IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MMILLA, J.A., And MKUYE, J.A.)

CIVIL APPEAL NO. 57 OF 2014

ESHIKAELI N. MAKERE ..... APPELLANT

VERSUS

TANZANIA TELECOMMUNICATIONS CO. LTD & ANOTHER ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Kyando, J.)

Dated 4th October, 2002

in

Civil Case No. 187 of 2002

JUDGMENT OF THE COURT

20th June, & 6th July, 2017

MMILLA, JA.:

The appellant, Eshikaeli N. Makere, instituted Civil Case No. 187 of 2002 against the respondents, Tanzania Telecommunication Company Limited, and Consolidated Holding Corporation (as successor to Parastatal Sector Reform Commission – PSRC), for wrongful termination from the employment. At the commencement of the trial, the first respondent filed a three point notice of preliminary objection on points of law, one of which

alleged that the suit was time-barred. The trial High Court sustained this ground, consequently the suit was dismissed. That decision aggrieved the appellant; he lodged the present appeal to challenge it on the basis of the lone ground that:-

> *"The learned Judge grossly misdirected himself in law by deciding that Civil Case No.187 of 2002 has been filed out of time and thereby striking it out."*

Before us, the appellant enjoyed the services of Mr. Eliya Mbuya, learned advocate, while Ms Nakazaeli Tenga, learned advocate, and Mr. Killey Mwitasi, learned Senior State Attorney, represented the first and second respondents respectively.

Mr. Mbuya began his submission in support of the appeal by first requesting to adopt his written submission which was filed on 2.9.2014. He then submitted that the High Court judge came to the wrong conclusion that the suit was time barred because he overlooked the provisions of section 21 (1) and (3) (c) of the Limitation Act Cap 89 of the Revised Edition, 2002 (the LLA). He maintained that had the learned High Court Judge considered that provision, he could have realized that in computing time, the period from 6.10.1997 when the appellant had instituted and was

prosecuting Civil Case No. 287 of 1997, to 21.5.2002 when the second sult was instituted, ought to have been excluded. He reinforced his point by citing the case of **Christopher Gaspar and Others v. Tanzania Harbours Authority**, Civil Appeal No. 43 of 19999, CAT (unreported). He therefore, asked the Court to allow the appeal with costs.

On the other hand, like Mr. Mbuya, Ms Tenga prayed to adopt her written submission which was filed on 23.9.2014. She emphatically opposed Mr. Mbuya's argument that the High Court judge could not have dismissed the suit had he considered the provisions of section 21 (1) and (3) (c) of the LLA. According to her, the appellant could only benefit under that section if two things could be established; **one,** that he was prosecuting the former suit in good faith and with due diligence; and **two,** that the two proceedings were founded on same cause of action. Ms Tenga submitted further that the appellant lodged Civil Case No. 287 of 1997 on 6.10.1997 after the first respondent had already been specified vide Government Notice No. 543 which came into force on 22.8.1997, therefore, the appellant's decision to withdraw Civil Case No. 287 of 1997 was compelled by a discovery that Government Notice No. 543 was in existence. Since it was there prior to filing the said case, she charged, the

appellant was negligent. She added that because the withdrawal of that case was voluntary, the appellant could not have benefited from the exception under section 21 (1) and (3) (c) of the Law of Limitation Act. She fortified the argument by citing the works of **B. B. Mitra, The Law of Limitation Act 1963, 19th Edition by M. R. Malik,** and **Desai's Limitation Act 1990, Sixth Edition by Trikamlali R. Desai and Ratilali K. Desai**, who are renowned/ accomplished commentators. These commentators were interpreting section 14 of the Law of Limitation Act of India which is in *pari materia* with our section 21 of the LLA. She cited as well the case of **Tanzania Cotton Marketing Board and COGECOT Cotton Company S.A.**, Civil Appeal No. 60 of 1998, CAT (unreported).

On another point, Ms Tenga submitted that Civil Case No. 287 of 1997 was undoubtedly withdrawn under the provisions of Order 23 rules 1 and 2 of the Civil Procedure Code (the CPC). However, she hastened to submit, Order 23 rules 1 and 2 of that Act stipulates the consequences attached to withdrawal, including the fact that the party withdrawing the suit is bound by the law of limitation. Ms Tenga submitted therefore, that the trial court rightly dismissed the suit for being out of time. She urged the Court to dismiss the appeal with costs.

On his part, while admitting that the trial court did not consider the provisions of section 21 (1) and (3) (c) of the LLA, Mr. Mwitasi submitted that the appellant should not benefit from the above provision of law on account that there was no leave to re-file the first suit after withdrawal. He prayed for the Court to dismiss the appeal with costs.

In a brief rejoinder, Mr. Mbuya submitted that Government Notice No. 543 of 1997 came into force on 22.8.1997 and not 22.8.1993 as submitted by Ms Tenga. However, he conceded that the first suit was lodged after that Government Notice was in existence. He hastened to qualify however, that they were not aware of its existence.

On another point, Mr. Mbuya submitted that the provisions of the Civil Procedure Code relied upon by Ms Tenga are not applicable because the CPC came into force in 1966 while the Law of Limitation was enacted in 1971. He reiterated his prayer for the Court to allow the appeal.

After carefully considering the cross submissions of counsel for the parties, we think the burning issue is whether or not consideration of section 21 (1) and (3) (c) of the LLA by the trial High Court could have a different end result than dismissal of the suit in the circumstances of this case.

We begin the discussion by first appreciating that in terms of the item 7 of Part 1 of the First Schedule to the Law of Limitation Act, the period of limitation for filing suits based on contracts is six (6) years, counted from the date of accrual of the cause of action. Also, there is no controversy that it is a period beyond six (6) years from 31.10.1994 when the appellant's contract of employment was terminated (accrual of cause of action), to 21.5.2002 when Civil Case No. 187 of 2002 was instituted.

As already pointed out, the appellant places reliance on the provisions of section 21 (1) and (3) (c) of the Law of Limitation Act, which he says ought to have been invoked by the trial High Court in his favour as of right in the circumstances of this case. Section 21 (1) and (3) (c) of the LLA provides that:-

> *"(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting,* ***with due diligence,*** *another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant,* ***shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect***

of jurisdiction or other cause of a like nature, is incompetent to entertain it.

(3) For the purposes of this section–

(a).....

(b).....

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with the defect of jurisdiction." [Emphasis added].

When we read the above provision in close quarters, it becomes clear that in order for the appellant to benefit from it, he has to show, among other things, that he was prosecuting the previous proceedings in good faith and with due diligence. As correctly submitted by Ms Tenga, this is also the position in India, looking through the works of **B. B. Mitra** and **Trikamlali R. Desai** (supra) who commonly insisted in their respective commentaries that the main factor which would influence the court in extending the benefit of section 14 of the Indian Limitation Act (which is section 21 of the Tanzania Law of Limitation Act) to a litigant, would be whether the applicant's conduct would satisfy the test of prosecuting the

former suit in good faith and due diligence. In that jurisdiction (India), these conditions were restated in case of **Arumachalam v. Laxmana**, 39 Mad 936.

In our jurisdiction, the provisions of section 21 (1) and (3) (c) of the LLA had the occasion of being discussed in the cases of **Christopher Gaspar and Others v. Tanzania Harbours Authority** and **Tanzania Cotton Marketing Board and COGECOT Cotton Company S.A.** (supra), among others.

In the case of **Christopher Gaspar and Others**, the appellants, who were the employees of the respondent, Tanzania Harbours Authority, filed a suit against the latter challenging their retrenchment with a view of being reinstated. At the commencement of the trial, a preliminary objection was raised to the effect that the suit was time barred, also that the Court had no jurisdiction to entertain the suit because of a misjoinder of parties. The preliminary objection was sustained, resulting in the dismissal of the suit. The appeal to the Court was grounded on the point that had the judge of the High Court properly addressed himself on the scope of section 21 (1) and (3) (c) of the Law Limitation Act, 1971, he would not have found that the suit was time barred.

After lengthy deliberations, the Court found that because some specified names among the appellants were not properly joined in the suit, that constituted a misjoinder of parties, and on that basis, it found that the appellants had been prosecuting their previous case with due diligence. It emphasized that had the trial judge taken that view of the matter, he could have found that in instituting afresh Civil Case No. 209 of 1998, the whole period from 31.12.1995, the date when the cause of action arose to 17.11.1997, when the previous suit, Civil Case No. 36 of 1996 was dismissed, was to be excluded. This is the reason why it found that by holding that the suit was time barred, the learned trial judge misapplied the provisions of section 21 (1) and (3) of the Law Limitation Act, 1971 to the factual situation of the previous Civil Case No. 36 of 1996.

On the other hand, in **Tanzania Cotton Marketing Board and COGECOT Cotton Company S.A.** (supra), the appeal was against the decision of the High Court that the petition was time barred. One of the arguments advanced by the advocate for the appellant was that under section 21 of the Limitation Act, the period spent for prosecuting a previous proceeding between the same parties which terminated on 16.6.1997 ought to have been excluded. The court held that

"In order for s. 21 to apply, and for time spent in the prosecution of another proceeding to be excluded, it has to be shown, ***inter alia,*** *that other proceeding was prosecuted in a court which, from defect of jurisdiction, was incompetent to entertain it. Counsel for the appellant was not heard to say that the proceeding which terminated on 16/6/976 (see [1997] T.L.R. 165) was prosecuted in a court incompetent to entertain it. It is obvious to us that the whole of the instant proceeding is a bad tactic."*

In our present case, it is plain and certain that Government Notice No. 543 of 1997, which came into force on 22.8.1997, was in existence before the filing of Civil Case No. 287 of 1997 on 6.10.1997. Also, it is clear that Civil Case No. 287 of 1997 was voluntarily withdrawn by the appellant upon discovery that the first respondent was a specified corporation. The aspect of voluntary withdrawal of Civil Case No. 287 of 1997 compels us to rule out the application of Order 23 rules 1 and 2 of the CPC.

On the basis of what we have just said, since GN No. 543 of 1997 was in existence before the institution of the said first suit on 6.10,1997, it is obvious that the appellant's advocate did not act with due diligence in

prosecuting that previous suit. Thus, the provisions of section 21 (1) and (3) (c) of the Law of Limitation could not have rescued the situation. As such, the trial court was justified in dismissing the suit on the ground that it was time -barred.

In the premises, we find no merit in this appeal. We accordingly dismiss it with costs.

DATED at **DAR ES SALAAAM** this 4th day of July, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E.F.FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL