IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 21 OF 2016

(Arising from Commercial Case No. 128 of 2014)

RUVU GEMSTONE MINING CO. LIMITED ..... APPLICANT

VERSUS

RELIANCE INSURANCE COMPANY (T) LTD ..... RESPONDENT

4th & 20th June 20, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for extension of time within which to make an application for extension of the lifespan of Commercial Case No. 128 of 2014 and for extension of the lifespan of the said case. The application has been made under section 14 (1) of the Law of Limitation Act Cap. 89 of the Revised Edition, 2002 and 95 of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 as well as Rule 32 (2) and (3) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules").

This application was agreed by the parties and blessed by the court to be disposed of by way of written submissions. Mr. Chuwa, learned counsel, bases his submissions mainly on his affidavit. He argues that delay of determination of the said suit was not on applicant's own making. He gives

an account of what transpired in the proceedings from the partial settlement of the suit, the delay in filing the witness statements by the respondent, grant of an application for doing so by this court, to adjournments and finally that the applicant has been diligently prosecuting the matter. The applicant cites several decisions to support his arguments. These are: ***Tanzania Knitwear Ltd Vs Shamshu Esmail*** [1989] TLR 48 (HC), ***Africa Medical Research Foundation Vs Stephen Emmanuel & Others*** DSM Civil Case No. 17 of 2011 (unreported) and ***Electrics International Co. Ltd Vs Archplan International Ltd & 4 others***, Civil Case No. 16 of 2003 (unreported).

On the other hand, Mr. Jethro Turyamwesiga, learned counsel, for the respondent, relying on the counter-affidavit of Adolf Runyoro, counters those arguments on mainly two angles. First, that no reasons are given for delay to apply for extension of the lifespan of the suit but rather the reasons given are those for delay to determine the matter, that no account is made for the five months delay that is from September 2015 to February 2016 to file an application for extension of the lifespan. Secondly, and in the nature of a preliminary point of law, that the application is omnibus and thus bad in law in that it contains two applications in one. He argues that in the light of ***Rutagatina C.L Vs the Advocates' Committee***, Civil Application No. 98 of 2010 (unreported), it should be dismissed, and further that this being an application for which time within which to institute it is not provided, it should have been brought within 60 days from the day the lifespan expired in terms of item 21 to part III of the Cap. 89.

Strange approach to rejoinder was adopted by Senior Counsel Edward Peter Chuwa in a somewhat evasion to the submissions in reply to his submissions-in-chief. He crafted a letter to this court dated 06.06.2016 and titled

"FAILURE TO FILE REJOINDER SUBMISSIONS". Therein he blames and laments as having been denied a chance to do so due to the respondent's delay to serve on him the reply submissions. That the same were served to him far beyond the time scheduled for him to file his rejoinder and therefore in his tone:

> "We humbly ask the court to take note of this omission and "excuse us" for failure to file the rejoinder as ordered"

The respondent has raised a point which is in the nature of a preliminary objection to the effect that the application is omnibus because it is a two-in-one application; an application for extension of time to apply for enlargement of time within which Commercial Case No. 128 of 2014 should be finalized and an application for extension of time within which the case should be finalized. The learned counsel relies on the ***Rutagatina*** case (supra) and ***Jovin Mutagwaba Vs Geita Gold Mining Ltd***, Civil Appeal No. 23 of 2014 (CAT unreported) for the proposition that that course is not permissible.

This issue was well articulated by this court [Mapigano, J. (as he then was)] in ***Tanzania Knitwear*** in which, faced with a similar situation – the issue whether an application which unites two distinct applications in one application, namely an application for setting aside a temporary injunction and an application for injunction is bad at law. His Lordship observed at page 51:

> "... the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of

proceedings. Courts of law encourage the opposite."

The above quote was affirmed by the Court of Appeal in ***MIC Tanzania Limited Vs Minister for Labour and Youth Development***, Civil Appeal No. 103 of 2004 (unreported). In that case, the Court of Appeal appreciated the foregoing quote in Tanzania Knitwear as the correct position of the law. The Court of Appeal stated:

> "In the TANZANIA KNITWEARLTD case (Supra), the application had united **two distinct applications,** namely one for setting aside a temporary injunction and another for issuance of a temporary injunction. Objection was taken against such a combination on the ground that it was bad in law. Mapigano, J. (as he then was) held:
>
> *In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite.*
>
> The learned Senior State Attorney in this appeal has invited us to disregard the holding of Mapigano, J. because we are not bound by it. Indeed we are not bound by it and there is no direct decision of this Court on the issue.

> However, that cannot be a hindrance to us in our endeavours to ensure that substantive justice always prevails. After all, judicial process is not a discovery process but a creation process. **Having so observed, we hold that the ruling of Mapigano, J. on the issue cannot be faulted, and we are respectfully in agreement with him.**"
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> [Bold supplied].

In the case at hand, the applicant has combined two applications in one: an application for, first, extension of time within which to apply to this court for enlargement of time of the lifespan of Commercial Case No. 128 of 2014 and secondly, for enlargement of the lifespan of the said case. I think the course taken by the applicant is, in the light of the ***Tanzania Knitwear*** case, quite in order. In the circumstances of Tanzania where the vision of the Judiciary is to administer justice effectively, efficiently and timely, it will be out of place for courts of law to encourage multiplicity of proceedings because this course would defeat the very purpose for which the Vision is intended to achieve. This said, I am not prepared to buy the contention of the respondent on this take. For the avoidance of doubt, I have read the ***Rutagatina*** and ***Mutagwaba*** cases cited to me by the learned counsel for the respondent. I think they are distinguishable. In ***Rutagatina*** the Court of Appeal was grappling with the Court of Appeal Rules, 2009 and found that they do not provide for an omnibus application. And in ***Mutagwaba***, the same court was dealing with the rules and wondered "why an application for leave in a land matter should be combined with an application to file a notice of appeal under

the Appellate Jurisdiction Act." By any stretch of the mind, the two cases can be distinguished from the present case for the main reason that the present application has not been taken under the Court of Appeal Rules, 2009.

It my view that the cases can be distinguished from the present case for two main reasons; first, the present application has not been taken under the Court of Appeal Rules, 2009 and secondly, applications in those case were found to be omnibus and consequently struck because they combined two or more applications which were unrelated. For the avoidance of doubt, the ***MIC Tanzania*** case was an appeal from the decision of this court which entertained two interrelated applications.

At this juncture, I find it irresistible to quote the observation of my brother at the Bench Dr. Ndika, J. in ***Gervas Mwakafwila & 5 Others Vs the Registered Trustees of Moravian Church in Southern Tanganyika***, Land Case No. 12 of 2013 (unreported), wherein, faced with an identical situation, discussed the seemingly two diametrically opposed positions of the Court of Appeal in MIC Tanzania and Rutagatina cases. His Lordship held:

> "I ... find the reasoning in *MIC Tanzania Limited* v *Minister for Labour and Youth Development* (*supra*) and *Knitwear Limited v Shamshu Esmail* (*supra*) highly persuasive. Compilation of several separate but interlinked and interdependent prayers into one chamber application, indeed, prevents multiplicity of proceedings. A combined application can still be supported by a single affidavit, which must, then, provide all necessary facts that will provide justification for granting

each and every prayer in the Chamber Summons. The fear that a single affidavit cannot legally and properly support more than one prayer is over the top. On balance, an affidavit is not mystical or magical creature that cannot be crafted to fit the circumstances of a particular case. It is just a vessel through which evidence is presented in court.

I must hasten to say, however, that I am aware of the possibility of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think, where combined prayers are apparently incompatible or discordant, the omnibus application may inevitably be rendered irregular and incompetent."

In view of the ***Tanzania Knitwear***, ***MIC Tanzania*** and ***Gervas Mwakafwila*** cases discussed above I wish to recap that while an omnibus application which is composed of two or more unrelated application may be struck out for being incompetent, an application comprising two or more applications which are interrelated is allowable at law.

For these reasons, I would overrule the firs point of objection in the respondent's PO. I would therefore entertain both prayers of the applicant.

I now turn to the second point which seeks to answer the question whether the applicant is entitled to the orders sought.

As rightly put by both learned counsel for the parties, the timeframe allotted to cases in the Commercial Division of the High Court within which they must be finalized is, as per rule 32 (2) of the Rules, ten months and not more than twelve. The present case - Commercial Case No. 128 of 2014 – whose lifespan is sought to be extended, was filed in this court on 10.10.2014. It therefore ought to have been finalized, at most, by 09.10.2015. Neither the plaintiff nor its counsel applied for extension of the lifespan as required by the law. The question which comes to the fore at this juncture, is: this being the case, is Commercial Case No. 128 of 2014 now incompetent and should thus be struck out as prayed by the respondent? I have serious doubts.

As good luck would have it, the question what should be done in case a speed track assigned to a case expires, is not a virgin territory in our jurisdiction. It has been traversed by this court before. The only problem is that there is, to the best of my knowledge, a dearth of Court of Appeal decisions on the subject or to put it more correctly, in my research, I have not been able to lay my hands on any decision of the Court of Appeal which falls in all fours with the present instance. Worse more, the High Court, which has some decisions on this point and on which decisions I could lay my hands on, is divided.

In ***Africa Medical Research Foundation*** (supra)), a case cited by the learned counsel for the applicant, my brother at the Bench, Dr. Twaib, J., seized with an identical situation in respect of speed tracks under the CPC, 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. However, of particular relevance to the present case is an observation to the effect that the provisions relating to speed

tracks to not provide for striking out or dismissing the suit which has outlivefd its speed track. His Lordship observed:

> "One thing is clear from these provisions [relating to speed tracks under the CPC]: 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."

As stated above, ***Africa Medical Research Foundation*** was discussing expiry of speed track of cases under the CPC. However, I have no speck of doubt that the jurisprudence under the provisions respecting speed track under the CPC and those respecting lifespan in the Rules, is the same. In both instances, the timeframes were put in place in order to expedite the hearing of cases in courts by fixing timeframes within which they must be finalized.

I entirely agree with the reasoning and conclusion in ***Africa Medical Research Foundation***. Rules of the Court are there to guide courts in the dispensation of justice and not to defeat it. I find comfort on this proposition in an English case of ***Re Coles Ravenshear Arbitration*** [1907] KB 1 wherein Collins M.R. had this to say at page 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 (henceforth "the Constitution") which urges the courts in this jurisdiction to dispense justice without being tied up with undue technical provisions, which may obstruct dispensation of justice. It is my well considered view that, bearing in mind the peculiar nature of the case whose lifespan is sought to be enlarged, this is a proper case in which the provisions of article 107A (2) (e) of the Constitution should be invited into play.

And in the same line of argument in respect of scheduling conferences under the CPC, it was held in a Ugandan case of ***Kigula and others Vs Attorney-General*** [2005] 1 EA 132 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 it may not be irrelevant 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."

In view of the foregoing discussion, it is abundantly clear that the procedure enumerated under rule 32 (3) of the Rules is but a handmaid and not a mistress, a lubricant, not a resistant in the administration of justice. In the premises, the plaintiff cannot be denied an opportunity of participating in the course of justice just because the lifespan within which his case ought to have been finalized has expired. 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 in which Madan, JA in an *obiter dicta* observed at page 9 [quoted in ***Benja Properties Limited Vs Savings And Loans Kenya Limited*** High Court at Nairobi (Mlimani Commercial Courts) Civil Case No. 173 of 2004 (available at www.kenyalaw.org)] as follows:

> "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**".
> [Emphasis added].

In the same line of argument, to borrow the words of Madan, J., a court of justice should aim at sustaining a suit rather than striking it out on the ground that its lifespan within which it should have been finalized has expired. In my considered view, what the court is supposed to do in such circumstances is to allow a party to apply its enlargement so that the suit is prosecuted to its finality. In appropriate cases, the court can even extend the lifespan *suo motu*.

To recapitulate on this point, a party who fails to apply for enlargement of the lifespan of the case within the time provided for by rule 32 (3) of the Rules, should be allowed to apply out of time if he so wishes. The court should not withhold such permission unless there are strong reasons to do so. The test should always be whether any injustice will be occasioned in taking that course. The provisions of rule 32 (2) which allows a party to apply for extension of the lifespan of the suit upon giving sufficient reason, intends to accord the plaintiff time to prosecute his suit to its finality.

In view of the above discussion, I grant an application for extension of time for the applicant making an application for enlargement of the lifespan of Commercial Case No. 128 of 2014 under prayer (a) of the Chamber Summons. The order sought under prayer (b) is also granted as well. The lifespan of Commercial Case No. 128 of 2014 is extended to twelve (12) more months commencing from 10.10.2015; on which the lifespan of the case immediately expired. The case should proceed for hearing on merits on a date to be fixed today.

Order accordingly.

DATED at DAR ES SALAAM this 1st day of October, 2015.

J. C. M. MWAMBEGELE

JUDGE