

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

MISCELLANEOUS COMMERCIAL CAUSE NO. 162 OF 2016

MAHESHKUMAR RAOJIBHAI PATEL APPLICANT

VERSUS

KARIM SHAMSHUDDIN SULEMAN RESPONDENT

15th November & 16th December, 2016

RULING

MWAMBEGELE, J.:

The applicant Maheshkumar Raojibhai Patel filed this application seeking extension of time within which to file witness' statements. The application has been taken under the provisions of section 14 of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (henceforth "the Law of Limitation") and any other enabling provisions of the law. It is supported by an affidavit of Yudathade Alexander; an advocate of this court and courts subordinate hereto except for the Primary Court.

On 20.10.2016, Mr. Yudathade Alexander, the learned counsel for the applicant asked the court to grant his application as the respondent had not filed any counter-affidavit. To him, the application had not been contested

and the court had to grant it. The court, however, asked the learned counsel to satisfy it if it has been properly moved. The learned counsel was asked to so address the court on 15.11.2016.

On 15.11.2016 the learned counsel for the applicant appeared. Also present was Mr. George Vedasto, learned counsel, who appeared for the respondent. As Mr. Vedasto had filed no counter-affidavit and at the hearing, he intimated to the court that he had no objection to the application, hence the course taken, the court heard the counsel for the applicant on whether it was properly moved.

The learned counsel for the applicant submitted that the court had been properly moved because the provisions of rule 49 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter referred to as “the Rules”) provide for time within which the witnesses’ statements must be filed. However, they do not provide for a course to be taken by a party which fails to file the same within the prescribed time. That is the reason why a resort was made to the Law of Limitation. He insisted that the provisions of section 14 (1) of the Law of Limitation was appropriately applicable to move the court to extend time with which to file the witnesses’ statements.

As Mr. Yudathade has rightly stated, the Rules under rule 49 (2) thereof, have provided for the time within which witnesses’ statements should be filed; they have not provided for what should be done by a party which has not filed the statements within the prescribed time. As rule 2 (1) of the Rules directs that a resort should be made to the CPC in case of any *lacuna* in the Rules, that is perhaps the reason why the applicant resorted to the CPC and later the Law of Limitation.

But the provisions of section 14 of the Law of Limitation to which the applicant made resort, are, in my considered view, not applicable in applications of this nature; applications for extension of time within which to file witnesses' statements. In more than one occasion, I have had an opportunity to discuss this issue and reached a conclusion that the proper provision under which an application for extension of time within which witnesses' statements should be filed is section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition 2002 (hereinafter referred to as "the CPC"). Those decisions include ***Reliance Insurance Company (T) Ltd Vs Ruvu Gemstone Mining Co. Limited***, Miscellaneous Commercial Cause No. 162 of 2015 and ***Total Tanzania Limited Vs Zenon Oil and Gas***, Miscellaneous Commercial Cause No. 219 Of 2015 (both unreported). As I still hold the same position today, I will reiterate that discussion in this ruling.

The provisions of section 14 of the Law of Limitation cannot be applicable to an application for extension of time to file witnesses' statements. This provision is applicable in situations when a party seeks extension of time to file an application or appeal. A witness statement is not an appeal. Neither is it an application. The provision reads:

"(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, **extend the period of limitation for the institution of an appeal or an 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.

(2) For the purposes of this section "the court" means the court **having jurisdiction to entertain the appeal or, as the case may be, the application."**

[Emphasis supplied].

The above provision speaks for itself: that it is applicable in extending time for filing of an appeal or application upon supply of reasonable or sufficient cause. A witness statement is neither an application nor an appeal envisaged by the provision. The present application, therefore, does not fall within the scope and purview of section 14 of the Law of Limitation Act.

- The Rules, under rule 49 (2), provide that witnesses' statements must be filed within seven (7) days of the completion of mediation. However, once a party fails to file the statements within seven days as prescribed by the sub-rule, the Rules are silent as to the course of action to be taken if a party still wishes to have the statements filed. That is when the provisions of rule 2 (1) of the Rules come into play; to resort to the CPC. A resort to the CPC does not unveil any specific provision to the filing of witnesses' statements out of time. As was held by this court in an unreported decision of ***Alliance Ginneries Limited Vs Kahama Oil Mills Limited***, Miscellaneous Commercial Cause No. 14 of 2015 (Mansoor, J.), the provisions of section 95 of the CPC become relevant in the circumstances. The provisions of sections 95 of the CPC are the correct provisions to support an application for extension of time to file witnesses' statements.

My brother Nyangarika, J., when faced with an identical situation in ***Fauzia Jamal Vs Lilian Onael Kileo***, Miscellaneous Commercial Cause No. 70 of 2014 (unreported) had this to say:

“Section 95 would be relevant to base this application [for extension of time within which to file witnesses’ statements] in the absence of proper provision in the law that provides for the filing of witness statement.”

I find myself highly persuaded by the decision of this court in ***Alliance Ginneries Limited Vs Kahama Oil Mills Limited*** and ***Fauzia Jamal Vs Lilian Onael Kileo*** (supra) and adopt them in the present application.

To recap, I wish to state as follows: the Rules, under rule 49 (2) thereof, provide for time - seven days after failure of mediation - within which witnesses’ statements must be filed. However, the Rules do not provide for recourse to be taken by a party which has failed to file the statements within the prescribed time and still wishes to file the same. In the circumstances, by virtue of rule 2 (1) of the Rules, a resort should be made to the CPC. But because the CPC does not have any specific provision to cater for an application for extension of time within which to file witnesses’ statements, and in view of the fact that the provisions of section 14 (1) of the Limitation Act are not applicable to applications to file witnesses’ statements out of time, the provisions of section 95 of the CPC regarding inherent powers of the court must be brought into play.

The present application which has been filed under the provisions of section 14 of the Law of Limitation has therefore been filed under wrong provisions.

There is a plethora of authorities that state an application filed under wrong provisions, must be struck out - see: ***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 Saivand 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) and ***Edward Bachwa & 3 Others Vs the Attorney General & Another*** Civil Application No. 128 of 2006 (DSM Unreported) and ***Chamma cha Walimu Tanzania Vs the Attorney General*** Civil Application No. 151 of 2008 [unreported] and ***Assays Mpwaga Vs Eyazali Mchape & 3 Others*** MBY. Civil Application No. 4 of 2013 (CAT unreported), to mention but a few.

Likewise, as Mr. Yudathade has rightly conceded, the application cannot be saved by the phrase "any other enabling provisions of the law". It has been held in this court time and again that the phrase is outdated, meaningless and an unnecessary embellishment, for, the court cannot be moved by unknown provisions of the law – see: ***Janeth Mmari Vs International School of Tanganyika and Another***, Miscellaneous Civil Cause No. 50 of 2005, ***Elizabeth Steven & another Vs Attorney General***, Miscellaneous Civil Cause No. 82 of 2005 (both unreported decisions of this court as per Mihayo, J. and ***Rubya Saw Mill Timber Vs Consolidated Holdings Corporation***, Commercial Case No. 297 of 2002 as per Makaramba, J. (all the three decisions are unreported).

Mr. Yudathade, learned counsel has urged the court to allow him file a fresh application should it (the court) find that the application has been proffered under wrong provisions. Of course, as per the authorities above, an application which has been filed under wrong provisions meets the wrath of being struck out, a course which will not bar the applicant to re-file a fresh application if he so wishes.

The present application which has been filed under wrong provisions faces the same wrath; it is struck out. As the respondent did not file any counter-affidavit and for that reason had no right of oral reply, I make no order as to costs.

Order accordingly.

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

J. C. M. MWAMBEGELE
JUDGE

