IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 258 OF 2017

MM WORLDWIDE TRADING COMPANY LIMITED.....1ST APPELLANT
JACOB FREDRICK MSAKI.....2ND APPELLANT
ANNETTE JACOB MSAKI.....3RD APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED .....RESPONDENT

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

(Sehel, J.)

dated 13th day of September, 2017
in
Commercial Case No. 84 of 2015

JUDGMENT OF THE COURT

21st April, & 10th May, 2021

MWANDAMBO, J.A.:

The issue for our determination in this appeal is a narrow one but not entirely less involving. It seeks an answer to the question whether it is open for a trial court to adjudicate on a suit founded on a subject matter already declared as time barred in a former suit before the same court.

Before we engage into a discussion on the issue, a brief background will be necessary. At the request of the first appellant, the respondent, a bank operating banking business, extended credit facilities

to the first appellant (the borrower) for specified purposes not directly relevant in this appeal. The credit facilities were in form of overdraft facility in the sum of United State Dollars (USD) 70,000 and letters of credit for USD 80,000. The terms and conditions of the credit facilities were reduced into a duly accepted letter of offer dated 1st November, 2005 from the respondent addressed to the first appellant on which there is no dispute. It is common ground that both facilities were set to expire on 30th November, 2005 on which date the first appellant should have repaid the respective outstanding amounts in full with interest thereon. Clause 4 of the letter of offer constituting the credit facility agreement admitted in evidence during the trial as exhibit P1 required the borrower (first appellant) to provide securities against the credit facilities. The securities included execution of a guarantee by the second and third appellants supported by a legal mortgage of a right of occupancy over a property on Plot No. 538, Block E, Mbezi Beach Area, Kinondoni Municipality registered in the name of the second appellant.

For reasons which are not relevant in this appeal, the first appellant did not live up to her contractual obligations under the relevant agreement (exhibit P1). There is no dispute on the breach of the terms of the credit facility agreement by the first appellant by her failure to repay the loaned amounts on the date of the expiry of the

facilities or any other subsequent date. By reason of the breach, the respondent instituted a suit before the High Court, Commercial Division namely: Commercial Case No. 166 of 2014 henceforth, the former suit, for recovery of the outstanding loan plus interest and penalties up to 31st October 2014 amounting to USD 683,839.70. She also prayed for alternative reliefs that is to say; enforcement of the mortgage (exhibit P4) by way of appointment of a receiver and manager with power to sell the mortgaged property. However, at the appellants' objection, the trial court (Mwambegele, J. as he then was) found that suit was time barred and struck it out.

Convinced that the order striking out the suit did not bar her from instituting a fresh suit, the respondent instituted Commercial Case No. 84 of 2015 (the second suit) before the same court for more or less the same reliefs but this time pleaded continuing breach to exempt her from time limitation seeking refuge from section 7 of the Law of Limitation Act [Cap. 89 R.E. 2002] (the Act). Not amused, the appellants, raised a preliminary objection contending that the court was already *functus officio* having determined that the matter was time barred in its ruling striking out the former suit. Nevertheless, the trial court found the preliminary objection devoid of merit. It overruled it reasoning that the

respondent had pleaded exemption in pursuance of s. 7 of the Act which was not pleaded in the former suit.

The suit was subsequently tried and determined in the respondent's favour in a judgment delivered on 13th September, 2017 (Sehel, J., as she then was) resulting in the instant appeal. The respondent too was dissatisfied with part of the judgment refusing to grant a relief for the enforcement of a mortgage which the trial court found unenforceable for lack of spousal consent.

Initially, the appellants, acting through Mr. Frank Mwalongo, learned advocate of Apex Attorneys, had raised two grounds of complaint in their memorandum of appeal. Before the commencement of the hearing of the appeal, Mr. Mwalongo abandoned ground two thereby remaining with the first ground faulting the trial court for adjudicating the matter which was hopelessly time barred after declaring so in the former suit in the absence of any order extending time within which to do so. Mr. Mwalongo had filed written submissions in support of the appeal which he stood by during hearing of the appeal adding a few arguments by way of elaboration. So did Mr. John Ignace Laswai, learned advocate representing the respondent taking over from IMMMA Advocates the erstwhile advocates.

Essentially, Mr. Mwalongo argues both in his written and oral submissions that it was not open for the trial court to adjudicate a suit founded on contract having been adjudged as time barred by the same court in Commercial Case No. 166 of 2014 regardless of the order striking out that suit instead of dismissing it as mandated by section 3 (1) of the Act. According to the learned advocate, the subject matter which was found to be unenforceable by way of a suit for being time barred could not be revived by a fresh suit merely by pleading continuing breach in the second suit giving rise to the instant appeal. At some point, the learned advocate appeared to be inviting us to fault the trial court for striking out the former suit instead of dismissing it as mandated by section 3 (1) of the Act. We refused that invitation because that decision is not subject of the appeal before us. At any rate, the complaint against the learned Judge is, with respect, misplaced considering that it is the appellants themselves who prayed for an order striking out the suit in their notice of preliminary objection. Be it as it may, the learned advocate urged us to allow the appeal.

Responding, Mr. Laswai argued that the trial court properly determined the suit since it was distinct from the former suit, it being founded on a new cause of action for breach of payment of the principal sum plus interest accruing on daily basis saved by section 7 of the Act.

The learned advocate impressed upon us, in the written submissions, that in so far as the respondent had pleaded continuing breach of contract, a fresh cause of action accrued thereby exempting her from the running of time in pursuance of section 7 of the Act. In the premises, the learned advocate invited the Court to hold that the High Court was not *functus officio* in adjudicating the second suit which was different from the former suit, it being founded on a fresh cause of action.

Rejoining, whilst conceding to the import of section 7 of the Act, Mr. Mwalongo's stance was that the section does nothing but to introduce a fresh cause of action which does not in any way revive a cause of action which the competent court had already adjudged to be time barred.

With the foregoing, we are now in a position to consider the merits of the competing arguments from the learned advocates.

For a start, we wish to put it clear that we are not called upon to determine the propriety of the order striking out the former suit after holding that it was time barred rather, whether the trial court was competent to determine a suit founded on a subject matter which it had already held to be time barred. Neither are we called upon to discuss the extent to which the exemption from limitation applied to the second

suit relied upon by the respondent. On the contrary, the issue for our consideration is whether, upon the trial court striking out the former suit for being time barred instead of dismissing it, it was open for that court to entertain the second suit founded on the same subject matter and the same reliefs. According to the respondent, the order in the former suit had no effect of finality and so she was not precluded from instituting the second suit as she did in which she pleaded exemption from limitation under section 7 of the Act.

We find the respondent's argument untenable. There is no merit in the respondent's contention that the second suit was for breach of payment of the principal sum plus interest accruing daily thereby creating a fresh cause of action. This is because the trial court had already held that the right to enforce it was time barred. That being the case, we are unable to comprehend which principal sum remained on which interest accrued creating a fresh cause of action after striking out the former suit.

Next we deal with the crux of the matter. Fortunately, we are not traversing in a virgin territory. This Court has had occasion to deal with a somewhat similar issue in some of its previous decisions. In **Olam Uganda Limited suing through its Attorney United Youth**

Shipping Company Limited v. Tanzania Habours Authority, Civil Appeal No. 57 of 2002 (unreported), a suit against the respondent's authority was dismissed for being instituted beyond 12 months contrary to the provisions of section 67(b) of the Tanzania Habours Authority Act, 1977. In terms of section 46 of the Act, a period of limitation prescribed under any other written law is deemed to be prescribed under the Act attracting the consequences prescribed by section 3(1) of the Act. The Court was emphatic that the consequences befalling upon a suit instituted beyond the prescribed period was to dismiss it under section 3(1) of the Act. It then considered the effect of the dismissal order and stated:

> *"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court...." (at page 10 and 11).*

The above excerpt is directly relevant to the instant appeal in that the order striking out the suit in the former suit for being time barred

amounted to a conclusive determination of that suit by the trial court. Three years later, a similar issue arose in **East African Development Bank v. Blue Line Enterprises Limited**, Civil Appeal No. 101 of 2009 (unreported) ["The EADB's case"] in which reference was made to **Olam Uganda's** case (supra).

Briefly, **East African Development Bank** (EADB), had lost to the respondent in arbitration proceedings. EADB's attempt to challenge the arbitral awards was quite uncharacteristic. Her first petition to set aside that award was struck out by the High Court for being incompetent. Since the time for filing a fresh petition had already run out, she lodged an application for extension of time to file a petition for setting aside the arbitral award. However, she subsequently withdrew that application on a belief, albeit mistakenly, that time had not yet expired for doing so. A fresh petition was filed thereafter but yet again, it met a snag; the High Court found the petition filed beyond 60 days to be way out of time and dismissed it. Finding, herself in that precarious situation, EADB filed another application for extension of time which was struck out and hence the appeal.

The Court was confronted with the issue whether it was open for EADB to go back to the same court seeking extension of time upon her

petition being dismissed on account of time bar. Guided by the provisions of section 3(1) of the Act and its previous decisions in **Olam Uganda's** case (supra) and **Hashim Madongo and Two others v. Minister for Industry and Two others,** Civil Appeal No. 2003 (unreported), the Court held that it is not open for a party to go back to the same court and seek extension of time as it happened in **Hashim Madongo's** case (supra) which was what the appellant bank had done.

Although we are not concerned with the propriety of the order striking out the former suit which features in the respondent's argument, that argument falls in the face of **Ngoni- Matengo Co-operative Marketing Union Limited v. Ali Mohamed Osman** [1959] E.A 577. That decision is an authority for the proposition that it is the substance of the matter that must be looked at rather than the words used. It is clear to us that irrespective of the words used, the final order amounted to a conclusive determination by the trial court disposing of the former suit for being time barred. In our view, it was not open for the respondent to institute a fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3 (1) of the Act.

In line with what we said in EADB's case (supra), as far as the High Court was concerned, the issue of limitation had been finally and conclusively determined. It became res judicata. As rightly submitted by Mr. Mwalongo, pleading exemption from limitation on a matter which was already held to be barred by limitation did not have the effect of reviving it. If we take the argument further, the respondent had sued the first appellants on two causes of action, that is to say; breach of the terms of the credit facilities and the contract of guarantee (exhibit P5). Going by clause 12(b) of Exhibit P1 for instance, breach had started much earlier than the expiry of the facilities. Mr. Laswai did not offer any argument in what way the cause of action predicated on the first appellant's failure to make deposits in her account could have been saved by section 7 of the Act. The same applies to the cause of action against the second and third appellants predicated on the breach of the contract of guarantee on which no argument has been offered by the respondent.

Consequently, we uphold the sole ground argued by the appellant's learned advocate and having so done, a discussion on the notice of cross appeal whose determination was predicated on the outcome of the appeal has been rendered superfluous.

The upshot of the foregoing is that the appeal has merit and we allow it. Having sustained the appeal, we quash the judgment and decree of the trial court and substitute it with an order upholding the preliminary objection with costs. The appellants shall have their costs in this appeal.

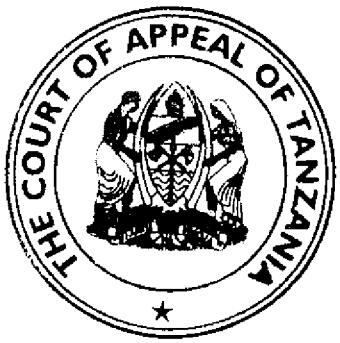
DATED at **DAR ES SALAAM** this 6th day of May, 2021

S. A. LILA
JUSTICE OF APPEAL

L. J.S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 10th day of May, 2021 in the presence of Ms. Mariam Masandike, counsel for the applicants and Mr. John Laswai, counsel for the respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL