

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

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CIVIL APPEAL NO. 133 OF 2016

ZUBEDABAI NURDIN KHANBAI APPELLANT

VERSUS

ETHIOPIAN AIRLINES..... RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Arusha)

(Moshi, J.)

Dated 19th day of May, 2016

In

Civil Case No. 38 of 2015

JUDGMENT OF THE COURT

5th & 8th Dec. 2017

MJASIRI, J.A.:

In the High Court of Tanzania at Arusha, the appellant/plaintiff Zubedabai Nurdin Khanbai filed a suit against Ethiopian Airlines the respondent/defendant, seeking for damages for injuries sustained after disembarking from the air craft at Bole International Airport in Addis Ababa. She acquired the injuries while she boarded an airline truck. According to her, the airline failed to provide her with a wheel chair despite her request to be provided with one.

She claimed for damages in the sum of United States Dollars Two Hundred and Thirty Thousand (USD 230,000). The respondent denied the claim. The following preliminary objection was raised in the respondent's written statement of defence on the following grounds:-

- (a) The suit is time barred. The plaintiff's right of claim has been extinguished by the provision of Article 35(1) of the Montreal Convention 1999 and the provisions of Regulation 38(1) of the Civil Aviation (Carriage by Air) Regulations, 2008 in so far as Tanzania is the State of choice in which the present claim is brought.*
- (b) The plaintiff does not have locus to sue with respect to claims contained in paragraphs 8 and 10 of the plaint or seek reliefs contained in prayers Clause (a) of the plaint.*
- (c) The reliefs sought in prayer clauses (b) and (c) of the plaint contravene the provisions of Article 29 of the Montreal Convention 1999 and those of Regulation 32 of the Civil Aviation (Carriage by Air)*

Regulations, 2008 in so far as Tanzania is the State of choice in which the present claim is brought.

The third ground of objection was abandoned by the respondent during the hearing who proceeded on the first two grounds.

When the matter came up for hearing, the High Court Judge (Moshi, J) upheld the preliminary objection and dismissed the suit with costs.

Aggrieved by the decision of the High Court, the appellant has appealed to this Court. A two-point memorandum of appeal has been presented by the appellant which is reproduced as under:-

- 1. That, the High Court erred by dismissing the suit by holding that the Plaintiff was duty bound to seek extension of time without stating the reasons for such decision.*
- 2. That, the High Court Judge erred in law to hold that the suit was time barred notwithstanding the prevailing legal circumstances.*

At the hearing of the appeal the appellant was represented by Mr. Ephraim Koisenge and Bashir Mallya, learned advocates whereas the respondent had the services of Mr. Joseph Ndazi, learned advocate.

Mr. Koisenge submitted that the High Court failed to make a proper interpretation of the Montreal Convention 1999 and the Civil Aviation Act 1977. He stated that the way of calculating the period of limitation is governed by the Law of Limitation Act [Cap. 89 R.E. 2002], the Limitation Act. According to him section 16 of the Limitation Act requires the Court to exclude the period under which the plaintiff was under a legal disability. The Judge concluded that the question of disability is something that must be proved by evidence.

Mr. Koisenge stated further that the plaintiff disclosed in the plaint that after the accident, she was disabled, went into a comma and was hospitalized on various occasions in Tanzania as well as outside the country, in Nairobi, Kenya and India. He also complained that the High Court Judge also dealt with factual issues contrary to what is required when handling a preliminary point of law.

Mr. Ndazi on his part, submitted that the decision of the High Court was a correct one. He argued that the plaintiff's claim was for damages for the injuries sustained after disembarking from the aircraft. The law limits such a claim for a period of two years. The plaintiff had filed a suit after a

lapse of two years from the date of the accident. A claim by the plaintiff that the entire time that the plaintiff was injured and incapacitated be exempted is not acceptable. There is no proof that the plaintiff was incapacitated. She has been busy engaging a lawyer etc. In her plaint the appellant should have complied with Rule 3 of Order 6 of the Civil Procedure Code, [Cap. 33 R.E. 2002] (the CPC). The issue of disability does not afford the appellant any relief.

We on our part, after a careful review of the record would like to make the following observations. The High Court Judge in addressing the preliminary points of law, did not confine herself to pure points of law. She sought to ascertain certain facts and tried to reach conclusions.

For instance on page 3 of her Ruling she stated as follows:-

"First the fact that the plaintiff was discharged in February, 2014 was not pleaded. Paragraph 7 of the plaint shows that the plaintiff was discharged from hospital on August 20, 2013".

She stated further:-

*"What is stated by Bashir Mallya regarding the date
i.e. February, 2014 is just an afterthought."*

The High Court Judge also held that the issue as to whether the plaintiff was prevented from filing the suit within the time limit set by law was due to disability must be proved. It is not an automatic right.

The Judge then went on to uphold the first ground of objection and consequently dismissed the appeal with costs. Upon looking at the findings by the High Court Judge, it is evident that what was raised by the respondent was not a pure point of law and its determination needed reference in order to ascertain certain facts and to draw certain conclusions from the sequence of events, as indicated in the Ruling.

In view of the circumstances in question, we need to determine whether or not the preliminary objection raised by the respondent was a pure point of law. The law is settled. In order for a matter to fall under the purview of a preliminary objection, it must consist of a pure point of law as per the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Limited** [1969] E.A. 696, Law JA., stated as follows at page 700:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit"

And **New bold P**, stated thus at page 701:-

*"A preliminary objection **is in the nature of what used to be a demurrer.** It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained or what is sought is the exercise of a judicial discretion**".*

[Emphasis is provided.]

In **Selcom Gaming Limited v. Gaming Management (T) Limited and Another** it was stated that:-

*"A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but in **stated legal, procedural or technical grounds.** Any alleged irregularity defects or default must be apparent on the face of the application."*

[Emphasis ours.]

See also-**The Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 69 of 2007 and **Hezron M. Nyachia v. Tanzania Union Workers and Others, Industrial and Commercial**, Civil Appeal No. 79 of 2001 (unreported).

In the instant application the preliminary objection raised was that the suit was time barred. Reference was made to Article 35(1) of the Montreal Convention 1999 (the Convention) and Regulation 38(1) of the Civil Aviation (Carriage by Air) Regulations 2008 made under section 12 of the Civil Aviation Act 1977 (Act No. 3 of 1977), (Regulation), Tanzania being the country chosen to file the suit.

The wording of the Convention and the Regulation are similar. Article 35 of the Convention provides that:-

"1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date of which the aircraft ought to have arrived, or from the date on which the carriage stopped."

Regulation 38(1) and (2) provides as follows:

- "(1) The right to damage shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date of which the carriage stopped.*
- (2) The method of calculating the period shall be determined by the law of the court seized of the case".*

Under section 16 of the law of Limitation Act [Cap 89, R.E. 2002], it is provided as follows:-

"Where after the right of action for a suit or an application for the execution of decree has accrued and before the period of limitation prescribed for such suit or application expires the person to whom such right has accrued suffers a disability, in computing the period of limitation prescribed for such suit or application the time during which such person is under disability shall be excluded".

This means certain facts have to be ascertained.

Given the circumstances we are of the considered view that the preliminary objection raised could not be determined without ascertaining

facts and making reference. This position is clearly demonstrated in the Ruling of the High Court. We therefore allow the appeal.

In the result and by the powers vested in us under section 4(2) of the Appellate Jurisdiction Act, 1979 we hereby quash the proceedings and Ruling of the High Court and set aside the dismissal order. The case should be heard before another High Court Judge. We award costs to the appellant.

DATED at ARUSHA this 7th day of DECEMBER, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APEPAL

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


A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL