

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 126 OF 2011

BETWEEN
TANZANIA REVENUE AUTHORITY..... APPELLANT
AND
DAWSON ISHENGOMA..... RESPONDENT

**(Appeal from the Judgment of the High Court
of Tanzania at Mwanza)**

(Rwakibarila, J.)

**dated the 11th day of February, 2011
in
Civil Case No 74 of 1999**

JUDGMENT OF THE COURT

28 & 30 May, 2012

KILEO, J. A.:

On 11.01.1991 the respondent's boat which was then plying for hire between Kisumu Port in Kenya and Musoma Port in Tanzania was impounded by the marine police as it was found to be conveying contraband goods. After impounding the said boat the police kept it at its officer's mess in Musoma. Meanwhile the Customs and Sales Tax Department were notified by the police that the boat had been impounded. A notice of seizure was issued to one Ramadhani Ramso who was the

captain of the boat. Following the notice of seizure the respondent claimed for release of the boat and the Commissioner of Customs and Sales Tax decided to release the boat but the respondent was required to pay Tshs. 40,000/= fine before the boat was released as it had carried contraband goods. The letter to the respondent requiring him to pay the fine was written on 13.06. 1991. The fine was paid on 13.08.1991. Immediately after the payment of the fine, the Regional Customs and Sales Tax Officer (RCSTO) of Mara region instructed the Mara Regional Police Commander (vide letter dated 14.08.1991- exhibit D1) to release the boat to the respondent. The respondent was advised, pursuant to a copy of the letter written to the Regional Police Commander to collect his vessel.

The facts narrated above were established.

The parties were not in agreement as to what transpired between the time the letter exhibit D1 was written and December 1999 when the suit was filed. The respondent claimed to have gone for collection of his boat but found it in a dilapidated state whereupon he was promised by the RCSTO that he would undertake to repair it. Apart from his own oral allegation

there was no other evidence to establish his assertion that the RCSTO had undertaken to repair the boat. The appellant Authority through its witness one Leornard Shija who was working in the RCSTO's office in Musoma at the time of the seizure of the boat refuted the respondent's claim. The witness was categorical that there was no promise of the repair of the boat by their office. Moreover, in its Written Statement of Defense the appellant had denied in toto the respondent's assertion that its officer had undertaken to repair the boat. The respondent was put to strict proof of the allegation.

The respondent's claim which was allowed by the High Court was for a total of shs. 116, 7000, 000/= comprising of loss of the marine vessel, special damages for loss of business and general damages.

In their Written Statement of Defense the appellants had raised two preliminary points of objection in addition to disputing the claim generally. One point referred to the liability of the appellant in the matter for the reason that it was not yet in existence at the time the cause of action arose. The second point of objection was based on period of limitation.

The appellants preferred the following six grounds of appeal:

- 1. That the trial judge misinterpreted the provisions of section 32 of the Tanzania Revenue Authority Act, Cap 399 R. E. 2002 and erroneously held that the appellant was answerable to the respondent's claim.*
- 2. That the trial court erred in law in entertaining and hearing the suit while the same was time barred.*
- 3. That the trial court erred in law and in fact in holding that the appellant's agents continued to detain the respondent's marine vessel unlawfully after the respondent had paid the necessary fine.*
- 4. That the trial court erred in law and in fact in holding that the respondent's marine vessel was lost while in the custody of the appellant's agents.*
- 5. That the trial court erred in law and in fact in awarding compensation of Tshs. 14,000,000/, for loss of the respondents marine vessel, special damages of Tshs. 92,700,000/= for loss of business income and general damages shs. 10,000,000/= while no loss was sustained by the respondent.*

6. That the trial court erred in law and in fact in awarding interests and costs.

Mr. Salvatory Switi, learned counsel appeared on behalf of the appellant Authority. The respondent was represented by Mr. Vedastus Laurean, learned advocate. Both sides had filed elaborate written submissions prior to the hearing of the appeal for which we are thankful.

We will begin our consideration of this appeal on whether or not the suit before the High Court was time barred.

There is no doubt that the suit was founded on tort. The respondent vainly tried to show that the suit was founded on contract but the respondent failed totally to establish that there was a contractual undertaking by the RCSTO to repair the boat, allegedly after the respondent had found it in a dilapidated state. There was no written undertaking to repair the vessel nor was the officer said to have undertaken to repair it called to establish that there was that contractual undertaking. The learned trial judge did not state that he found the suit to have been founded on contract and reading from his judgment one gets the impression that he agreed with the

appellant's counsel that the suit was founded on tort. He stated thus at page 123 of the record:

*"In the second ground in the preliminary objection, Mr. Sweet stated in defendant's written submission that the cause of action accrued on 14.08.1991, when the marine vessel was found damaged. He opined that under item 6, Part 1 of the **Law of Limitation Act, Cap 89 (R. E.2002)** the period of limitation founded on tort was three years. But what were clarified in the first and second issues show that the plaintiff was moved to institute this suit from December, 1996, when he determined that the material vessel was missing. And the cause of action accrued from that juncture. Therefore in December, 1999 when the plaintiff instituted this suit, it was not time barred."*

The period of limitation for suits founded on tort is three years as per item 6 of Part 1 of the First Schedule of the Law of Limitation Act. The crucial question then is when did the cause of action arise?

It is on record that the marine police were asked to release the vessel soon after the respondent had paid the fine. The letter which was written to the

marine police is dated 14.08.1991. The letter was copied to the respondent. We agree with the learned counsel for the appellant and indeed we are settled in our minds that 14.08.1991 is the date that the cause of action arose. From 14.08.1991 till 30.12.1999 when the suit was filed is over 8 years. The suit was late by 5 years. The learned trial judge ought to have dismissed the suit for having been filed outside the time limited by law.

Even if, for the sake of academic argument we were to assume that the suit was founded on contract, the cause of action would have accrued from the date that the RCSTO undertook to repair the vessel which must have been in August 1991 when the respondent found his vessel to have been in a dilapidated state. Counting from August 1991 to December 1999 is a period of over 8 years. Suits founded on contract have to be filed within 6 years as per item 7 of the Schedule to the Law of Limitation Act.

We observe also that the respondent very conveniently did not mention the exact date in December 1996 when he allegedly found his vessel missing. There is no gainsaying that in computing period of limitation every single

day counts. If it were to be assumed for example that the cause of action of the suit founded on tort arose in December 1996 then the period of limitation would end in December 1999. The plaint here was filed on 30.12.1999. What would give the court justification to assume that it was filed within time in the absence of a specific mention of the date that the cause of action arose? Mr. Laurean suggested that it was the appellant Authority who ought to have known the exact date that the cause of action arose because it wanted to apply the law of limitation. With due respect to the learned counsel, this suggestion is highly misguided. It was the plaintiff, now respondent who had to show that his suit was in time. Mentioning of the specific date when the cause of action arose in the circumstances of this case was vital.

In the circumstances we find ground two on period of limitation to have been preferred with good cause. The learned trial judge ought to have dismissed the suit on account of being barred by period of limitation. Having so found we consider it futile to embark on the other grounds of appeal.

The appeal is in the event allowed with costs.

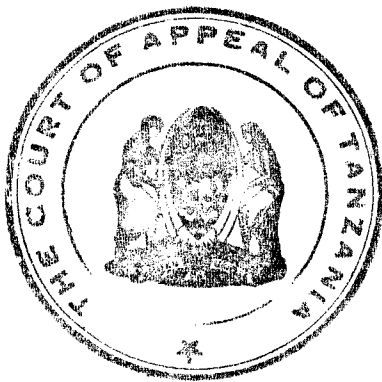
DATED at **MWANZA** this 29th day of May 2012.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR