IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

MISCELLANEOUS COMMERCIAL CAUSE NO. 11 OF 2015

DABENCO ENTERPRISES LIMITED ..... APPLICANT

VERSUS

TRIACT EAST AFRICA LTD ..... RESPONDENT

17th April & 17th May, 2015

RULING

MWAMBEGELE, J.:

This application has been brought under the provisions of section 14 of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (hereinafter "the Limitation Act"), rule 32 of the High Court (Commercial Division) Procedure Rules, 2012 - GN No. 250 of 2012 (hereinafter "the Rules") and sections 93 and 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC"). Through this application, the applicant seeks to move this court to do one thing in its favour, that is, extending the lifespan of the Counter claim in Commercial case No. 16 of 2013 between the parties above-named, as well as providing for costs and any other relief that the court may deem fit to grant.

Briefly, the original suit, that is to say, commercial case number 16 of 2013 wherein the respondents had sued the applicant, was survived by the counter claim subject of this application, after it had demised for want of lifespan. Now, the counter claim has not been heard up to the expiry of its lifespan. It is noteworthy that twice the life span has been resuscitated.

Against the affidavit sworn by Ms. Queen Allen, learned counsel, in support of the application, Mr. Nasimire learned counsel for the respondent filed a counter affidavit prefaced with a preliminary objection based on two grounds to wit:

a) That the application is misconceived for not being filed within the time frame contemplated under rule 32 (3) of the High Court (Commercial Division) Procedure Rules, 2012 - GN. No. 250 of 2012.
b) That the application is bad in law for non-citation of the proper provision of the law.

The preliminary objection was heard on the 17.04.2015. I will briefly recapitulate the arguments both learned counsel in substance and then move on to determine their strength for or against the objection raised.

On the first point, Mr. Nasimire, learned counsel, contends that the lifespan of the counter claim having been extended for two months from 10.03.2015, was to expire on 10.04.2015 and therefore, this application which was lodged on the said date of 10.04.2015 was lodged out of time and should be dismissed with costs.

As to the second point, he contends that sections 93 and 95 of the CPC does not apply because there are specific provisions governing applications for the extension of the lifespan of the commercial cases and that the CPC would apply where there is no particular law governing the application. As for section 14 of the limitation Act, and rule 32 of the Rules, he submits that the court would have been properly moved had the applicants cited section 14 (1) as well as rule 32 (3) respectively. He submits that it is an established principle that wrong citation of the law renders an application incompetent and therefore the court is not properly moved. To cement his submission, he cites to me unreported decisions of the Court of Appeal of ***Pius Burchard Vs Maximillian Athuman***, Civil Application No. 1 of 2007 (CA) and ***Harish Ambaram Jina Vs Abdulrazak Jussa Suleiman***, ZNZ Civil Application No. 2 of 2003 (CA).

Ms. Allen, learned Counsel, submitting with respect to the first preliminary point of objection, argues that rule 32 (3) prescribes the time within which an application should be made; within thirty days before expiry of the lifespan. She adds the rule is silent as to what should be done if an application is not filed within the time prescribed. That is the reason why, she submits, the applicant resorted to the CPC. She went on to state that the lifespan having been extended for two months from 11.02.2015 the application was supposed to be filed on 11.03.2015 and when the application was called on for hearing on 19.03.2015 the court directed that the matter be adjourned as there were electricity problems on that date.

As to the second limb of objection, she maintained that the decisions cited by Mr. Nasimire are properly depicting the position of law and quickly added that the court of appeal is inconsistent on that point. To prove the inconsistency, she cited to me the case of ***Fortunatus Masha Vs William Shija & another***, [1997] TLR 213 in which the Court of Appeal held that non-citation or omission to cite the proper provision of the law does not affect the validity of an application. It was her submission that the court should do away with technicalities and proceed to hear the case o merits and prayed that the preliminary objection be dismissed with costs.

Mr. Nasimire learned counsel for the respondent in his rejoinder on the first point substantially reiterated his submissions in chief but added that counsel for the applicant impliedly conceded that the application was filed out of time. On the second point, he added that the ***Fotunatus Masha*** case is a 1997 case whereas the ***Harish*** and ***Burchard*** cases are 2003 and 2007 cases respectively. He maintained that the presumption is that the recent cases represents the proper position of law and that the two cases disregarded the decision of a single judge in ***Fortunatus Masha*** case.

Having heard the rival arguments of both learned counsel appearing, I think I am called to determine on the competency of this application. The grounds upon which this application is sought to be impeached by Mr. Nasimire at this early stage are mainly two; that the application is time barred and two, that it is not backed by proper provisions of the law. I am certain that none of these will task my mind.

To start with the first point, the contention is that the lifespan was extended for 60 days from 10.03.2015 and was to expire on 10.04.2015. Therefore, in terms of rule 32 (3) extension of the life span should have been sought one month before the expiry. Indeed, as rightly rejoined by Mr. Nasiimire, Ms. Allen seems to concede that the application is time barred by submitting that it was supposed to be made on the 11.03.2015 and further that the Rules are silent on what should be done where the application is brought out of time hence their resort to the CPC.

I have gone through an affidavit sworn by Ms. Allen. At paragraph 5 she depones that the lifespan was extended on 11.02.2015 for 60 days. I note that this is contrary to what Mr. Nasimire stated in his submissions that the lifespan was extended on 10.03.2015 and was to expire on the 10.04.2015. However, if I was to take what he stated to be true, I do not see how a lifespan extended on 10.03.2015 for 60 more days could be expiring on the 10.04.2015 only thirty days after it had been extended. I will therefore disregard his statement in that respect and take what is appearing in the affidavit and the record of this court that the lifespan was extended on the 11.02.2015.

Coming now to the question as to whether the application was filed out of time, indeed the rule prescribes that such application should be made "within" 30 days before expiry of the life span. It is not disputed that the lifespan of the counter claim was to expire on 10.04.2015. The sub-question here becomes, from whence, and up to what date should the 30 days "within" should be counted. In my considered opinion, since the

counter claim life span was extended on the 11.02.2015 for 60 days, the time within which this application could be made started to run from the 11.03.2015 when the first 30 days expired. This is so because it is then that there remained the last 30 days after which the resuscitated case could be no more. Thus, an application could be made any time within those 30 days provided it was not beyond the 30 days. Now the question will be whether an application lodged in this court on the 10.04.2015 was out of time?

I note, and indisputably so, that from the 11.03.2015 the other 30 days were to expire on the 11.04.2015. This bare fact shows that the application was made one day within the period of 30 days before the expiry of the lifespan. This goes to answer the questions above posed in the negative and hence renders the objection in this respect misconceived. It is accordingly and without much ado, overruled.

As to the second ground, indisputably, the provisions upon which the application is based are those of section 14 the Law of Limitation, rule 32 of the Rules and sections 93 and 95 of the CPC. These provisions are very general in nature providing for various and specific actions and or remedies. It is this fact which led to this contention of incompetency for non-citation of the enabling provision of the law. Having heard the contending views on this take, I need not labour much but to state the obvious, and on concession by Ms. Allen that there is non-citation of the proper provision of the law in support of the application. As to the consequences thereof, Ms. Allen maintains that there are inconsistencies in

the court of appeal's position in that regard, and therefore, she invited me to dismiss the objection. She maintains, relying on ***Fortunatus Masha***, that non-citation of proper provision is not fatal. Mr. Nasimire on the other hand is adamant and maintains that it is fatal and the application should be dismissed. To me, I must outrightly express my disagreement with Ms. Allen. It is now settled principle as widely held and followed in our courts that non-citation of proper provision of the law is a fatal ailment to the proceedings. A lot of authorities are abounding to this effect. I will only mention a few here: ***Pius Burchard*** (supra), ***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), ***Fabian Akoonay Vs Mathias Dawite***, civil Application No. 11 of 2003 (unreported), ***Harish Ambaram Jina By His Attorney Ajay Patel Vs Abdulrazak Jussa Suleiman*** ZNZ Civil Application No. 2 of 2003 and ***Edward Bachwa & 3 Others Vs the Attorney General & Another*** Civil Application No. 128 of 2006 (DSM Unreported)]

The above goes to show that any application which is based on wrong provisions of the law or lacks a proper provision of the law is fatally defective rendering the same to be struck out. Ms. Allen, apart from the

Fortunatus Masha case seems to be counting on the provisions she cited in their generality. They cannot help for the very obvious reasons of their generality. Take for instance, section 14 the Law of Limitation. It has only one subsection which is (1) allowing this court to extend time. This has not been cited in the application. As for rule 32, it has a total of three sub-rules whereby only one that is sub-rule 3 allows this application to be made. It has not been cited either. Coming to sections 93 and 95, this court has held on a number of occasions that they are not applicable in circumstances where there are specific provisions to cure the problem - see for instance ***TANESCO Limited Vs Interbest Investment Co. Limited***, Civil Case No. 68 of 2008 (Unreported), ***Exim Bank (Tanzania) Limited Vs Chameleon Security Services Ltd & Others***, Commercial Case No. 6 of 2011 (unreported) and the ***Liaison Tanzania Ltd Vs AAR Insurance Tanzania Ltd*** Commercial Case No. 80 of 2010 (unreported)

At this juncture I pause to observe that there is a difference between citing and pegging an application on wrong provisions of the law, on the one hand, and citing an improper among proper provision (s) of the law on the other hand in that in the latter, the improperly cited provision can be ignored and the court proceed to act on the proper one, whereas in the former, the application is rendered incompetent (see also ***CRDB Bank PLC Vs Intersystem Holdings & another***, Commercial Case No. 107 of 2009). In the present application, I have shown hereinabove that none of the cited provisions can be said to be proper for the reasons that the specific subsection and sub-rules have been omitted and section 93 and 95 are neither proper, which qualifies this application as incompetent.

Thus, on the basis of the foregoing, and particularly in the ***Meghji*** case (Supra), non-citation of the specific provision including a sub-section and a sub-rule for that matter, renders an application incompetent as the court is not properly moved.

Thus, as I come to a conclusion and upholding the second point of objection, I have no option than to declare this application incompetent. I proceed to strike it out with costs.

It is so ordered.

DATED at MWANZA this 18th day of May, 2015.

J. C. M. MWAMBEGELE
JUDGE