

TANZANIA / JUDGMENT

bidco oil and soap ltd vs saving and finance comm bank another 2010 tzhccomd 15 28 june 2010

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT PAR ES SALAAM
COMMERCIAL CASE No 84 OF 2006 BIDCO OIL AND SOAP LIMITED..... PLAINTIFF/
APPLICANT Versus SAVINGS AND FINANCE COMMERCIAL BANK.... DEFENDANT/RESPONDENT

RULING

MRUMAJ, This is an application filed by the plaintiffs counsel requesting the court to depart from or amend its scheduling order dated 14th May, 2007 and extend time for the hearing and determination of the main suit which is still pending before the court. The said application is preferred under the provisions of Order VI11A Rules 3 and 4 and Section 95 of Civil Procedure Code Cap 33 RE 2002. As is the practice, the application is supported by affidavit and the supporting affidavit in this matter is that of Mr Deogratias J, Lyimo the plaintiffs learned advocate. Rule 3 (1) of Order VI11A of the civil Procedure Code, one of the laws under which this application is preferred provides as follows; " In every case assigned to a specific Judge or Magistrate, a first scheduling and settlement conference attended by the parties or their recognized agents or advocates shall be held and presided over by such Judge or Magistrate within a period of twenty one days of after conclusion of the pleadings for purposes of ascertaining the speed track of the case resolving the case through negotiation, mediation, arbitration or such other procedures not involving trial" Sub rule (3) of the same rule provides that; 1 "The appropriate speed track of a case shall be determined asfollows-

- (a) (Not relevant)
- (b) Speed Track Two shall be reserved for cases considered by the J Magistrate to be normal cases capable of being or are required in the interest of justice to be concluded within a period not exceeding twelve months from commencement of the case" (c).....
(Not relevant)
- (d) (Not relevant)". This case was commenced by presenting a plaint to the court on 10th November, 2006 and it was placed under speed track two. The scheduling order to that effect was made by my brother Luanda J (as he then was), on 14th May, 2007. Mediation was

marked to have failed on 26th June, 2007 and the matter was re- assigned to Mjasiri J (as she then was) for trial. Final pre trial conference was held on 27th July 2007 and the parties agreed that trial should be conducted with the aid of Court Assessors. Trial was planned to begin on 8th October, 2007 and to continue for three consecutive days up to 10th October, 2007. However, when the matter was called for hearing on 8 October, 2007 no assessor was present. It was adjourned to the next day, I. e. 9th October, 2007. On that day only one assessor attended. Sensing imminent, delays, parties changed their minds and agreed to proceed with the trial without the aid of assessors. Therefore the case was rescheduled for hearing on 13th November, 2007. On that day one Mr Mdoe, a principal officer of the plaintiff informed the court that the plaintiff's counsel one Mrs Msuya was not in court and that she will be away for a week and that the plaintiff was thinking of engaging another lawyer. He therefore, successfully prayed for an adjournment. The matter was rescheduled for hearing on 18th and 19th March, 2008. In December, 2008 the trial Judge together with other two Judges who stationed in this registry were elevated to the Court of Appeal and no Judge single was posted to the Commercial Division of the High Court till March, 2008. 2 Because the court was in a statutory Easter Vacation during March and substantial part of April, 2008 no hearing could take place and therefore hearing of the matter had to be adjourned to 5th and 6th May, 2008. On 5th May, 2008 counsel for both the plaintiff and the defendant were in agreement that given the nature of the suit against the third party it would be advisable that the third party be represented by a lawyer. Accordingly, the court advised the third party to engage a lawyer and the matter were rescheduled to 19th and 20th June, 2008 for hearing. On that day trial began and three (3) witnesses gave their evidence in support of the plaintiff's case. At the end of the day Mr Shayo, counsel for the plaintiff intimated that the plaintiff had still one more witness to testify but on that day he could not procure his attendance because he (the witness) was doing his examinations. He therefore successfully prayed for adjournment till 14th July

2008. On 14th July, 2008, the intended witness gave his testimony and the plaintiff closed its case. By consent defence hearing was set to start on 5th and continue to 8th November,
2008. When the matter was called for hearing of defence case, on 5th November, 2008 as scheduled, Mr Kamala advocate who appeared for the defendant informed the court that Mr Kesaria, learned advocate who has the conduct of this case was appearing in the Court of Appeal. The matter was adjourned to 21st October, 2008 for hearing. On that later date the trial Judge was indisposed and the matter had to be adjourned for mention on 27th November, 2008. On 27th November, 2008 counsel for the parties agreed to continue with the defence case on 17th February, 2009. This was so because December is a Statutory Court X- Mass Vacation and In January the trial Judge was in his annual leave. On 17th February, 2009 defence case was opened and one witness was called to testify. Later in the day argument ensued on the admission and non admission of a document I adjourned the matter to another date for ruling. Ruling was delivered on 21st April 2009 and further defence hearing was set for 17th June,

2009. However, when the case was called for continuation of defence hearing counsel for the defendant informed the court that his witness (DW1), had 3 confused the dates he was supposed to appear in court to continue with his testimony and that instead of 17th June, ordered he came to court on 16th June, 2009. In the circumstances the matter had to be adjourned once again to 31st July 2009. It would appear that in July 31st this matter was not called before a Judge and it lost its track therefore it was called for mention on 25th August, 2009 with the view to fixing a date for continuation of defence hearing. Defence hearing was set to proceed on 19th October 2009 and two witnesses (including DW1) testified on that day before the matter was adjourned again for further defence hearing on 5th November, 2009. On that day, Mr Lyimo the plaintiffs counsel did not appear. Mr Kesaria, counsel for the defendant who held his brief informed the court that the information he had was that Mr Lyimo was appearing in another case in the High Court (Main Registry. The matter was adjourned and was set for mention before the Registrar on 2nd December, 2009. On that day neither the plaintiff nor his advocate appeared. Similarly the third party and his counsel were absent. In the circumstances the court had no option but to adjourn the case to another date. On 17th February, 2010 Mr Lyimo counsel for the plaintiff filed this application for departure or amendment of the scheduling order made on 14th May, 2007 and extension of time for the hearing and final determination of the suit which is still pending in court. Mr Kesaria, counsel for the defendant has filed a notice of preliminary objection on the ground that the application has been made after the expiry of the prescribed limitation period and consequently it should stand dismissed pursuant to section 3(1) of the Law of Limitation Act Cap 89 RE 2002. In order to save time counsel for the parties were ordered to submit orally on the preliminary point of objection and the application simultaneously. I am thankful for both counsels for their brilliant submissions which have been of much help to me in composing this ruling. As intimated earlier, this suit was commenced on 10th November, 2006. According to Mr Martin Rwehumbiza defence counsel who argued the preliminary objection 4 together with the application, in speed track two under which this suit was placed a matter or suit is required to be concluded within a period not exceeding twelve months from its commencement. The counsel contended that in the instance case even at the time when the plaintiff was closing its case the speed track under which the case was placed had already expired. He said that as per record trial was commenced on 18th July 2008 six months after the expiry of the speed track and there were neither an application nor any leave granted for departure or extension from the scheduled order. The learned counsel submitted therefore that whatever took place in the proceedings after the expiry of the speed track of the case is a nullity. He said that the speed track sets a life span of a particular case therefore the life span of that case ends with the expiry of its speed track. He cited to this court High Court decisions in cases of Mwanza City Engineer & Another Vs. Anchor Traders Limited Civil Application No 17 of 2005 and Absalom Msaka Vs. Peter Masawe & Another Civil Case No 124 of 1998 (both unreported) in which suits were dismissed on the ground that the life span had expired and there were no application for departure and/or that the applications were brought out of time. Submitting on the preliminary point, the learned counsel

contended that under the 1st Schedule to the Law of Limitation Act paragraph 21, an application like the one at hand ought to have been filed within sixty (60) days after expiration of the speed track scheduled. The learned counsel said that section 3(1) of the Law of Limitation Act prohibits an action to be filed after expiry of limitation time. For these two reasons the learned counsel requested this court to dismiss the application with costs. Responding to the submissions made by Mr Rwehumbiza, Mr Lyimo counsel for the plaintiff/applicant submitted that the two authorities cited by Mr Rwehumbiza are distinguishable in that in those cases the application were made absolutely without no good reasons. He said that in the present case apart from the fact that the application is made in the interest of justice, there are good reasons for making it. The learned counsel contended that the plaintiff should not be blamed alone for delay in this case because under the law either party could move the court for departure from a scheduled order. He said that rule 4 of Order 5 VIIIA of the Civil Procedure Code is clear that any party may move the court to depart from the scheduled order. He said that it will be extremely unfair to nullify the proceedings in this case on simple reason that there is no amendment of the scheduled order while the court itself is involved in the delays. He cited to me the decision of this court in Commercial Case No 71 of 2004 between Tanzania Fertilizers and NIC & PSRC (supra) (Massati J, as he then was). Regarding the Preliminary objection raised against the application itself, the learned counsel contended that section 3(1) of the Law of Limitation Act does not apply to this case and he "condemned" Mr Rwehumbiza for reading only part of the said section. He nevertheless concluded that should the court find that the application is out of time, then it should exercise its discretion and powers to grant an extension of time within which the applicant should be allowed to apply for departure and/or amendment from the scheduling order. The law under Rule 4 of Order VIII A of the Civil Procedure Code with reference to which counsels are arguing this application provides as follows; "Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment if is necessary in the interest of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment unless the court directs otherwise" Two scheduling conference orders were made by this court on 14th May 2007. The orders are- fl) That the matter be placed under speed track two

- (2) That the matter will first be resolved through mediation. In law as quoted above it is these two orders that no departure or amendment there from can be allowed unless it is in the interest of justice. The order under reference now is in respect of the speed track. Therefore, in law the central issue should be justice and not the procedure involved. In other words in terms of the provisions of Rule 4 of Order VI11 A, if the 6 court is of the view that justice of the case requires a departure, then procedural irregularity may be ignored. As stated earlier the present case was commenced on 10th November, 2006, therefore the life span of the case which is twelve months expired on 10 November, 2007. This was more than seven months before the commencement of the trial and about six (6) months after the

scheduling order was made. The bone of contention here is therefore the issue of the value of technicalities versus the merits of the matter before the court. The question is; should technical and procedural irregularities block the way to the merit of the case or are procedural aspects just facilitative avenues towards justice? In the case of Tanzania Fertilizers Co Ltd Vs. National Insurance & another (supra) Massati J, (as he then was), had an opportunity to deal with wordings of the provisions of Rule 4 of Order VIII A Of the Civil Procedure Code. The learned Judge was of the view that although the said Rule is couched in mandatory terms "shall" but the object of the Legislation was to make the said Rule directory. He gave his reasons. He said that the object of enacting Rule 4 is to speed up and minimize un- necessary delays in disposal of civil cases therefore construing it as mandatory may lead to nullification of all the proceedings conducted beyond the scheduling order. The consequences, he observed would be dire even to parties with genuine reasons for failure to comply with the requirement of the law. I entirely subscribe myself to this view of Massati J; I only wish to add that it should not skip our minds that the role of procedure is to reach just decisions in cases before us therefore procedure issues should not be used as a pretext to defeat the justice it is designed to enhance. In the case of The Iron& Steel wares Limited Vs. C. W. Martyr & Company (1956) EA 175, an appeal from the High Court of Uganda, Sir Newman Worley, then President of the Court of Appeal for East Africa observed that: "Procedural rules are intended to serve as the handmaidens of justice, not to defeat it, and we think that the High Court in its inherent jurisdiction to control its own procedure, has a discretion to waive the strict application order XVI 7 rule2, and has duty to ensure that each party is given a fair opportunity to state its case and answer the case made against it" In that case the Court was dealing with Rule 2, of Order XVI of Uganda Civil Procedure Code which is in para materia with Rule 2, of Order XVII of our own Civil Procedure Code. Rule 2 of Order XVII is similarly worded with Rule 4 of order VIIIA. As I have pointed out earlier, the life span of this case expired on 10th November, 2007 and by the time trial was commenced i. e on 19th June 2008 parties were out of time for a period of more than six months. Neither the plaintiff nor the defendant moved the court to reschedule its order. In the circumstance it would be unfair to blame the plaintiff alone for the delay in completing of this matter. As the record would depicts between December, 2007 and March, 2008 there were no judge in this station after all the Judges who were stationed in this registry were elevated to the Court of Appeal. Certainly when the presiding Judge was making an order placing this matter under speed track two he could not have envisaged a situation where for over three months this division would have no judge. He made the order on the assumption of ceteris paribus (i. e. all other things being equal), and the assumption did not work. Other adjournments were caused by both parties and few by the court itself. Should the plaintiff be punished for that? In my view and for reasons stated above he should not. Procedures are but the grease of law, the channel and means whereby law is administered and justice reached. It should not be allowed to depart from its proper channel when in place of facilitating, it obstruct and even extinguish legal rights and is thus made to govern where it ought to serve. I am aware of another decision of the High Court in the case of Mwanza City Engineers & Another Vs, Anchor Traders Limited HC Civil Appeal No 17 of 2005 cited to me

in which it was decided that after the expiry of the life span of a case, there is no case before the Court. Probably the Mwanza City case (supra) was so decided because the proceedings were before a District Court which does not have the inherent powers to regulate its own procedures as the High do. There is an adage in the legal fraternity that each case must be decided on its own facts. I think this case should be decided on its own facts. In this particular case I would rather take a liberal approach in interpreting Rule 4 of Order VIIIA taken by this Court in the Tanzania Fertilizers' case (supra), where it was held that rule 4 of Order VIIIA of the Civil Procedure Code is merely directory although the wording is prima facie mandatory and only wish to add that the High Court in its inherent Jurisdiction to make any order as may be necessary for the ends of justice embodied in section 95 of the Civil Procedure Code has discretion to waive strict application of some rules of procedure, among them the said Rule 4. The need to dispense justice without regard to undue technicalities is the concern of our Constitution and is spelt out by Article 107A (2) (e) which provides that; "In delivering decision in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say-

- (e) To dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice?" Thus, the Constitution concern is not limited to decision making by the courts as conferred to them by Articles 107 A (1) and 107B but extends to the processes of decision making which should bring about acceptable standards of administration of justice in courts. The responsibility is clearly of the court to ensure proper administration of justice. Another objection by Mr Rwehumbiza is on the limitation. Mr Rwehumbiza contends that the application for departure is time barred. This was conceded by Mr Lyimo and he said that in the event this court will be of the view that the application is time barred as contended by Mr Rwehumbiza, then the court should be pleased to grant an extension of time within which the plaintiff can make an application for departure from the scheduled order. This prayer was strongly resisted by Mr Rwehumbiza who said that it is intended to pre-empt the preliminary point raised. 9 In the case of Tanzania Fertilizer (supra) this court was of the view that if a party finds that the deadline for the finalization of his case is about to expire, he is legally bound to seek extension or amendment of the scheduling order well before the expiry. I do agree. The question we have to ask ourselves here is what is the limitation time for an application for departure from the scheduling conference order? As stated before, prohibition of amendment to or departure from the order is clearly provided for under the provision of rule 4 of Order VIIA of the Civil Procedure Code (Cap 33 RE 2002). However, under the same rule the court has discretion to allow amendment in the interest of justice. The law does not provide for limitation of time within which this discretion of the court should be exercised. On the other hand the provision of sub-rule (3) of rule 3 of the same order is to an effect that cases placed under speed track should be concluded within the period of twelve months. The question we have to ask ourselves here is whether this particular legal technicality justifies holding justice by preventing the court from addressing the merits of the matter before it. In my view the limit for the court to exercise its discretion is justice itself. Where justice requires

court will not hesitate to call into play the application of the provision of sections 93 and 95 of the Civil Procedure Code to do what is necessary so that justice is not only done but seen to be done by the court. Section 95 of the Civil Procedure Code provides as follows:-

"Nothing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to make such order to make such orders as may be necessary for the ends of justice or to prevent of the process of the court" While section 93 of the same code provides that:-

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this code, the court may, in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired" io The period originally fixed by the court for conclusion of this case was Twelve Months. This period was fixed in accordance with the provisions of sub-rule (3) of Rule 3 of Order VIIIA of the Civil Procedure Code and it is prescribed by the Code. Admittedly section 93 imposes no restriction whatsoever in the court's discretion in extending time and none is imposed by sub-rule (3) of rule 3 of Order VIIIA of the same Code. Thus it is my view that when a case is not concluded within the prescribed time and neither party bear the blame for the delay, the law under the provisions of Rule 4 of the same Order read together with sections 93 and 95 of the Civil Procedure Code allows amendment to or departure from the scheduling order on application and there is no time limit imposed for such extension. It was held in Mwanza City's case (supra) that the plaintiff's case is not done until the whole case is done; therefore the duty is always on the plaintiff to move the court for extension or departure from the scheduled order. My view is that the plaintiff's case is done when the plaintiff's case is closed. Under the Civil Procedure Code, plaintiff initiates proceedings by filing a plaint. The defendant responds by filing a written statement of defence and things goes like that. Likewise during the trial the plaintiff starts its case by calling its witnesses then the defendant counter the plaintiff's case by calling its own witnesses too etc. In these respect proceedings before the court can be treated as a football match with doubtlessly pleadings being the ball kicked to and from each party's field. Thus, when the plaintiff closes its case the ball is in defendant's field and the duty is upon him to kick it out of its field. If the defendant fails to discharge its duty, he is likely to face the consequences that the plaintiff would do. That is because Rule 4 of Order VIIIA does not put the duty to move the court for a departure on a specific party. That is why the law says: - ".....the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment....." 11 Had the law intended to put the duty on the plaintiff only, it could have clearly so stated. It is my opinion therefore that by using the word "the party in favour of whom....." The law intended to put that duty on either party. That being the case therefore when a life span of a case is about to expire after the plaintiff had closed its case, I think legally either party can seek for extension or amendment of the scheduled order but conveniently the defendant should move the court lest he may lose an opportunity to be heard. This should be so because if, for instance the plaintiff has closed its case and the defendant for no apparent reasons dilly dallies and /or dodges the case and the life span of the case expires, the plaintiff should not be punished for that. In my view the defendant must show sufficient cause for the delays otherwise court should proceed to determine the

matter on the available facts. I think that is the spirit of the wording of rule 4 of Order VII A, that "the party in favour of whom such departure or amendment is made shall bear the costs". This literally means that, if it is the plaintiff who made an application for extension and the same is granted he should bear the costs. Likewise, if it is the defendant who applied and an order is made in his favour he must bear the costs. Otherwise the rule would have said "the plaintiff shall bear the costs!" In the instance case and as demonstrated above neither party can be blamed for the delay, therefore either party could have moved the court for departure or amendment of the scheduled order. I therefore find that this is a fit case that the court should exhibit a considerable degree of sensitivity to justice and the plight of the people appearing before it (It being the last hope where their rights can be determined on merits) and allow the extension of time. In fine therefore I allow the application for extension of time within which an application for departure of or amendment to the scheduled order could be made. The application is allowed on two grounds; One because as it was held in Tanzania Fertilizers case (supra) Rule 4 of order VIIA of the Civil Procedure Code although couched in mandatory terms is directory and does not put the duty to move the court specifically on the plaintiff and two because the provisions of section 93 and sub-rule (3) of Rule 3 of Order VIIIA do not impose restrictions in 12 the court's discretion in extending time. Having allowed the said oral application for extension of time, and having heard arguments from both counsel on the application for departure and/or amendment of the scheduling order and taking into consideration that the underlying issue should be justice and not the procedure involved, I order that the scheduling order made by this court on 14th May, 2007 be and is hereby departed from and time be extended for a period of twelve months from 14th May, 2008 when the first period expired and for further period of Eighteen (18) months from 14th May, 2009 when the first extension expired so that this matter can be concluded before December 2010. There shall be no orders as to the costs. A. R. MRUMA, JUDGE 28/6/2010 Date: 28.6.2010 Coram: Hon. A.R.Mruma, Judge. For the Plaintiff- Mr. Magusu holding Mr. Lyimo's brief for. For the Defendant - Mr. Magusu for Defendant. For the Third Party - Mr. Magusu holding Mr. Mlinga's brief for the third party. CC: R. Mtey. Court: Ruling delivered. A. R. MRUMA, JUDGE 28/6/2010 4,710 words I Certify that this is a true and correct copy of the original order Judgment Rolling Sign:..... .ifcjL..... -..... Registrar, Commercial Comt. DSM. 13 Date:.. 2-J ~ I J?_.....

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