IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 59 OF 2011

THE NATIONAL BANK OF COMMERCE LIMITED ..... PLAINTIFF

VERSUS

PAV INVESTMENTS LIMITED
PETER ALBANO VAVA
MARGARITA ROSE VAVA ..... **DEFENDANTS**
YOHANA CHARLES ALBANO

16th November & 16th December, 2016

RULING

MWAMBEGELE, J.:

The present suit was instituted by a plaint filed in this court on 18.07.2011. It is perhaps one of the oldest cases in the registry. The plaintiff closed her case on 06.06.2016. The first defence witness testified on 29.06.2016. After that the defence prayed for another date to bring its last two witnesses and the court granted the prayer and ordered the defendants to field its last two witnesses on 31.08.2016. On that date; that is, on 31.08.2016, defence hearing could not proceed as I, the presiding judge, was outside the station on another official assignment which lasted for two consecutive months. The defence hearing was ordered by the Deputy Registrar of his court to proceed on 18.10.2016.

Before that date the defence counsel filed a notice of preliminary objection on two points of law. The Preliminary objection filed (hereinafter referred to as "the PO") reads:

1. This suit is in court in contravention of rule 32 (2) and (3) of the High Court (Commercial Division) Procedure Rules, 2012; and in the alternative
2. This suit is in contravention of Order VIIIA rule 3 (3) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002.

As the practice of this court dictates, the proceedings of the main case had to be kept at abeyance to determine on the PO. The PO was argued before me on 16.11.2016. At the hearing, both parties were represented by the learned counsel who represent them in the main suit; that is, Mr. Gaspar Nyika, learned counsel for the plaintiff and Mr. Benard Shirima, also learned counsel, for the defendants. Both parties had earlier filed their respective skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth referred to as "the Rules").

Arguing for the PO, Mr. Shirima, learned counsel for the defendants, having adopted the skeleton written arguments earlier filed as part of the oral submission, stated that the case was filed on 19.07.2011 and assigned Speed Track IV on 13.02.2012 and thus it was supposed to be legally in court by 12.02.2014. He submitted that the only plaintiff witness started to testify on 16.07.2014 almost six months after the expiry of the speed track assigned to the case. He submitted that the plaintiff ought to have applied for departure from the scheduling order so as to give life to the case. That has not been done to date which is about two and a half years after the speed track

expired. The learned counsel made reliance on ***Tanzania Fertilizer Company Ltd Vs National Insurance Cooperation and another***, Commercial Case No. 71 of 2004 (unreported) the court (Massati, J. as he then was) to pray that the suit be dismissed with cost.

The learned counsel made equivalent submissions under rule 32 (2) and (3) of the Rules for the same prayers.

On the other hand, Mr. Nyika, for the plaintiff, arguing against the PO and having adopted the skeleton arguments earlier filed, conceded that the speed track assigned to the case on 16.02.2012 has since expired. He, however, was of the view that the suit cannot be dismissed for such reason because the plaintiff is not only to blame for the delay. He submitted that the suit has not been finalized within the slated timeframe because the defendants have been asking for adjournments several times and that sometimes raising frivolous matters on which the court was forced to decide.

Mr. Nyika, learned counsel, stated that the consequence of expiry of the speed track of a case is not to strike out or dismiss the suit as prayed by the learned counsel for the defendants because Order VIIIA does not provide for such consequence. The learned counsel relied on ***Nazira Kamru Vs MIC Tanzania***, Limited Civil Appeal No. 111 of 2015 (CAT unreported) to remind the court that the Court of Appeal implored courts not to read automatism in Order VIIIA rule 4 of the CPC to the legal consequence that once a speed track of a case expires, the life of everything including evidence becomes inconsequential. As the plaintiff has completed her case, the defendants' case is partly heard and that the cause of the delay is not entirely the plaintiff's, it is fair and just that the case be allowed to proceed to the end.

The learned counsel also submitted that the obligation to ensure that the case proceeds according to the agreed schedule is not the plaintiff's alone but the duty of all the parties to see to it that the case is efficiently managed and determined within the scheduled speed track. That is the reason why courts have held that the consequence should not be to strike out the suit but to look into all the circumstances leading to the delay. On this position, the learned counsel cited ***Africa Medical Research Foundation Vs Stephen Emmanuel & Others*** Land Case No. 17 of 2011, ***Bata Limited Canada Vs Bora Industries Ltd***, Commercial Case No. 76 of 2015 and ***Afritex Limited Vs Mediterranean Shipping Co. Ltd***, Commercial Case No. 54 of 2008, all unreported decisions of this court.

On the arguments under rule 32 (2) and (3) of the Rules, the learned counsel argued, correctly so in my view, that as the present suit was filed before the Rules became justiciable. The provisions of the Rules will therefore not apply to the present case.

On the basis of the above, the learned counsel for the plaintiff beckoned the court to dismiss the PO with costs and extend the speed track of the case to a further period to allow determination of the suit on merit.

Rejoining, Mr. Shirima, learned counsel insisted on the duty of the plaintiff to pray for extension of the speed track of the case as it expired while the plaintiff had not closed its case. He submitted that it was not proper to extend the speed track after four years since the speed track was assigned. The learned counsel stated that there are two schools of thought on what should be done when a speed track expires one of which has the stance that a case whose speed track expires and no extension is sought and obtained,

should be dismissed. The learned counsel asked the court to follow this school.

Having heard the learned contending arguments by the learned counsel for the parties, I should now be in position to confront the million dollar question which this court must answer; which is, should the court dismiss the present suit on account that it has outlived its speed track?

As rightly put by Mr. Shirima, learned counsel for the defendants, and conceded by Mr. Nyika, learned counsel for the plaintiff, the present case was assigned Speed Track IV on 13.02.2012.

It may not be out be place to remind anybody here that Order VIIIA of the Civil Procedure Code, Cap 33 (R.E 2002) is relatively new in our legislation. It was entrenched in the Civil Procedure Code in 1994 vide the Civil Procedure Code (Amendment of Schedules) Rules, 1994 - GN No. 422 of 1994 and later improved by the Civil Procedure Code (Amendment of the First Schedule) Rules, 1999 - GN No. 140 of 1999. The Concept is therefore about two decades in our midst. Likewise, I do not think I will be wasting anybody's time to expound further. According to Order VIIIA, cases are assigned Speed Tracks taking due regard to their nature. A case is assigned a speed track in consideration of its being fast, complex or its being a special case. There are four categories of Speed Tracks as provided for by Clause (3) of Rule 3 to Order VIIIA of the CPC as amended by the Civil Procedure Code (Amendment of the First Schedule) Rules, 1999 - GN No. 140 of 1999. These are Speed Tracks One, Two, Three and Four.

Speed Track One is reserved for fast cases which are considered by the Judge or Magistrate to be fast cases capable of being or are required in the interest of justice to be concluded fast within a period not exceeding ten months from

commencement of the case. Speed Track two is reserved for cases considered by the judge or Magistrate to be normal cases capable of being or are required in the interests of justice to be concluded within a period not exceeding twelve months from commencement of the case. Speed Track three is reserved for cases considered by the judge or Magistrate to be complex cases capable of being or are required in the interest of justice to be concluded within a period not exceeding fourteen months. Speed Track four is reserved for cases considered by the judge or Magistrate to be special cases which are neither considered to be fast, normal nor complex which nonetheless need to be concluded within a period not exceeding twenty four months.

From the foregoing, it is apparent that in this jurisdiction, cases must be concluded at most within twenty four (24) months. As already said, in assigning a speed track to a case, the judge or magistrate will take cognizance of the nature of the case if it is fast, normal, complex or abnormal.

It is also worth noting that in the provisions of Clause (3) of Rule 3 to Order VIIIA of the CPC, unlike in respect of Speed Tracks I and II, the words "from commencement of the case" do not appear in respect of Speed Tracks III and IV. Which would suggest that time allotted to such cases is reckoned from the moment it is assigned. Thus the learned counsel for the parties are in the right track when they say that the speed track assigned to the case at hand expired on 12.02.2014.

I have had, in more than one occasion, an opportunity to discuss the problem the subject of this ruling in some of my previous rulings. The rulings include ***Leonidas Machumi & 25 others Vs Yono Auction Mart & another***, Land

Case No. 160 of 2007, ***Ayubu Lumuliko Ngulukia Vs National Microfinance Bank & Another***, Miscellaneous Land Application No. 7 of 2014, ***Soud Eliasa Rashid Vs National Microfinance Bank Ltd***, Land Case No. 5 of 2012 and ***Panache Ltd Vs Phoenix of Tanzania Assurance Company Ltd***, Miscellaneous Commercial Application No. 101 of 2015 (all unreported). I also discussed the same point in ***Spice Vas Tanzania Vs Stanbic Bank Tanzania Limited***, Commercial Case No. 102 of 2015 (also unreported) in respect of sister provisions in the Rules which cater for lifespan of cases in the Commercial Division of the High Court. As I hold the same position today, I will reiterate my discussion and conclusion in those cases to determine the present matter. In ***Africa Medical Research Foundation*** (supra), a case referred and supplied to me by Mr. Nyika, learned counsel for the plaintiff, my brother at the Bench, Dr. Twaib, J., seized with an identical situation, dealt with this issue at some considerable length. His Lordship revisited a number of decisions of this court on the point and came up with three schools of thought on the subject. The decisions discussed therein include ***Dal Forwarding (T) Ltd Vs National Insurance Corporation (T) Ltd. & Presidential Parastatal Sector Reform Commission***, Commercial Case No. 70 of 2002, ***Mwanza City Engineer Vs Anchor Traders Ltd*** Civil Application No. 14 of 1995, ***Jared Nyakila & Another Vs Shanti Shah & 3 Others***, Commercial Case No. 40 of 2008, ***Tanzania Fertilizer Co. Ltd*** (supra); a case cited by Mr. Shirima, learned counsel for the defendants and ***Covell Mathew Partnership Ltd. Vs Gautam Chavda***, Civil Case No. 3 of 2002, all unreported decisions of this court.

His Lordship Dr. Twaib, J. reiterated his earlier discussion in ***Bakari Yohana Vs Muhimu Awadh & 2 Others***, Civil Appeal No. 123 of 2011 (also unreported). In those two cases, this court categorized three schools of

thought on the subject. First, is the strict approach school which holds that once the speed track assigned to a case expires, the court lacks jurisdiction to entertain it and the suit must be struck out. The second school is the moderate approach which will extend the speed track assigned to a case if so moved by a party within the limitation period in terms of item 21 of part III of the first schedule to the Law of Limitation. And the third one is a liberal approach school which places on the court a preliminary responsibility to order a departure from or amendment of a scheduling order. Under this school, the court may order departure from or amendment of the scheduling order *suo motu*, at any time, without limitation, and will not strike out the suit on grounds of expiry of a speed track.

His Lordship Dr. Twaib, J. is right on the schools of thought existing in this court on the subject. Most of the High Court decisions on this point fall in the second school of thought. As rightly put by Dr. Twaib, J. in the ***Africa Medical Research Foundation*** and ***Bakari Yohana*** cases (supra), this school is divided into two sub-groups. The first one imposes the duty upon the plaintiff to apply for amendment of a scheduling order upon realizing that the suit cannot be finalized within the allotted speed track while the second places that duty upon any benefitting party. Save for the commencement dates of speed track in respect of speed track III and speed track IV, I entirely share the reasoning in the ***Africa Medical Research Foundation*** and ***Bakari Yohana*** cases (supra) and wish to adopt them in this ruling.

The reason why the provisions of Order VIIIA and Order VIIIB of the CPC were introduced into our legislation was not for an embellishment; they were introduced with a purpose. They were introduced in our legislation as a case management tool; that cases must be finalized within a scheduled timeframe.

The CPC is silent regarding the legal consequences to follow if the speed track of a case expires before the suit is finalized and nothing can be gleaned from its provisions as to empower the court to strike out or dismiss a suit in case of noncompliance with the provisions. Striking out or dismissing a suit for on account that it has outlived its speed track would, in my considered view, be tantamount to defeating the very purpose for which the provisions were intended to address. As was observed by the Court of Appeal in ***John Morris Mpaki Vs the NBC Ltd and Ngalapila Ngonyani***, Civil Appeal No. 95 of 2013 (unreported) at p. 4 of the typed judgment:

> "We have ... learnt from the C.P.C. that it is silent regarding the legal consequences to follow if the assigned speed track runs its course before the suit is finalised."
>
> [See also ***Nazira Kamru*** (supra)]

I also find solace on this stance in ***Mrs Asha Ramadhani Laseko Vs Ramadhani Ali Laseko***, Civil Case No. 40 of 1996 (HC unreported) and ***Bata Limited Canada Vs Bora Industries Ltd***, Commercial Case No. 76 of 2015 (HC unreported) in which this court stated that even if the case had exceeded its speed track, the remedy is not to dismiss the suit but to grant costs. In ***Mrs Asha Ramadhani Laseko*** (supra) the court [Mrosso, J. (as he then was)] had this to say on what should happen to a case which has exhausted the slowest available speed track:

> "While the policy reason for speed track is weakened or over defeated if they (the speed tracks) are not strictly observed yet non-observance can be occasioned by a party to a

case or by the court itself, sometimes for unavoidable reason. **If, for example, a case lasts beyond the assigned speed track because the court itself could not finalize it in time why should the plaintiff as a result be deprived of a decision of the court for no fault of his own? Surely order VIIIA of the Civil Procedure Code, 1966 as amended by GN. No. 422 of 1994 was intended to improve the quality of civil justice by making it speedier, not to provide occasion for depriving justice to parties without any fault attributable to them.**".

[Emphasis added].

Likewise, in ***Africa Medical Research Foundation*** it was stated as follows:

'One thing is clear from these provisions: the law does not empower the court to strike out a suit on grounds that no application has been made by the party benefitting from such amendment or departure. Neither is there anything that can be construed as requiring that there must be an application to that effect before the court can move to order a departure or amendment."

I entirely agree. This also finds support in an English case of **Re *Coles Ravenshear Arbitration*** [1907] KB 1, Collins M.R. had this to say on procedural law at p. 4:

"Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

In Tanzania, what was stated in ***Re Coles Ravenshear Arbitration*** (supra) has been codified in article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 (hereinafter referred to as "the Constitution"). For easy reference, let me reproduce this article as far as it is relevant to the present discussion. It reads (in the official version) as follows:

"(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani:

(a) ...

(b) ...

(c) ...

(d) ...

(e) Kutenda haki bila ya kufungwa kupita kiasi na masharti ya kifundi yanayoweza kukwamisha haki kutendeka".

And its corresponding English version reads:

> "(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice."

The technicalities that are intended by the Constitution under these provisions and which this court must nurture, are, in my considered view, those which if ignored will make justice smile. In the instant case, as already alluded to above, the plaintiff has closed its case and the defence case is partly heard as, according to the defendant's counsel, only two witnesses are remaining. In my view, if the case which has reached this stage is struck out or dismissed for exceeding its speed track as prayed by the defendants' counsel the interest of justice will not be served. It is my well considered view that this is a proper case in which the provisions of article 107A (2) (e) of the Constitution should be invited into play.

And on the same line of argument in respect of scheduling conferences, as here, it was held in a Ugandan case of ***Kigula and others Vs Attorney-General*** [2005] 1 EA 132; a decision of the Constitutional Court of Uganda, in the headnote thereof as follows:

> "The purpose of a scheduling conference is to save time of the Court by sorting out points of agreement and disagreement so as to expedite disposal of cases. Like any other rules of procedure, it is a handmaiden of justice not intended to be an obstacle in the path of justice."

While still on the same point, I wish to refer to an Indian decision of ***Sushil Rani Vs Attam Parkash*** (2007) 146 PLR 595 (available at http://indiankanoon.org/doc/401757/) in which Hemant Gupta, J. had the following to say at paragraph 14 of the judgment delivered on 05.04.2007:

> "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

And, in the same token, it may not be out of point, I think, to underscore what was stated by the Supreme Court of India in ***R. N. Jadi & Brothers V. Subhashchandra***, (2007) 9 Scale 202 (available at http://indiankanoon.org/doc/1461813/) in which the court considered the procedural law *vis-a-vis* substantive law and observed as under:

> "All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

I find the decisions in the ***Kigula***, ***Suchil*** and ***Jadi*** cases (supra) to be of high persuasive value. In the light of those decisions, it is abundantly clear that the procedure enumerated under Order VIIIA of the CPC is only a handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Thus, unless it is extremely necessary, a case which has exceeded its speed track should not be struck out or dismissed for that sole reason.

On this conclusion, I feel irresistible to associate myself with the persuasive decision of the Court of Appeal of Kenya in ***DT Dobie Vs Joseph Mbaria Muchina & Another*** [1982] KLR 1 (available at www.kenyalaw.org)] in which Madan, JA in an *obiter dicta* observed at page 9 as follows:

> "If an action is explainable as a likely happening which is not plainly and obviously impossible the

court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it."

In the same line of argument, to borrow the words of His Lordship Madan, JA, I would say that a court of justice should aim at sustaining a suit rather than striking it out or dismissing it on the ground that it is beyond the speed track allotted to it. In my considered view, unless it is extremely necessary, what the court is supposed to do in such eventuality, is to allow a party to apply for departure and the court should not unnecessarily withhold such leave so that the suit is prosecuted to its finality. And in appropriate situations, the court may, *suo motu*, amend the scheduling order provided that that course would not leave justice crying. As was held in ***Nazira Kamru*** (supra), and with due respect to the contrary view of Mr. Shirima, learned counsel for the defendants, the provisions are not the concern of the plaintiffs alone. Each party to a suit is supposed to see to it that the case is conducted and finalized within the allotted speed track.

To recap, I wish to state that the court does not cease to have jurisdiction on a case which has exceeded its speed track assigned to it under the provisions of Order VIIIA rule 3 (3) of the CPC. A party which fails to apply for departure from a scheduling order of a case, should be allowed to do so if it so wishes and unless there are special and glaring reasons to the contrary, a party which applies for such departure should be granted the prayer. The court may, in appropriate situations, depart from the scheduling order and order extension of the speed track of a case *suo motu*. The test should always be whether or not any injustice will be occasioned in taking such a

course. The provisions of Order VIIIA rule 4 of the CPC which allow a party to apply for departure from a scheduling order of a case upon supply to the court of sufficient reason, intends to accord the party applying time to prosecute (or defend) its suit to its logical finality.

In the final analysis, I am not ready to accept the invitation extended to me by Mr. Shirima, learned counsel for the defendants, to dismiss this suit on account of its having been exceeded its lifespan. Conversely, I would, *suo motu*, extend the speed track of this case to twenty-four (24) months reckoned from 13.02.2014. However, as the extended speed track expired on 12.02.2016, I, again *suo motu*, extend the speed track of the case eighteen (18) more months reckoned from 13.02.2016. I think justice will be left smiling this way.

For the avoidance of doubt, I will not discuss and determine on the arguments on rule 32 (2) and (3) of the Rules for the simple reason that the present case is not covered by the Rules. The Rules came into force on 13.07.2012 by virtue of GN. 250 of 2012, well after the present case was instituted on 15.07.2011; about a year back.

Cost of this application will be in the main suit.

Order accordingly.

DATED at DAR ES SALAAM this 16th day of December, 2016.

J. C. M. MWAMBEGELE
JUDGE