections 93 of the CPC and section 14 of the Law of Limitation to which the applicant made resort, are, in my considered view, not applicable in applications of this nature; applications for extension of time within which to file witnesses' statements. I have had an opportunity to discuss this issue in ***Reliance Insurance Company (T) Ltd Vs Ruvu Gemstone Mining Co. Limited***, Miscellaneous Commercial Cause No. 162 of 2015 (unreported). In that case, I relied on two other unreported decisions of this court - ***Alliance Ginneries Limited Vs Kahama Oil Mills Limited***, Miscellaneous Commercial Cause No. 14 of 2015 (Mansoor, J.) and

Fauzia Jamal Vs Lilian Onael Kileo, Miscellaneous Commercial Cause No. 70 of 2014 (Nyangarika, J.) – to reach the conclusion that the proper provision to support an application for extension of time within which witnesses' statements should be filed is section 95 of the CPC. As I still hold the same position today. I will reiterate that discussion in this ruling.

Dr. Kyauke, argues that the provisions of section 93 of the CPC are applicable in the present instance because it was the court which fixed the time within which the witnesses' statements should be filed. However, the learned counsel contradicts himself when arguing for the reason why he had to cite a provision dealing with time within which to file the statements. The learned counsel is recorded as saying:

"About rule 32 (2) of the Rules, we just mentioned because it is the one specifying the seven days. It does not cater for extension. We had to cite that and then cite the provisions that extend time".

This is a contradiction in material particulars in the learned counsel's submissions. Be it as it may, the rule dealing with time within which witnesses' statements should be filed is, as already stated, rule 49 (2) of the Rules.

I have perused the record of this matter. The order of this court (Songoro, J.) of 16.06.2015 did not fix the seven days as Dr. Kyauke, learned counsel for the applicant, would like the court to believe. On that date, the court ordered, *inter alia*, as follows:

“... parties are advised to file witnesses’ statement as per [the] Rules.”

As can be seen in the order above, the parties were ordered to file the witnesses’ statements as provided for by the Rules. Having failed to file the statements within seven days as provided by rule 49 (2) of the Rules, the applicant filed this application seeking leave of the court to file the same out of time. Thus, it is not the court which fixed the seven days as argued by Dr. Kyauke, learned counsel for the applicant.

The foregoing discussion culminates into a conclusion that the provisions of section 93 of the CPC cannot be applicable. These provisions are only applicable in situations when any period is fixed or granted by the court for the doing of any act prescribed or allowed by the CPC. Let section 93 of the CPC speak by itself:

“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.”

To support the foregoing proposition further, I wish to refer to 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 148 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 scope and purview 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, respectively, our Order VI rule 17 and Order VII rule 11 (b) of the CPC.

As good luck would have it, Dr. Kyauke, learned counsel for the applicant concedes that the provision is applicable in such situations. As already stated above, section 93 of the CPC is therefore not applicable in applications for extension of time within which to file a witness statement which time is not provided by the court.

The provisions of section 14 of the Law of Limitation cannot be applicable either. This provision is applicable in situations when a party seeks extension of time to file an application or appeal. The provision reads:

"(1) 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.

(2) For the purposes of this section "the court" means the court having jurisdiction to entertain the appeal or, as the case may be, the application."

[Emphasis supplied].

The above provision speaks for itself: that it is applicable in extending time for filing of an appeal or application upon supply of reasonable or sufficient cause. An application to file a witness statement is not an application. It is not an appeal either. The present application, therefore, does not fall within the scope and purview of section 14 of the Law of Limitation Act.

The Rules, under rule 49 (2), provide that 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 specific provision to the filing witnesses' statements out of

time. As was held by this court in the ***Alliance Ginneries case*** (supra), the provisions of section 95 of the CPC become relevant in the circumstances. The provisions of sections 95 of the CPC are the correct provisions to support an application for extension of time to file witnesses' statements.

My brother Nyangarika, J., when faced with an identical situation in the ***Fauzia Jamal*** case (supra), 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."

To recap, the Rules, under rule 49 (2) thereof, provide for time; seven days after failure of mediation, within which witnesses' statements must be filed. However, the Rules do not provide for a recourse to be taken by a litigant who has failed to file the statements within the prescribed time and still 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 specific provision to cater for an application for extension of time within which to file witnesses' statements after failure of mediation, and in view of the fact that the provisions of section 93 of the CPC and section 14 (1) of the Limitation Act are not applicable to applications to file witnesses' statements out of time, the provisions of section 95 of the CPC regarding inherent powers of the court must be brought into play.

The present application which has been filed under the provisions of section 14 of the Law of Limitation, rule 32 of the Rules and section 93 of the CPC, has therefore been filed under wrong provisions. There is a plethora of authorities that state an application filed under wrong provisions to support it, must be struck out - see: ***National Bank of Commerce Vs Sadrudin Meghji*** [1998] TLR 503, ***Almas Iddie Mwinyi Vs National Bank of Commerce & Another*** [2001] TLR 83, ***China Henan International Co-operation Group Vs Salvand K. A. Rwegasira*** [2006] TLR 220, ***Citibank Tanzania Limited Vs TTCL & 4 others*** Civil Application No. 64 of 2003 (unreported), ***NBC (1997) Ltd Vs Thomas K. Chacha t/a Ibora Timber Supply (T) Ltd*** Civil Application No. 3 of 2000 (unreported), ***Antony J. Tesha Vs Anita Tesha*** Civil Application No. 10 of 2003 (unreported) and ***Edward Bachwa & 3 Others Vs the Attorney General & Another*** Civil Application No. 128 of 2006 (DSM Unreported) and ***Chamma cha Walimu Tanzania Vs the Attorney General*** Civil Application No. 151 of 2008 [unreported] and ***Assays Mpwaga Vs Eyazali Mchape & 3 Others*** MBY. Civil Application No. 4 of 2013 (CAT unreported), to mention but a few.

In ***Chama cha Walimu***, for instance, it was held:

“non-citation and/or wrong citation of an enabling provision render the proceedings incompetent. Decisions by this court in which this principle of law has been enunciated are now legendary. Most of them are cited in the case of Edward Bachwa & 3 Others Vs the Attorney General & another [Civil Application No. 128 of 2006]. To that list may be added:

- i. ***Fabian Akoonay Vs Mathias Dawite***, civil Application No. 11 of 2003 (unreported) and
- ii. ***Harish Jina By His Attorney Ajay Patel Vs Abdulrazak Jussa Suleiman*** [ZNZ Civil Application No. 2 of 2003]”

It is now settled law that wrong or non-citation of an enabling law to support an application renders it incompetent. The present application is therefore incompetent and deserves the wrath of being struck out.

On the basis of the findings above, I do not find that I have been properly moved to hear and entertain this application. In the premises, I do not find any need of going into the merits of this application. Consequently, I strike out this application for wrong citation of enabling provisions. As the application proceeded *ex parte* and no skeleton arguments were filed by the respondent despite the order of this court, I make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 15th day of March, 2015.

J. C. M. MWAMBEGELE
JUDGE