IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 19 OF 2016

BARCLAYS BANK TANZANIA LIMITED ..... APPELLANT

VERSUS

PHYLISIAH HUSSEIN MCHENI ..... RESPONDENT

(Appeal from the order of the High Court of Tanzania, Labour Division, at Dar es Salaam)

(Wambura, J.)

dated the 28th day of November, 2012
in
Complaint No. 31 of 2010

JUDGMENT OF THE COURT

16th March & 17th May, 2021

KITUSI, J.A.:

The parties to this appeal had an employer-employee relationship that went sour. The respondent terminated the appellant's employment under circumstances that were considered by the appellant to be unfair. She therefore instituted legal proceedings to challenge the termination but, in this appeal, we are not called upon to decide on the issue of the alleged unfairness of the termination. Rather, we are confronted with a narrow but unfamiliar point of law to determine. We shall briefly trace its essence first.

The respondent was employed by the appellant in May, 2007 and that employment was terminated in April, 2010 for reasons that are not relevant presently as we have said. She went to the High Court, Labour Division, to seek remedy by filing a complaint. That was on 27th October, 2010. The appellant filed a response to the statement of complaint, the equivalent of what under the Civil Procedure Code [Cap 33 R.E 2002] (the CPC) would be called the written statement of defence. In that response, the appellant raised two points of preliminary objection, but we are interested with only one, for the purpose of this appeal. That point of preliminary objection runs as follows: -

> *"(a) On the first day of hearing or any day when the matter stays adjourned the Respondent will raise a preliminary objection on the point of law that the complaint is time barred."*

The essence of this appeal is the proceedings and resultant order of the High Court when the matter was eventually called before it for hearing on 28/11/2012. We shall reproduce the relevant part.

> *"Mr. Kamara: The matter is for hearing of a preliminary objection and I am ready to proceed*

Mr. Anthony: I concede to the first preliminary objection raised and thus pray that I be given leave to refile the same after it has been struck out

Mr. Kamara: if he concedes then the effect is to dismiss the same as was held in case of Dr. MJELLA Vs MZUMBE UNIVERSITY Complaint No. 47/2008

Mr. Anthony: I beg to differ as the effect is not to dismiss the matter. The prayer was to restore the matter to CMA. Matters filed out of time are usually struck out not dismissed. My intention is to save the time of the court and parties. I thus pray be allowed to file the same at CMA

Court: ***As the applicants concede to the preliminary objection raised the application is accordingly struck out. Applicants are at liberty to refile the same if they still wish to pursue the matter."*** (Emphasis supplied).

The appellants have filed one ground of appeal to challenge that decision and that is the reason for our confined interest on the matter. The ground of appeal reads: -

"(a) The honourable trial Judge erred in law by holding (sic) to struck out the complaint with liberty to refile instead of dismissing the same after deciding that it was time barred."

Before us, Mr. Paschal Kamala, learned advocate, represented the appellant whereas Mr. Mashaka Mfalla, also learned advocate, appeared for the respondent. Mr. Kamala had earlier filed written submissions which he adopted when it was time for him to address us. Mr. Mfalla had not filed any written submission but he addressed us orally as per the Tanzania Court of Appeal Rules, 2009 (the Rules). Counsel have different views on the fate of a time barred matter; whether it is dismissal, as argued by Mr. Kamala or, striking it out, as maintained by Mr. Mfalla. That is the narrow scope of our task in this appeal.

Mr. Kamala's submissions carried two points. The first is that there is a decision of the Labour Division of the High Court that a time barred complaint has to be dismissed. He cited the case of **Dr. Noordin Jella v. Mzumbe University**, Complaint No. 47 of 2008 (unreported) which, he submitted, set the time for lodging complaints to the CMA or to the High Court, Labour Division as being not more than 60 days. Mr. Kamala submitted that the position in that case

remains the same to date because no decision of this Court has changed it.

The second point made by Mr. Kamala is that section 3(1) of the Law of Limitation Act [Cap 89 R.E 2002] (the Act) provides that a time barred case should be dismissed. The learned counsel cited to us quite a number of our decisions and decisions of the High Court giving effect to section 3 (1) of the Act.

On the other hand, in his submissions, Mr. Mfalla made the following points; **One**, that all the cases relied upon by Mr. Kamala are irrelevant to our case because they were on section 3 (1) of the Act which is not applicable in labour matters such as the present. **Two**, the Labour Division of the High Court is a court of equity as per Rule 3 (1) of the Labour Court Rules, 2007. Counsel argued that as a court of equity, the Labour Division of the High Court should not be caught in technicalities. **Three**, since the matter was not properly before the court for the reason that it was time barred, the court had no jurisdiction to make any order other than striking it out.

In a short rejoinder, Mr. Kamala submitted that the matter was time barred either by following the decision in **Dr. Noordin Jella**

(supra) which set the time limit to be 30 days or by following section 46 of the Act read together with the second schedule, which sets the time limit of any other cases to be 60 days.

We appreciate counsel's industry that has enriched our discussion in this case. We will be making reference to the cases cited to us as and when deliberating on a relevant point, although only a few of those cases may suffice. However, we shall begin by making reference to some rules of statutory interpretation because that seems to be our duty in this case. We have dealt with that area in many of our previous decisions, so we shall simply reproduce what was stated in **Ngasa Kapuli @ Sengerema v. Republic,** Criminal Appeal No. 160 "B" of 2014 (unreported):-

> *"The **first** general rule, is that, if the words of statute are clear, the duty of the court is to give effect to their natural ordinary meaning, unless it finds that to do so, would lead to hardship, serious consequences, inconvenience, injustice, absurdity or anomaly. If that is so, then preference should be given to that construction which would avoid such results. The **second** principle is that a statute must be read as a whole. One provision of the section should be construed with reference to the*

other provisions in the Act so as to make consistent enactment of the whole statute. In that way any inconsistency, or repugnancy either in the section or between a section and other parts of a statute, would be avoided. Here the duty of the court is to harmonize the provisions of the same Act as much as possible, so as to avoid a head on collision between two sections of the same Act. The last, ***third*** *principle is the rule of construction in favor of presumption of constitutionality."*

See also **Barnabas Msabi Nyamonge v. Assistant Registrar of Titles and Shufaa Jambo Awadhi**, Civil Appeal No. 176 of 2018, and **The Director of Public Prosecutions v. Li Ling Ling**, Criminal Appeal No. 508 of 2015 (both unreported). We shall apply these principles or any of them in our consideration of the provision of the Act and other statutes relevant to our case where necessary.

The first relevant provision is section 43 of the Act which provides as follows: -

"43. This Act shall not apply to: -

(a) Criminal proceedings;

(b) applications and appeals to the Court of Appeal;

(c) proceedings by the Government to recover possession of any public land or to recover any tax or the interest on any tax or any penalty for non-payment or late payment of any tax or any costs or expense in connection with any such recovery;

(d) *forfeiture proceedings under the Customs (Management and Tariff) Act or the Excise (Management and Tariff) Act;*

(e) proceedings in respect of the forfeiture of a ship or an aircraft;

(f) any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46".

Then section 46 provides: -

> *"46 Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act."*

The language of the two provisions is very clear in our view. It is clear that the Act applies to all proceedings except those mentioned under section 43 (a) – (f). It is clear again that under section 46 even

those proceedings whose time limit is prescribed by other statutes as mandated by section 43 (f), the time limits set by those other statutes are deemed to be prescribed by the Act. Consistent with the rules of statutory interpretation referred to earlier, there should not come a point when section 43 and section 46 of the Act are in conflict.

Back to the case at hand, we shall proceed from the premise that there are time limits for initiating labour matters. Inspired by Rule 10 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, G.N. No. 64 of 2007, the learned High Court Judge in **Dr. Noordin Jella** (supra) set the time limits as 30 days for a matter involving fairness of an employee's termination, and 60 days for any other dispute. While we are not determining whether the matter fell under unfairness of the dismissal as we earlier intimated, we shall, in terms of section 46 of the Act, take the maximum time limit as being prescribed by the said Act which is 60 days as argued by Mr. Kamala.

Counsel are at one that no consequences are provided for a labour dispute which is filed out of time. While Mr. Kamala submits that the matter should have been dismissed as required by section 3 (1) of the Act, Mr. Mfalla submits that the Labour Court being a Court of

equity as provided for under Rule 3 (1) of the Labour Court Rules, 2007 G.N. No. 106 of 2007, it correctly struck out the matter.

Perhaps we should take cognizance of a recent case in which the issue of the Labour Division being a court of equity came up. This was in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019 (unreported). Before us the appellant had complained against the order of the Labour Court striking out an application for revision and ordering refiling of a proper application. Our determination of the complaint was as follows: -

> *"In our view, the court acted consistent with Rule 3(1) and 55 (1) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 (the Rules) made under section 55 (1) of the Labour Institutions Act, [Cap 300 R.E 2019]. The former rule provides that the Labour Court shall be a court of equity whilst the latter empowers it to adopt any appointed procedure for any matter not provided for".*

We observed that the Labour Court did what the justice of the case in the obtaining circumstances required. And what were those circumstances? The respondent had been aggrieved by the award the CMA had made in favour of the appellant. She filed a revision to the

Labour Court within the statutory six weeks but that court struck it out on account of some technicalities and ordered a refiling of a proper application. The appellant's complaint was that the subsequent application was time barred and should have been dismissed.

With respect, the facts in this case are diametrically different from the facts of the case of **Felician Rutwaza** (supra), so we cannot go along with Mr. Mfalla's argument of equity on the basis of that decision. First, in that case the application for revision had originally been filed within time but was struck out for reasons other than time limit. Secondly, the issue of time limit was just a route to the destination, in that, the borne of the contention in that case was different. In this case the issue of time limit and its consequences is the main and only issue, so it is the destination. Besides, the inputs from counsel on the point, are quite different. In this case one of the cases cited to us by the appellant's counsel is **John Cornel v. A. Grevo (T) Ltd,** Civil Case No. 70 of 1998 (unreported) where Kalegeya J (as he then was) made this statement which we adopt: -

> *"However unfortunate it may be for the plaintiff, the Law of Limitation, on actions, knows* ***no sympathy or equity****. It is a merciless sword that cuts across and deep*

into all those who get caught in its web". (emphasis supplied).

On the basis of that statement, the law of limitation knows no equity, and we subscribe to that.

We take note that the first objective of the Employment and Labour Relations Act No. 6 of 2004 is to promote economic development through economic efficiency, productivity and social justice. The learned High Court Judge (Rweyemamu, J as she then was) appreciated that fact and proceeded to state the following in **Dr. Noordin Jella** (supra): -

> *"For one, economic development cannot be promoted by allowing labour disputes to remain unresolved for an undue long period, as that would keep both the employer and employee tied up in disputes instead of being productively engaged .... To revert to the submission of counsel for the complainant, I stress that it is in regard to the nature of labour disputes that time limits for initiating actions must be provided."*

We fully adopt that statement and add that, it would be inequitable if we allowed one party to an employment contract to disregard time in instituting a complaint against the other party. We think matters would

not come to finality as required if a party who allows grass to grow under his feet and delays in instituting an action, would only be given an order to refile it. The very object of the law of limitation would be defeated for, as C. K. Takwani writes in **CIVIL PROCEDURE, With Limitation Act, 1963,** 7th Edition, Eastern Book Company, at page 782 :-

> *"Statutes on limitation are based on two well - known legal maxims:*
>
> *(i) The interest of the State requires that there should be an end to litigation (**interest reipublicae ut sit finis litium**).*
>
> *(ii) The law assists the vigilant and not one who sleeps over his rights (**Vigiiantibus non dormientibus jura- subveniunt)**".*

In addition, in **The Director of Public Prosecutions v. Li Ling Ling** (supra), we underscored the principle that one provision of a statute cannot defeat another provision of the same statute. In line with that, we are settled that section 46 of the Act will defeat section 3 (1) of the Act if a time - barred matter will be struck out with leave to refile, instead of being dismissed.

Besides, we are inclined to hold that it is a rule of statutory interpretation that if the legislature had intended time - barred employment matters to be struck out, it would have expressly stated so. While we are still on this point, we should also say in line with another rule of statutory interpretation, that in enacting the Labour Institutions Act, No. 6 of 2004 and the Employment and Labour Relations Act, 2004, the legislature must be assumed to have been aware of the existence of the Act which had been in place since 1971. On this principle, see **Vepa P. Sarathi** in a book titled **Interpretation of Statutes, 5th Edition, Eastern Book Company, 2013.** The learned author states at pages 236- 237 thus:-

> " *The court must also assume that the legislature knew about existing enactments when passing a law...The court ought in general, in constructing an Act of Parliament to assume that the legislature knows the existing state of the law and did not intend to overthrow a fundamental legal principle in the absence of clearly expressed contrary intention".*

We subscribe to that principle in as much as the Act has been in place for so long before the new labour laws were enacted. If the Parliament

had intended the contrary in the labour laws, it would have stated so clearly.

Finally, therefore, there was no basis for the learned High Court Judge to strike out the complaint that had been presented in court after expiration of 60 days. In a similar situation in the case of **Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Another,** Civil Appeal No. 79 of 2001 (unreported), cited to us by the appellant's counsel, this Court held that, although the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance set the time limit for instituting actions to be six months, but did not provide for the consequences of filing a matter out of time, section 3 of the Act was applicable in dismissing the petition. In view of that position of the law, it is our conclusion that the learned High Court Judge should have resorted to section 3 (1) of the Act to dismiss the complaint instead of striking it out as she did.

Accordingly, we allow the appeal, quash and set aside the order of striking out the complaint with leave to refile, and replace it with an order of dismissal.

As this appeal arises from an employment cause, we order no costs.

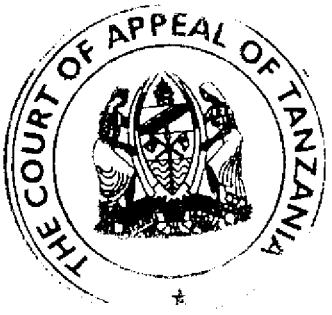
DATED at **DAR ES SALAAM** this 12th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEA

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 17th day of May, 2020 in the presence of Mr. Mashaka Mfala, learned counsel for the Respondent also holding brief of Mr. Paschal Kamala, learned counsel for the Appellant, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL