IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT MWANZA

MISCELLANEOUS COMMERCIAL CAUSE NO. 14 OF 2015

ALLIANCE GINNERIES
LIMITED.....APPLICANT

VERSUS

KAHAMA OIL MILLS
LIMITED.....RESPONDENT

(Arising from Commercial Case no. 27 of 2014)

RULING

Mansoor J.

[19.05.2015 & 22.5.2015]

The applicant has preferred this application under section 14(1) of the Law of Limitation Act Cap. 89 R.E 2005 and "any other enabling provision of the law" moving this court to allow the applicant to file witness statements out of time and order costs to be in the cause.

The applicant herein has been sued for breach of contract of supply of cotton seeds entered by and between her and the plaintiff on the 26/10/2014.

The parties went through the mediation process but the mediation was marked failed on the 16/04/2015. The matter was fixed for final PTC on the 19.05.2015 and ordered the parties to file their witness statements within seven days from the date the mediation was marked failed in terms of the High Court (Commercial Division) Procedure Rules, 2012.

The plaintiff complied and filed their witness statements on the 23/4/2015, but the defendant did not file the witness statement. On the 30/4/2015, the defendant filed this application for extension of time to file a witness statement. Along with the counter affidavit , the respondent/plaintiff counsel took a preliminary objection on a point of law couched thus "***...to the extent that a witness statement is neither an application nor an Appeal, this Application is incompetent for being brought under the wrong provision of the Law***"

On the 19/5/2015 the parties appeared dully represented by their learned counsels. Mr. Bantulaki senior learned counsel and Mr. Magoiga learned counsel appeared for the applicant whereas Mr. Jonathan Wangubo appeared for the respondent.

I have keenly heard the counsels' submissions. What I gather therefrom

Commercial Court as far as civil procedure law is concerned in our Jurisdiction. Therefore, the dilemma faced by the learned counsels for the applicants is understandable in that whereas the rules requires reference to be made in the Civil Procedure Code for anything on which they are silent, the Code does not contain anything that could cure their ailment. The counsel for the respondent is at one on this dilemma with the counsel for the applicant but is of the view that in the circumstance the appropriate law then would have been section 95 of the Code.

Eventually therefrom, before I can answer the above posed question, the immediate sub-question that begs an answer is, as between sections 14(1) of the Law of Limitation Act, and section 95 of the Code, which is the appropriate provision and or law under which this court can be properly be moved to extend time within which to file Witness statements? For easy of reference, I will reproduce the said provisions of the two legislations here under;

***"Section14 (1) of the Law of Limitation Act*,Cap.89 R.E 2002**

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

"Section 95 of the CPC

Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court" (underlining is mine and it is for emphasis).

Starting with section 14(1) herein above, it is lucidly clear that the court can enlarge time for the institution of either an appeal or an application. Obviously, the learned counsels here are not at issue as to the fact that the present one being an application is not seeking for institution of an application or an appeal but rather a Witness statement. In other words, they are at congruency, and so am I, that therefore, a Witness statement in itself is not an application nor an appeal. Henceforth, logic and legal reasoning dictates, and the canons of statutory interpretations affirms that section 14(1) herein above, cannot be employed to move this court to extend time within which a Witness statement can be filed. The provisions contained in Section 14 of the Law of Limitation Act, shall apply only in so far as, and to the extent to which, they are not expressly excluded by such wording. This section is solely used for applications to extend time for filing an appeal or application. A witness statement is not an application, and the extension of time for filing it outside the prescribed limit cannot be granted under Section 14 of the Law of Limitation Act.

Turning to section 95 herein above, it has been widely heard to be, as rightly submitted by Magoiga learned counsel a general provision that saves the inherent powers of the Court, which is often relied upon by counsels when seeking either procedural or substantive indulgence of

is that the arguments were purely interpretative of section 14(1) of the Law of Limitation Act (Supra). Thus, whereas the counsel for the respondent argues that, that provision is inapplicable because the provision can only be invoked when a party is seeking an extension of time to file an appeal or an application out of time, an argument which is, according to the learned counsel grounded on the fact that a witness statement for which time is sought to be extended so that it can be filed is neither an appeal nor an application. The learned counsel puts that the applicants should have instead invoked section 95 of the Civil Procedure Code Cap.33 .R. E 2002 .

On the other hand, Mr. Magoiga attacks the preliminary objection that it is misconceived, misplaced and do not qualify to be treated as a preliminary objection. He maintains that though the witness statement is not an application, he says the present application being an application for extension of time to do an act i.e to file a witness stamen is an application and it is therefore properly brought under the correct provision of the law i.e. Section 14(1). The learned counsel forcefully submitted that section 95 of the CPC is covered by the phrase "and any other enabling provision of the law" as appearing on the chamber summons and further referring to the definition of an application in the Law of Limitation Act, and maintains that since the rules are silent on extension of time, section 14(1) is properly invoked and therefore since it has been cited, then the preliminary objection is not a preliminary objection in light of the celebrated case of Mukisa Biscuits.

On rejoinder, the counsel for the respondent submitted that the respondent do not dispute as to the present application being an application but rather the fact that the Court is not properly moved. He concedes that there is a lacuna in the Commercial Court Rules but submitted that the Court can be properly moved under the CPC. Finally he wrapped up by submitting that citation of a wrong provision of the law renders an application incompetent and invited this court to strike out the application with costs.

I must admit that at the face value, this point raised by the counsel for the respondent appeared to be rather a non-issue to me. However through the submissions by the learned counsels it became crystal clear that a crucial legal issue of the interpretation of the said provision of the law is involved. It is the question that I am called to determine as to whether this court has been wrongly moved by citing section 14(1) of the Law of Limitation Act.

I will start from the undisputed premise that indeed the High Court (Commercial Division) Procedure Rules, 2012 are silent in so far as extension of time to file a Witness statement is concerned. However, rule 2 of the said Rules states categorically that in case of a lacuna therein, the provisions of the Code (Cap.33 R.E 2002) will be applicable.

Apparently, the Civil Procedure Code does not contain any provision with regard to Witness Statement, the same being an invention of the

the Court by invoking its discretion in order to do that which is just. In the present circumstance, the defendants faces a dire consequence of being unable to prosecute their case for failure to adhere to the rules of the Court as far as the modus operandi thereof is concerned, and yet the law is silent. To this extent, I agree entirely with the learned counsel for the respondent that the situation at hand calls for the invocation of the inherent powers of the Court to extend time within which to file the said statements. It follows therefore that section 95 of the Code is an appropriate provision upon which this court could have been properly moved to extend time within which the applicants could file their witness statements. This gives us an affirmative answer to the primary question posed as to whether this court has been wrongly moved by citing section 14(1) of the Law of Limitation act (supra) for the instant application.

Mr. Magoiga seems to front an alternative argument, when he submits that if that will be the case then, the said section is covered in the phrase "and any other enabling provisions of the law". I am afraid, that line of verse is devoid of any flavor in the circumstance. It was observed recently by my learned brother Mwambegele J that the said phrase cannot be interpreted as a gap-filler for procedural misfits such as of this nature where the party fails to expressly cite an enabling provision of the law(**See Makumira Filling Station and 2 others versus FBME Banking Limited, Miscellaneous Commercial cause no. 24 of 24** (Unreported). His Lordship had observed so having considered also the words of His Lordship Mihayo J in **Janeth Mmari versus International School of Tanganyika & Another, Miscellaneous Civil**

Cause No. 50 of 2005 (unreported), . They go thus; ***"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".***

Apparently therefore, it is not hard to agree with counsel for the respondent that this court cannot go into the street looking for the provision to support an application under the umbrella of "any other enabling provisions of the law". The phrase is a mere chorus which has no effect whatsoever on an application or prayers.

To this juncture, the consequence as to non citation of an enabling provision to an application is no longer a task to this court. It has been certainly established, as the matter stands currently, that such application must be struck out for being incompetent as the court is not properly moved(see N**ational Bank of Commerce Vs Sadrudin Meghji, [1998] TLR 303, Almas Iddie Mwinyi Vs National Bank of Commerce & Another [2001]TLR 22, Citibank Tanzania Ltd. Vs Tanzania Telecommunications Co. Ltd. & 4 Others, Civil Application No. 64 of 2003 (unreported), China Henan International Co-operation Group Vs Salvand K. A. Rwegasira [2006] TLR 220,Edward Bachwa & 3 Others Vs the Attorney General & Another, Civil Application No. 128 of 2006 (Unreported)** and ,**Pius Burchard Vs Maximillian Athuman, Civil Application No. 1 of 2007 (CA)(Unreported)** just a few but to mention).

In as much as I am aware of the dire consequences to befall on the part of the applicants, since this court is not a Court of sympathy but a Court of law (see **Arusha Art Ltd Vs Alliance Insurance Corporation Commercial case No. 12 of 2011(Unreported)**, and further on the basis of the list of authorities above cited, I am afraid, nothing can be done to rescue an application brought under the wrong provision of the law, not even the celebrated and often referred article 107 A(2)(e) of the Constitution of the United Republic of Tanzania (as amended from time to time), following the holding by the same Court of appeal that such a fault is not a technicality envisaged by the said Constitutional provision (See **China Henan International Co-operation Group Supra,** as re-echoed in **Zuberi Musa versus Shinyanga Town Council, Civil Application no.100 Of 2004(Unreported) (CAT-Mwanza, delivered on 16/3/2007).**

In the upshot, I find the application for extension of time to file the witness statements to be incompetent for being brought under a wrong provision of the law. I proceed to strike it out with costs.

Order accordingly.