IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MSOFFE, J.A., MBAROUK, J.A., And BWANA, J.A.)

CIVIL APPEALS NOS. 41, 42, 43, 44 And 45 OF 2011

MENEJA MKUU, SHIRIKA LA UMEME, ZANZIBAR.....APPELLANT

VERSUS

1. **JUMA SIMAI MKUMBINI**
2. **JUMA NASSOR JUMA**
3. **SALUM ALI HASSAN**
4. **OMAR JUMA ABEID**
5. **ALI MWINYI MWENDAMBO**

.....RESPONDENTS

(Appeals from the Judgments and Decrees of the High Court of Zanzibar (Industrial Division) at Mambo Msiige)

(Mshibe A. Bakari, J.)

all dated the 17th day of August, 2010
in
Civil Cases Nos. 11 of 2009, 15 of 2009, 16 of 2008
12 of 2008 and 15 of 2008.

JUDGMENT OF THE COURT

8 & 12 December, 2011

MSOFFE, J.A.:

Pursuant to a prayer made before us by Mr. Salim Mnkonje and agreed by Mr. Nassor K. Mohamed, learned advocates representing the appellant Corporation and the respondents, respectively, on 7/12/2011 we invoked Rule 110 of the Tanzania Court of Appeal Rules, 2009 and consolidated Civil Appeals Nos. 41, 42, 43, 44 and 45 of 2011. We did so after we were satisfied that while there are issues which are special,

peculiar or particular to one or some of the appeals only, there is however one issue which is common to all the appeals, as consolidated. The common issue relates to the jurisdiction of the High Court of Zanzibar (Industrial Division). In the appeals, as consolidated, the common jurisdictional ground of appeal is that the court below erred in dealing with suits which were time barred.

Apparently the above jurisdictional issue was canvassed in all the suits at the trial in question. The judge considered the point. In the end, he dismissed it in one sentence which features in all the suits thus: -

> *The point of time barred (limitation period) and appeal to the President of Zanzibar could have been an issue to be considered if there was any reason whether good or bad raised and proved by the defendant.*

At this juncture, we think it is pertinent to state two principles of law on the aspect of jurisdiction as spelt out in the book **CIVIL PROCEDURE**, Fifth Edition, by C. K. Takwani, at pages 35 – 36, an authority which was cited to us by Mr. Mnkonje, and which we accept and adopt as good law for purposes of determining jurisdiction in our civil justice system. **Firstly**, there is a distinction between want of jurisdiction and the irregular exercise

of it. Want of jurisdiction usually presupposes or entails that the court sitting in judgment over a matter had no power to deal with it. Once it is held that a court has jurisdiction to entertain and determine a matter the correctness of the decision given cannot be said to be without jurisdiction in as much as the power to decide necessarily carries with it the power to decide a case wrongly or rightly. In other words, save where want of jurisdiction is an inhibiting factor a court has jurisdiction to decide wrongly or rightly. **Secondly**, in determining the jurisdiction of a civil court the averments made in a plaint are material. In effect, this means that the jurisdiction of a court should normally be determined on the basis of the case put forward by the plaintiff in the plaint and not by the defendant in the written statement of defence. It is the law, therefore, that the averments made in a plaint usually decide the forum.

It is common ground that Civil Case No. 11 of 2009 which eventually led to this Court's Civil Appeal No. 41 of 2011 was filed on 30/6/2009. As per paragraph four of the plaint thereto the respondent's services were terminated on 3/3/1999. In Civil Case No. 15 of 2009 subject of this Court's Civil Appeal No. 42 of 2011 under paragraph four thereof the respondent's services were terminated on 2/7/1997. The suit was filed on 13/7/2009. As for Civil Case No. 16 of 2008, which led to Civil Appeal No.

43 of 2011, under paragraph four of the plaint the respondent was terminated from service on 1/7/1996. The suit was filed on 7/8/2008. In Civil Case No. 12 of 2008, which led to Civil Appeal No. 44 of 2011, the suit was filed on 20/5/2008 while under paragraph four of the plaint it is averred that the respondent's services were terminated on 2/2/1996. Finally, in Civil Case No. 15 of 2008, which gave rise to Civil Appeal No. 45 of 2011, paragraph six of the plaint shows that the respondent was terminated from service on 1/7/1996. The suit was filed on 7/8/2008.

It is evident from the above background information that all the suits were filed beyond the period of three years prescribed under item 102 of the Schedule to the Limitation Decree (CAP 12) (hereinafter the Decree). In view of this, Mr. Salim Mnkonje, advocating for the appellant Corporation, urged very strongly before us that the High Court (Industrial Division) erred in entertaining the suits for want of jurisdiction.

On the other hand, Mr. Nassor K. Mohamed, learned advocate for the respondents, referred us to a letter ref. no. TUS/AR/C/KM/VOL.IV/302 dated 6/5/2004 addressed to JUMA SIMAI MKUMBINI, which according to him applies or is relevant to all the respondents. He singled out the following statement in that letter: -

Kamati ilipendekeza kwa Serikali kuwa dai lako liangaliwe kwa misingi ya kibinaadamu na upewe kazi nyengine (kwa mkataba) kwa vile tayari ulishalipwa mafao yako.

In his view therefore, Mr. Nassor K. Mohamed maintained that the period of limitation should be reckoned from the date of that letter. In saying so, he was of the affirmative view that after the terminations from services the respondents did not sit idle. Rather, they took administrative steps in pursuing their rights. In that context, he contended that the period of limitation ought to be computed from the above date in which there was an undertaking from the Government to the respondents to be offered alternative employment on contractual basis. In support of the above proposition, he cited to us the provisions of Section 19(1) of the Decree which reads: -

19.-(1) Where, before the expiration of ***the period prescribed for a suit*** *in respect of any property or* ***right****, an* ***acknowledgment of liability*** *in respect of such property or* ***right has been made in writing signed*** *by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be*

computed from the time when the acknowledgment was so signed.

(Emphasis supplied.)

It seems to us that for the above sub-section to apply there have to be two prerequisites. **One**, the acknowledgment of liability must be made in writing and signed by the person against whom the property or right is claimed. **Two**, the acknowledgment has to be made before the expiration of the period prescribed for a suit.

In our considered opinion, the above sub-section does not apply in the justice of this matter. We say so for reasons which we will endeavour to give hereunder.

As submitted by Mr. Nassor K. Mohamed, and since we have no reason(s) for disbelieving or doubting him or holding otherwise because even Mr. Mnkonje did not submit anything to the contrary, the appellant Corporation was being run under the auspices of the Government at the material time. If so, our reading and understanding of the letter dated 6/5/2004 *(supra)* tells us that there was a committee formed by the Government with a view to looking into complaints and related matters regarding the workers (including the respondents) who were terminated from service. In the process, the committee made certain

recommendations to the Government. One of the recommendations was the one mentioned in the above letter in which, for our purposes, the key word is *"ilipendekeza".* Since the committee merely recommended *(ilipendekeza)* we think that that cannot be the sort of acknowledgment envisaged under the sub-section. At any rate, an acknowledgment, if any, ought to have come from the Government, which was the respondents' employer for that matter, and not from the committee whose mandate was only to probe into the respondents' grievances and then make appropriate recommendations to the Government.

In terms of the above sub-section an acknowledgment of liability has to be made before the expiration of the period prescribed for a suit. In this sense, an acknowledgment ought to have been made within a period of three years from the date(s) the cause(s) of action arose. In the justice of this matter cause(s) of action(s) arose from the respective dates of terminations. In this regard, except for JUMA NASOR JUMA whose services were terminated in 1997, all the other respondents were terminated in 1996. Therefore, assuming for a moment that the above letter was an acknowledgment of liability, it is evident that it was written beyond the three year period prescribed under item 102 *(supra)* read together with the

above sub-section. Therefore, all things being equal, in an ideal situation the above sub-section would not apply in favour of the respondents either.

As contended by Mr. Nassor K. Mohamed, the above letter was written in response to the letter written by Mr. JUMA SIMAI MKUMBINI on 25/2/2002. The significance of the latter letter and the other letters of similar nature written at different times by the other respondents, lies in the fact that after the terminations the respondents engaged themselves in exercises of pursuing their rights by administrative means. In our view, while that was certainly a perfect step to take in the circumstances they ought to have known that time to file the suits was not going to wait for them. Indeed, as correctly pointed out by Mr. Mnkonje, had they been prudent enough they could have filed the suits within the time stipulated by the law and then pursue their rights administratively later. As a matter of fact, ordinarily there would have been no harm in pursuing their rights judicially in tandem with an administrative approach. We say so because if the latter step was going to succeed the respondents could have always gone back to the court and pray for necessary orders. We wish to emphasize here that it is settled law that the time spent by a party in pursuing his right(s) through other avenues is not counted in the computation of time. The only exception would seem to us to be under

section 19(1) *(supra)* whereby if there is a firm acknowledgment of liability in writing before the expiration of the period prescribed for a suit a fresh period of limitation is computed from the time when the acknowledgment was so signed. As happened therefore, the respondents took very long periods of time trying to sort out their grievances administratively without knowing that time to deal with the matter judicially was not in their favour. In this regard, they were themselves to blame for inaction.

It follows therefore, that the judge ought to have invoked Section 3(1) of the Decree and thereby dismiss the suits whether or not limitation had been set up as a defence. He should have done so for want of jurisdiction. Put differently, he had no jurisdiction to determine the suits because they were time barred by virtue of the law of limitation. Apparently in all the suits limitation had been put up as a defence but for reasons best known to the judge he decided to ignore it. Needless to say, it is elementary that prudence demands that before a magistrate or a judge sets out to determine a case the first and fundamental question that he has to ask and satisfy himself is whether or not he is seized with the requisite jurisdiction to dispose it of.

For the foregoing reasons, we hereby allow the appeals, as consolidated, on the basis of the above ground of appeal only. Henceforth, we accordingly nullify the proceedings and judgments of the court below. In view of the rather unfortunate circumstances of this matter we make no order as to costs.

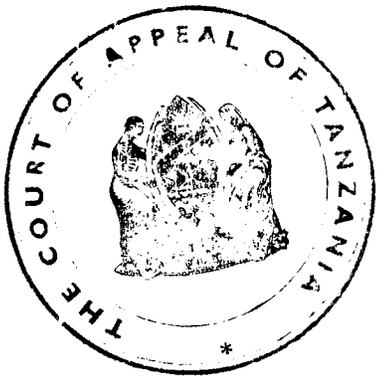
DATED at **ZANZIBAR** this 12th day of December, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

J. S. BWANA
JUSTICE OF APPEAL

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



(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL