

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

MISCELLANEOUS COMMERCIAL APPLICATION NO. 168 OF 2016
(Originating From Commercial Case No. 36 of 2016)

CMA CGM (TANZANIA) LIMITED APPLICANT

VERSUS

INSIGNIA LIMITED RESPONDENT

13th October & 14th November, 2016

RULING

MWAMBEGELE, J.:

The applicant is the defendant in Commercial Case No. 36 of 2016 in which the respondent is the plaintiff. In the present application the applicant filed the present application seeking for the following orders:

1. That the names of both or either Shipper or Agent/agent be added to the above case as defendant(s) to as person(s) whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all the questions involved in the case aforesaid;
2. That costs of this application be awarded to the applicant in any event;
and

3. That any other relief may be given to the applicant as to the Honourable court appears to be just and convenient.

On 26.09.2016, Mr. Dickson Sanga; the learned counsel for the respondent, filed a two-point preliminary objection against the application. The preliminary objection is couched thus:

1. This Honourable Court has no jurisdiction to entertain the applicant's application as it is hopelessly time barred; and
2. The application before this Honourable court is incompetent for being preferred under wrong provisions of the law.

The preliminary objection (henceforth "the PO") was argued before me on 13.10.2016 prior to which learned counsel for the parties – Mr. Novatus Rweyemamu for the applicant, and Mr. Dickson Sanga for the respondent – had filed their respective skeleton written arguments as dictated by rule 64 of the Rules. This is a ruling of..

Arguing for the first point of the PO, Mr. Sanga, learned counsel for the respondent submits that the application is time barred because it was filed on 02.08.2016 while the applicant was served with the plaint on 02.05.2016. The learned counsel argues that by virtue of the provisions of item 21 of Part III of the first schedule to the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002, the application ought to have been filed within sixty (60) days after service. This is so, the learned counsel argues, because the CPC does not provide for the time within which such an application should be filed. He argues that the present application which was filed more than one hundred (100) days after service, is hopelessly time barred and should be dismissed. To bolster up his arguments, the learned counsel has cited ***Tanzania Cotton***

Marketing Board Vs Cogecot Cotton Company S.A [2004] TLR 132 at
Mulla: the Code of Civil Procedure, Volume 2 16th Edition at pp 1554-5

On the second point, the learned counsel submits that the present application has been preferred under wrong provisions and therefore cannot move the court to grant the orders sought. He submits further that the provisions of Order I rule 10 (2) and (4) of the CPC are not applicable because there is no party who has been wrongly or improperly joined in which the court may strike out the wrongly or improperly joined party and the person who ought to have been joined added. He stresses that these provisions presupposed this kind of situation as was held in **Ami Mpungwe Vs Abbas Sykes**, Civil Appeal No. 67 of 2000 (unreported) in which the Court of Appeal quoted the following paragraph in **Daphne Parry Vs Murray Alexander Carson** [1962] EA 515:

"Rule 10 (2) empowers the court that the name of any party improperly joined whether as Plaintiff or defendant to be struck out, and that the name of any person who ought to have been joined, whether as plaintiff be added ...

The rule is thus concerned with parties who have been wrongly joined, or who ought to be joined or added. To join or to add a party is not synonymous with making a person a party."

On the strength of the above arguments, the learned counsel for the respondent has urged the court to sustain the PO and dismiss the application with costs.

Arguing against the PO, Mr. Rweyemamu, learned counsel submitted that the limitation of sixty days must be reckoned from either 01.06.2016 when he filed the written statement of defence, or 13.06.2016 when he expressed his wish to make an oral application for addition of parties or 28.06.2016 when the court advised him to file a formal application for addition of the parties. On the first alternative date; that is 01.06.2016, the learned counsel concedes that the application was filed a day out of time. The learned counsel was quick, however, to pray that the court extends time (of one day) in terms of section 14 of the Law of Limitation so that the application is deemed to have been filed in time.

Mr. Rweyemamu argues in the alternative that no limitation of time is relevant in an application under Order I rule 10 (2) of the CPC.

On the second point, the learned counsel argues that the provisions cited in support of the application are quite appropriate.

I have subjected the arguments of both learned counsel for the parties to proper consideration. The question on which the learned counsel for the parties are at issue is on limitation of time in applications of this nature. The learned counsel seem to be at one that the limitation is sixty days. Mr. Rweyemamu however raised an alternative argument that the sixty days limitation is not applicable to applications of this nature.

Let me start with Mr. Rweyemamu's alternative argument. For easy reference, let me reproduce the relevant sub-rule; sub-rule (2) of rule 10 of Order I of the CPC hereunder:

"The court may, at any stage of the proceedings,
either upon or without the application of either

party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The sub-rule uses the words "at any stage of the proceedings". Mr. Sanga argued that in India the application must be subject to the legislation relating to limitation and cites **Mulla: the Code of Civil Procedure** for this proposition. I think Mr. Sanga has misconstrued the point. The paragraph on which Mr. Sanga relies in **Mulla: the Code of Civil Procedure** is Order I rule 10 (5) of the Indian Code of Civil Procedure reads:

"Subject to the provisions of the Indian Limitation Act (1877 (15 of 1877))* , s 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

That provision is in *pari materia* with our Order I rule 10 (5) of the Law of Limitation Act which reads:

"Subject to the provisions of section 22 of the Law of Limitation Act *, the proceedings as against any

person added as defendant shall be deemed to have begun only on the service of the summons."

My reading of the provision has it that reference as to limitation of time is being made to a party who has been added as a defendant. I read nowhere in the provision suggesting that an application under the provisions to be subjected to the Law of Limitation Act. In my considered view, the use of the words "at any stage of the proceedings" suggest that an application under Order I rule 10 (2) of the CPC is not subject to the Law of Limitation Act. I therefore concur with Mr. Rweyemamu's alternative prayer and overrule the first point of the PO.

As for the second point of objection, I think Mr. Sanga has again misconstrued the tenor and import Aof the provision. **Daphne** is distinguishable as it was an application seeking to replace a party not to join or add a party which is the case here. The second point of the PO is overruled as well.

The above said, I find the two-point preliminary objection to be wanting in merit and overrule it with costs.

Order accordingly.

DATED at DAR ES SALAAM this 14th day of November, 2016.

J. C. M. MWAMBEGELE
JUDGE