IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 5 OF 1994

BETWEEN

1. ABDULRASUL AHMED JAFFER
2. THE NATIONAL HOUSING CORP. ..... APPELLANTS
3. THE REGISTRAR OF TITLES

AND

1. PARIN A. JAFFER
2. AMIRALI AHMED JAFFER ..... RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mapigano, J.)

dated the 18th day of February, 1993

in

Miscellaneous Civil Application No. 48 of 1992

---

JUDGEMENT OF THE COURT

KISANGA, J.A.:

Parin A.A. Jaffer and her late father Amirali A. Jaffer had jointly applied to the High Court for the rectification of errors in the Land Register in respect of particulars relating to a long term lease of appartments 0101 and 0201 over plot No. 2254 Block 83 Mwisho/Zaramo Street situate within the city of Dar es Salaam. The respondents to that application were Abdulrasul A. Jaffer, The National Housing Corporation and the Registrar of Titles.

..../2

Before the hearing of the application commenced a preliminary objection was taken on three grounds, namely, that Parin A. Jaffer had no locus standi in the matter, that the application was wrongly brought before the High Court in the first instance and that the application was time barred. The High Court (Mapigano, J.) overruled the objection, and it is from that Ruling that this appeal emanates.

When this appeal was called on for hearing Mr. Ismail, learned Counsel who had represented Abdulrasul A. Jaffer in the High Court informed us that his client had died before the filing of this appeal. In the premise Counsel applied that the name of his client be struck off the record of appeal, and that Mr. Ismail himself be permitted to drop out of the proceedings relating to this appeal. There being no objection, Mr. Ismail's application was granted accordingly.

Glancing through the record it also transpired that the Registrar of Titles did not appeal against the Ruling of the High Court and therefore he is not a party to this appeal; accordingly we struck off his name from the record of appeal. The appeal, therefore proceeded in respect of the National Housing Corporation as the appellant and Parin A. Jaffer as the respondent, being the legal representative of her father, Amirali A. Jaffer who has since died. Appearing before us were Mr. M. Maira learned advocate for the appellant and Dr. M. Lamwai learned Counsel for the respondent.

..../3

Mr. Maira's main ground of appeal was that the High Court erred in failing to dismiss the application before him as being time barred. In his ruling the trial judge found that the application was time barred but decided, nevertheless that he had power, acting on his own initiative, to extend the period of limitation. It is pertinent to point out here that there was no application, or even a suggestion made to the Court, for the extension of time. Indeed Dr. Mapunda who advocated for the applicant in the High Court consistently maintained that the application was timous. Nevertheless, taking up the issue himself the learned judge in his Ruling said:

> "Looking at the circumstances surrounding this case I have come to take the view that it is one that admits of the application of section 14(1) of the Law of Limitation Act, and it is also my considered judicial view that this Court can proceed to do so suo motu,
> ... ...
> ... ... I will, and do hereby, extend the period of limitation to the day application was instituted in this Court, and with that I overrule the preliminary objection."

Mr. Maira strongly criticised the learned judge who, he said, had acted in contravention of the provisions of section 3(1) of the Law of Limitation Act which said:-

> "3. - (1) Subject to the provisions of this Act, every proceeding described in the first column of the First Schedule to this Act and which is instituted after the period of limitation prescribed therefor opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."

Mr. Maira vigorously contended that once the learned judge had found that the application before him was time barred, then he had to dismiss it. Refering to section 14(1) of the Law of Limitation Act relied on by the learned judge, Counsel submitted that in the absence of any application made to the Court in that behalf, the judge had no power to extend the period of limitation suo motu.

The provisions of section 14(1) above cited are set out hereunder for ease of reference.

> "14. - (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."

It is quite apparent that this provision qualifies section 3(1) of the same Act, also set out earlier in this judgement

..../5

which generally requires the Court to dismiss a proceeding instituted after the expiration of the period of limitation. Under this provision the Court has discretion to enlarge the period of limitation except where the matter is an application for the execution of a decree. The question, however, is whether the provision empowers the Court to enlarge the period of limitation suo motu or whether the Court has to be moved. Upon a careful reading of the provision we have come to the view that the discretion conferred under it is exerciseable only if and when the Court is moved to exercise it. It is hardly necessary to add that the court is enjoined to exercise that discretion judicially.

In holding that view we are prepared to envisage a situation where the trial judge considers that the matter before him is a fit case in which to extend the period of limitation in order, say, to remedy an obvious injustice, that in his view there is reasonable or sufficient ground for extending the period of limitation but that the party concerned has not moved the Court. In such a situation we think that it is open to the judge to intimate to the party concerned his preparedness to enlarge the time, if moved to do so, and then leave it for the party concerned to decide whether or not to take the advice. Where for one reason or another the party concerned declines to take the advice the matter should end there, and we could find no rationale for the view that the Court should force its way through and extend the period of limitation suo motu. The approach put forward

..../6

here will avoid a possible disharmony or anomaly which can arise in certain cases. For instance, where the party concerned does not share the Court's view that the proceeding is time barred, such party may refuse to take the Court's advice. That will be the end of the matter and so far things will be smooth. However where the Court, acting on its own initiative, proceeds to extend the time this may bring about an undesirable or anomalous situation. Indeed this is what happened in the present case. The view taken by the trial judge that the application was time barred was not shared by Dr. Mapunda who had advocated for the applicant at the trial, nor by his successor Dr. Lamwai who argued the appeal before us. Both Counsel were of the firm conviction that the application was timous. Thus it was somewhat odd, and indeed ironical that the Court extended the period of limitation in favour of the applicant against the conviction of the applicant himself or his Counsel that the application was timous. The Court purported to assist a party who through his counsel was saying that he was not in need of that kind of assistance. That does not commend the Court; instead it tends to earn disrespect for the Court. In short it does not accord with the smooth conduct of Court business.

All that we have been trying to say is that in our opinion the Court's discretion under section 14(1) reproduced above should be exercised only upon an application being made to the Court in that behalf, and both sides have been given

..../7

the opportunity of being heard. Such approach puts the court in a position where it can properly determine whether or not reasonable or sufficient cause has been disclosed for extending the time, and serves to ensure that the court's discretion is exercised judicially. In the instant case no such application was made and, therefore, the learned judge wrongly invoked the provisions of that section.

As intimated before, Dr. Lamwai when arguing this appeal before us spent much time and energy urging that the application was not time barred. Some of the arguments he marshalled in support of his stand include the view that his client resided abroad and therefore in terms of section 20 of the Law of Limitation Act the period of limitation did not begin to run against him until he came back, if he did come back at all. Again Counsel strenuously contended that this application was in the nature of a suit for the recovery of an interest in land, so that the period of limitation of 12 years prescribed under Item 22 of Part I of the First Schedule to the Law of Limitation Act had not yet run out at the time of filing this application. All these arguments were, no doubt, interesting. But it is quite apparent that they do not answer the question raised in this appeal. The High Court judge made a specific finding that the application before him was time barred. Dr. Lamwai did not, and has not sought to, appeal against that finding. Therefore, as mentioned earlier, Mr. Maira's main ground

..../8

of appeal is that once the judge found that the application was time barred he had to dismiss it and he could not extend the period of limitation suo motu as he did. To our minds it seems plain that that question cannot be answered by seeking to establish that the application was not time barred. Such argument was, with due respect, irrelevant. Dr. Lamwai should have concentrated on seeking to demonstrate that the trial judge, after finding the application before him to be time barred, had the power to extend the period of limitation suo motu. However, as amply demonstrated hereinbefore, we are of the settled view that the learned judge did not have such power and that, as submitted by Mr. Maira, he should have dismissed the application under section 3(1) of the Law of Limitation Act, which we hereby do.

In the result we accordingly allow the appeal with costs.

DATED at DAR ES SALAAM this 21st day of November, 1995.

R. H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

( M.S. SHANGALI )
DEPUTY REGISTRAR